U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RHONDA E. MASON and U.S. POSTAL SERVICE,
POST OFFICE, Gary, Ind.

Docket No. 96-1352; Submitted on the Record;
Issued June 10, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

The only Office decision before the Board on this appeal is the Office's February 9, 1996 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. § 10.138(b)(2), 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 April 12, 1994 and the filing of appellant's appeal on March 27, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

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 --
>
> '(1) end, decrease, or increase the compensation awarded; or
>
> '(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.

[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.

§ 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." 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 by an Office hearing representative on April 12, 1994. Appellant had one year from the date of this decision to request reconsideration, and did not do so until January 18, 1996. 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. § 10.138(b)(2).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[3] Office procedures state 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of

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

[3] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991), states:

> "The term 'clear evidence' 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, 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...."

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

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

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

[8] *See Leona N. Travis*, *supra* note 5.

record and whether the new evidence demonstrates clear error on the part of the Office.[9] 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.[10] 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.[11]

The Board finds that appellant's request for reconsideration did not demonstrate clear evidence of error in the Office's April 12, 1994 decision.

An Office hearing representative, by an April 12, 1994 decision, found that the Office properly terminated appellant's compensation effective January 12, 1993 for refusal of suitable employment. In her January 18, 1996 request for reconsideration, appellant contended that Dr. George J. Volan, the hand surgeon who performed decompression surgery of the median and ulnar nerves of appellant's right wrist on April 21, 1992, should not have indicated she could return to her regular work , given his findings on a March 17, 1992 examination. Dr. Volan, however, did not indicate appellant could return to work until July 20, 1992, which was three months after her right wrist surgery. Appellant's questioning of Dr. Volan's opinion that she could return to work does not show clear evidence of error. In her request for reconsideration, appellant noted that she had filed a claim for anxiety related to her accepted carpal tunnel syndrome, and that she had not received a decision. This does not show clear evidence of error in the Office hearing representative's April 14, 1994 decision, as that decision did not address the claim for an anxiety neurosis. Appellant also noted that her attending physician, Dr. Choong J. Yoon, a Board-certified physiatrist, stated that she could return to work four hours per day on January 20, 1993. This opinion would at best create a conflict of medical opinion with the opinions of the physicians who indicated appellant could perform the position offered to appellant by the employing establishment on December 2, 1992. Since, as pointed out above, the submission of medical evidence sufficient to create a conflict of medical opinion does not show clear evidence of error, clear evidence of error also cannot be shown by pointing to a possible conflict of medical opinion already existing.

The evidence appellant submitted with her January 18, 1996 request for reconsideration also does not show clear evidence of error. The medical notes submitted do not indicate that appellant could not perform the offered position in December 1992, nor does the July 3, 1995 report from Dr. Yoon. The employing establishment's lists of vacancies dated July 21 and June 8, 1993 have no bearing on whether appellant refused an offer of suitable employment in December 1992.

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

[10] *Leon D. Faidley*, *supra* note 1.

[11] *Gregory Griffin*, *supra* note 2.

The decision of the Office of Workers' Compensation Programs dated February 9, 1996 is affirmed.

Dated, Washington, D.C.
June 10, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member