U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GREGORY R. ROUSH and U.S. POSTAL SERVICE,
PROCESSING & DISTRIBUTION CENTER, West Sacramento, CA

Docket No. 03-1390; Submitted on the Record;
Issued August 18, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error.

On August 14, 2001 appellant, then a 31-year-old truck driver, filed a claim for an occupational disease. He listed the nature of the disease as "work stress that set off post-traumatic stress disorder from past military duties" that he attributed to daily harassment from management for using his earned sick leave, promotion of violence in the workplace and constant change in his run.

In response to an Office request for a detailed description of the employment factors or incidents to which he attributed his condition and for a comprehensive medical report from his attending physician, appellant stated that the most recent stress started with an injury on the job on May 17, 2001 that was caused by faulty equipment, that the harassment had been ongoing and created a hostile work environment and that he had filed an Equal Employment Opportunity (EEO) complaint and a grievance, which were still pending. He submitted an August 14, 2001 report from a licensed clinical social worker at the Veterans Administration, stating that appellant was being treated for symptoms related to post-traumatic stress disorder and that he should be excused from work due to these symptoms and his emotional fragility.

By decision dated November 1, 2001, the Office found the evidence submitted by appellant "was insufficient because there were no specific events or specific employment factors noted that would support a causal relationship between your alleged illness and employment factors" and because it appeared his post-traumatic stress disorder was related to his military service rather than to factors of his employment.

On April 22, 2003 appellant, through his attorney, submitted a request for reconsideration of the Office's November 1, 2001 decision, accompanied by a February 15, 2003 report from Dr. Ethan G. Harris, a Board-certified psychiatrist, who set forth a history that appellant was

stalked by a coworker, called names by another coworker and harassed and abused by his supervisor, who was continually excessively critical of his behavior and pulled him off work to lecture him. Dr. Harris stated that on August 18, 2001 appellant was confronted by his supervisors, who "insisted [that] he was a threat to others due to his complaints and he was escorted and locked out of the building." He noted that appellant "has a history of emotional disorders," including nightmares, flashbacks and anxiety after he returned from Vietnam in 1971; that he received no treatment at that time, but his symptoms remitted over the years; and that his symptoms relapsed in 1994, "aggravated by stalking and harassment that he experienced at work." Dr. Harris stated in his report that appellant was credible and that appellant presented "documentation with logs and pictures," Dr. Harris stated that he had read the statement prepared by appellant describing the conditions of his employment from 1993 to 2001 and had attached a copy of this statement. However, the Board notes that the case record does not contains this statement. After describing findings on mental status examination, Dr. Harris diagnosed "[m]ajor [d]epressive [d]isorder, [b]eginning in 1993" and "[p]ost-[t]raumatic [s]tress [d]isorder, in [r]elapse [r]emission 1971 to 1993." Dr. Harris concluded:

> "After a comprehensive psychiatric evaluation, [appellant] is, therefore, now found to manifest a severe work-related exacerbation of prior [p]ost-[t]raumatic [s]tress [d]isorder, with depressive and anxiety features, caused and aggravated by work circumstances, in all reasonable medical probability. He is still disabled and is not likely to be able to return to work at the [employing establishment] and he is in need of ongoing psychiatric treatment."

By decision dated April 28, 2003, the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error. The Office decision noted that appellant "never did submit a statement and still has not, although Dr. Harris refers to one in his report of February 15, 2003." With regard to his report, the decision stated: "If this report had been submitted within one year of November 1, 2001, the Office might have needed to do further development of the factual basis for the claim for the performance of duty issue. But a medical report that raises factual questions about the original claim is not the same as showing clear evidence of error."

The only Office decision before the Board on this appeal is the Office's April 28, 2003 decision denying appellant's request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.607(a), and that it did not present clear evidence of error. Since more than one year elapsed between the date of the Office's most recent merit decision on November 1, 2001 and the filing of appellant's appeal on May 7, 2003, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that appellant's request for reconsideration was not timely filed.

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides: "An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought." The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[2]

In the present case, the most recent merit decision by the Office was issued on November 1, 2001. Appellant had one year from the date of this decision to request reconsideration and did not do so until April 23, 2003. The Board has found that late filing of a request for reconsideration may not be excused for extenuating circumstances.[3] The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. In *Gregory Griffin*, the Board found: "Denying merit review of a case solely on the basis that an application for review was untimely filed …, without any consideration as to whether, notwithstanding that fact, merit review may be warranted, is not a proper exercise of the Office's discretionary authority under 5 U.S.C. § 8128(a)…. In fact, the Board's holding in prior cases that a claimant has a 'right to review' under section 8128(a), whenever he or she presents evidence that an Office decision is erroneous, requires the Office to perform a limited review of such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office thereby requiring merit review of the claimant's case."[4]

The Office incorporated the "clear evidence of error" standard of review into new regulations that were effective January 4, 1999.[5] 20 C.F.R. § 607(b) provides: "[The Office]

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[2] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[3] *Bradley L. Mattern*, 44 ECAB 809 (1993); *Charles J. Prudencio*, 41 ECAB 499 (1990).

[4] *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[5] 63 Fed. Reg. 227 (1998). Prior to the adoption of these new regulations, the "clear evidence of error" standard was contained only in the Office's procedure manual, at Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (May 1991).

will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 608(b) provides, in pertinent part: "[W]here the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits."

By issuing the above regulations, the Office has limited its discretion to review decisions under 5 U.S.C. § 8128(a) on untimely application of the claimant.[6] Having exercised its discretion by issuance of regulations, the only function left for the Office, in an individual case, is to determine whether an untimely application for reconsideration meets the standard of the regulations; that is, whether the application presents clear evidence of error. If it does, a review on the merits must be done; if it does not, a review on the merits on the claimant's application will not be done. This determination does not involve discretion by the Office and, having made this determination, the Office is under no requirement to further exercise its discretion with regard to an untimely application for reconsideration.

The Office's exercise of its discretion by issuing regulations found at 20 C.F.R. §§ 10.607(b) and 10.608(b) is an appropriate exercise of the Office's delegated authority.[7] These regulations are not manifestly contrary to the Act,[8] given the intent of Congress[9] to give the Secretary of Labor, delegated to the Director of the Office, discretion to review awards for or against the payment of compensation. As the standard of 20 C.F.R. § 10.607(b) for obtaining review is consistent with that, in Board precedent[10] and does not infringe on the long-standing rights of claimants to obtain a review of the merits,[11] the Office's issuance of this regulation does not constitute an abuse of the discretionary authority granted to the Office by section 8128(a) of the Act.

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[6] The Office is not prohibited from reviewing an untimely application for reconsideration under the less stringent standards set forth at 20 C.F.R. § 10.606(b), but such a review would be on the Office's own motion pursuant to 20 C.F.R. § 10.610. The decision whether or not to review an award on the Office's own motion is solely within the Office's discretion and not subject to review, per 20 C.F.R. § 10.610(a).

[7] In *Annette Louise*, 54 ECAB ___ (Docket No. 03-445, issued July 11, 2003), the Board found that an Office regulation defining the standards under which the Office would grant a merit review of a timely application for reconsideration was an appropriate exercise of the discretionary authority granted to the Office under 5 U.S.C. § 8128(a). In *Kenneth L. Pless*, *supra* (1993), the Board found that an Office regulation determining that lump-sum payments would not be made for loss of wage-earning capacity was an appropriate exercise of the Office's discretionary authority.

[8] This standard is set forth in *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 694 (1984).

[9] In *International Union, UAW v. Dole*, 919 F.2d 753 (D.C. Cir. 1990), the Court expressed its standard of review as determining whether the regulations in question were "rationally connected to the legislative ends."

[10] *E.g.*, *Fidel E. Perez*, 48 ECAB 663 (1997); *Dennis G. Nivens*, 46 ECAB 926 (1995); *Howard A. Williams*, 45 ECAB 853 (1994); *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

[11] In *Leonard E. Redway*, 28 ECAB 242, 246 (1977), the Board stated: "It is a fundamental principle of long standing under the Act that a claimant has a right under section 8128 to secure review by the adjudicating agency of its decision where he presents new evidence relevant to his contention that the decision is erroneous."

The Office has appropriately exercised its discretionary authority under section 8128(a) of the Act by issuing regulations defining the limited circumstances under which it will grant a merit review upon untimely application of a claimant. When reviewing an Office decision denying a merit review upon untimely application, the function of the Board is not to determine whether the Office abused its discretion but rather to determine whether the Office properly applied the "clear evidence of error" standard set forth at 20 C.F.R. § 10.607(b) to the claimant's untimely application for reconsideration and any evidence submitted in support thereof.

In the present case, the Office properly found that appellant's application for review of the Office's November 1, 2001 decision did not present clear evidence of error. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[16] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[17] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[18]

The report from Dr. Harris submitted by appellant, in support of his application for reconsideration, contains a somewhat more detailed description of employment factors than contained in appellant's claim form and his brief response to the Office's request for a detailed description of employment incidents and factors to which he attributed his condition. Dr. Harris' recitation of these incidents and the belief in appellant's credibility, however, do not constitute probative and reliable evidence substantiating that the incidents occurred as alleged in

[12] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[13] *See Leona N. Travis*, 43 ECAB 227 (1991).

[14] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[15] *See Leona N. Travis*, *supra* note 13.

[16] *Nelson T. Thompson*, 43 ECAB 919 (1992).

[17] *Leon D. Faidley, Jr.*, *supra* note 2.

[18] *Gregory Griffin*, *supra* note 4.

Dr. Harris' report. Where appellant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[19] Appellant has provided no corroborating evidence, such as witness statements to establish that these incidents occurred as alleged in Dr. Harris' report.[20] His report does not raise a substantial question as to the correctness of the Office decision and does not present clear evidence of error.

The April 28, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
August 18, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[19] *Joel Parker, Sr.*, 43 ECAB 220 (1991).

[20] *Id*.