U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA D. PARIS and U.S. POSTAL SERVICE,
POST OFFICE, Gaithersburg, MD

Docket No. 01-2038; Oral Argument Held December 3, 2001;
Issued March 17, 2003

Appearances: *Pamela D. Paris, pro se*; *Miriam D. Ozur, Esq.,* for the Director,
Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her applications for review were not timely filed and failed to present clear evidence of error.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision[1] on December 11, 1995, which affirmed the Office's April 8 and June 9, 1994 decisions on the grounds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after February 19, 1992 due to her December 2, 1986 right wrist and hand injury.[2] The Board determined that the reports of appellant's attending Board-certified orthopedic surgeons, Dr. Rida N. Azer and Dr. William E. Gentry, did not show that she sustained such an employment-related recurrence of total disability. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference

Appellant requested reconsideration of her claim on numerous additional occasions. By decisions dated June 19, 1996 and January 17, 1997, the Office denied appellant's timely

[1] Docket No. 95-802.

[2] The Office accepted that appellant sustained tendinitis and de Quervain's complex of the right wrist and hand and paid compensation for periods of disability until December 29, 1990, when she returned to limited-duty work. The case number for this injury is A25-297044. In its December 11, 1995 decision, the Board also affirmed the Office's January 25, April 8 and August 8, 1994 decisions as modified to reflect that appellant had no disability after March 10, 1993 due to her February 9, 1992 left thumb injury. This injury (case number A25-398729) is not the subject of the present appeal.

reconsideration requests as insufficient to warrant review of her claim. By decisions dated April 3, 1997, April 10 and September 29, 1998, June 3, 1999, March 14 and June 23, 2000 and February 21 and May 4, 2001, the Office denied appellant's requests for merit review on the grounds that her applications for review were not timely filed and failed to present clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her applications for review were not timely filed and failed to present clear evidence of error.

The only decisions before the Board on this appeal are the February 21, 2000 and May 4, 2001 decisions, denying appellant's requests for review on the merits of her claim. Because more than one year has elapsed between the issuance of the Office's last merit decision and August 6, 2001, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the prior merit decisions.[3]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office's regulations provide that a claimant must (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[5] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[6] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[7] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[8]

In its February 21 and May 4, 2001 decisions, the Office properly determined that appellant failed to file timely applications for review. The last merit decision of record is the Board's December 11, 1995 decision and appellant's requests for reconsideration were dated December 15, 2000 and April 6, 2001, more than one year after December 11, 1995.[9]

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[3] *See* 20 C.F.R. § 501.3(d)(2).

[4] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.607(a).

[7] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[8] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[9] According to Office procedure, the one-year period for requesting reconsideration, established by 20 C.F.R. § 10.607(a), begins on the date of original Office decision, but that the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including, *inter alia*, any merit decision by the Board. *See* 20 C.F.R. § 10.607(a); Federal (FECA) Procedure Manual, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

The Office, however, may not deny an application for review solely on the ground that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[10] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[11]

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 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]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's applications for review showed clear evidence of error, which would warrant reopening appellant's case for merit review

[10] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

[12] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[13] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[14] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

[16] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[17] *Leon D. Faidley, Jr.*, *supra* note 8.

[18] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon.*, 41 ECAB 458, 466 (1990).

under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her applications for review, but found that it did not clearly show that the Office's prior decisions were in error.

The Board finds that the evidence submitted by appellant in support of her applications for review does not raise a substantial question as to the correctness of the Office's prior merit decisions and is insufficient to demonstrate clear evidence of error.

In support of her December 15, 2000 and April 6, 2001 reconsideration requests, appellant argued that the Office improperly determined that she did not sustain a recurrence of total disability on or after February 19, 1992 due to her December 2, 1986 employment injury, tendinitis and de Quervain's complex of her right wrist and hand. She submitted a number of reports of Dr. Azer, an attending Board-certified orthopedic surgeon, which indicated that she continued to have problems with her right wrist and hand. Appellant argued that these documents showed that the Office had erred in its prior merit decisions. However, the Board has performed a limited review of these documents and notes that they are not relevant as they do not contain a rationalized opinion that appellant sustained a recurrence of total disability on or after February 19, 1992 due to her December 2, 1986 injury.[19] These reports would not otherwise clearly show that the Office erred in its prior decisions.

For these reasons, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her applications for review were not timely filed and failed to present clear evidence of error.

[19] Appellant submitted a November 2, 2000 report in which Dr. Azer indicated that she was totally disabled and that her right wrist problems were due to her December 2, 1986 employment injury. At best, such a report might require further development of the medical evidence, but it would not clearly show that the Office erred when it rendered its last merit decision in 1994. As noted above, such evidence is not sufficient to show clear evidence of error. *See supra* notes 15 through 17 and accompanying text.

The May 4 and February 21, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.[20]

Dated, Washington, DC
March 17, 2003

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[20] The Board notes that Chairman Michael J. Walsh, who participated in the oral argument was no longer a member of the Board after January 10, 2003, as his appointment expired, and he did not participate in the preparation of this decision.