United States Department of Labor
Employees' Compensation Appeals Board

SEAN C. DOCKERY, Appellant	)	
and	)	**Docket No. 05-827**
	)	**Issued: August 1, 2005**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Boise, ID, Employer	)	

Appearances:
Thomas P. Fochs, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 23, 2005 appellant filed a timely appeal of a November 23, 2004 decision of the Office of Workers' Compensation Programs, denying a request for reconsideration because he did not establish clear evidence of error. The Board's jurisdiction is limited to final Office decisions issued within one year of the filing of the appeal under 20 C.F.R. § 501.3(d)(2). Therefore, the only decision over which the Board has jurisdiction on this appeal is the November 23, 2004 decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

FACTUAL HISTORY

On June 12, 2001 appellant, then a 32-year-old distribution clerk, filed a traumatic injury claim for continuation of pay/compensation (Form CA-1), alleging that he sustained a back injury on June 1, 2001 while lifting mail. The reverse of the claim form indicated that appellant

was off work from June 1 to 12, 2001. He filed a claim for compensation (Form CA-7) commencing on July 16, 2001. The Office accepted the claim for lumbosacral sprain.

By letter dated September 24, 2001, the Office advised appellant that he had been assigned a registered nurse to assist his recovery from the employment injury. The letter stated that the nurse would be contacting appellant for a meeting and contacting the treating physicians with the objective of receiving appropriate and timely medical attention throughout the recovery period. In a report dated October 31, 2001, the nurse assigned to the case indicated that she had left messages with appellant in an attempt to meet with him. The nurse indicated that appellant did leave a message on October 10, 2001, but did not return subsequent telephone calls.

In a letter dated December 7, 2001, the Office advised appellant that the evidence supported a finding that he was "refusing to cooperate with the nurse intervention, and by association, the vocational rehabilitation efforts" of the Office. Appellant was advised that, under 5 U.S.C. § 8113(b) and 20 C.F.R. § 519, his compensation would be reduced to zero unless he produced evidence contrary to the assumption that provision of nurse services would have resulted in return to work with no loss of wage-earning capacity.

By decision dated March 13, 2002, the Office reduced appellant's compensation to zero pursuant to 5 U.S.C. § 8113(b) on the grounds that he failed, without good cause, to undergo vocational rehabilitation when so directed. In a decision dated December 3, 2002, the Office denied merit review of the claim.

Appellant requested reconsideration in a letter dated August 23, 2004, contending that the Office had improperly reduced his compensation under section 8113(b) because there was no vocational rehabilitation program in place. Appellant cited the case of *James Whitehead*,[1] in support of his argument that the March 13, 2002 was erroneous.

In a decision dated November 23, 2004, the Office found that appellant's request for reconsideration was untimely and failed to show clear evidence of error. The Office found that the *Whitehead* decision "appears to be inconsistent with the regulations and current Office policy" and did not show clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its

[1] Docket No. 04-41 (issued February 9, 2004).

[2] 5 U.S.C. § 8128(a).

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

[4] 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 his own motion or on application."

discretionary authority under 5 U.S.C. § 8128(a).[5] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[6] 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).[7]

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[8] In accordance with this holding the Office has stated in its Procedure Manual that it 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.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] The Board makes an

[5] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[6] 20 C.F.R. § 10.607(a).

[7] *See Leon D. Faidley, Jr.*, *supra* note 3.

[8] *Leonard E. Redway*, 28 ECAB 242 (1977).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

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

[13] *See Leona N. Travis*, *supra* note 11.

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

[15] *Leon D. Faidley, Jr.*, *supra* note 3.

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.[16]

ANALYSIS

The request for reconsideration in the present case was dated August 23, 2004. Since this is more than one year after the March 13, 2002 decision, it is untimely.

The March 13, 2002 decision reduced appellant's compensation to zero on the grounds that without good cause he failed to undergo vocational rehabilitation when so directed.[17] Appellant argues on reconsideration that there was no refusal to undergo vocational rehabilitation because referral to a nurse does not itself constitute vocational rehabilitation, citing the *Whitehead* case. In that case the Board found that the claimant's failure to respond to the assigned nurse's telephone calls was not a failure to cooperate with vocational rehabilitation because there was "no evidence that there was any vocational rehabilitation effort in place."[18]

As the Board noted in *Ozine J. Hagan*,[19] the regulations do not equate the assignment of an Office nurse with vocational rehabilitation. While the regulations state that the vocational rehabilitation planning process may include meetings with a nurse,[20] a meeting with a nurse could concern matters unrelated to vocational rehabilitation, such as medical management. When there is no evidence of vocational rehabilitation services, such as referral to a rehabilitation counselor, discussion of a rehabilitation plan, assessment of vocational skills, retraining or assistance in finding work, then it is improper for the Office to reduce appellant's compensation under 5 U.S.C. § 8113(b).[21]

In the present case, the September 24, 2001 Office letter referred appellant to a registered nurse "to assist you in your recovery from your work[-]related injury." The referral was for medical assistance and management, with no indication of vocational rehabilitation services. As found in *Whitehead* and *Hagan*, there was no evidence to support a finding that the referral to a nurse was pursuant to a vocational rehabilitation plan.

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[16] *Gregory Griffin*, 41 ECAB 458 (1990).

[17] Section 8113(b) of the Act provides: "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."

[18] *James Whitehead, supra* note 1.

[19] 55 ECAB ___ Docket No. 04-584, issued September 2, 2004).

[20] *See* 20 C.F.R. § 10.519(b).

[21] *Ozine J. Hagan, supra* note 19.

The evidence therefore does show clear evidence of error by the Office. It is well established that the Office cannot reduce compensation to zero pursuant to section 8113(b) under the circumstances presented in this case. Appellant has *prima facie* shifted the weight of the evidence in his favor and raised a substantial question as to the correctness of the Office decision and therefore the Office abused its discretion in failing to reopen appellant's claim for further merit review.

CONCLUSION

The Board finds that appellant established clear evidence of error in the March 13, 2002 decision and the Office improperly denied his request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 23, 2004 is reversed.

Issued: August 1, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board