U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SONYA O. ALEXANDER and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, San Francisco, Calif.

Docket No. 96-1499; Submitted on the Record;
Issued March 13, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

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 application for review was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The only decisions before the Board on this appeal are the Office's November 22 and October 17, 1995 decisions denying appellant's requests for a review on the merits of its January 24, 1994 decision. Because more than one year has elapsed between the issuance of the Office's January 24, 1994 decision and April 23, 1996, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the January 24, 1994 decision.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[3] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review

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[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

[3] 20 C.F.R. §§ 10.138(b)(1)(2).

within one year of the date of that decision.[4] 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.[5] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[6]

In its November 22 and October 17, 1995 decisions, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on January 24, 1994 and appellant's requests for reconsideration were dated September 15 and October 25, 1995 which were clearly more than one year after January 24, 1994. Therefore, appellant's requests for reconsideration of her case on its merits were untimely filed.

The Office, however, may not deny an application for review solely on the grounds 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."[7] 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be

[4] 20 C.F.R. § 10.138(b)(2).

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

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

[7] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such 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 an would not require a review of the case of the Director's own motion."

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

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

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

construed so as to produce a contrary conclusion.[12] 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.[13] 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.[14] The Board makes an independent determination as to 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.[15]

In the present case, following two nonmerit decisions dated November 2, 1994 and February 6, 1995, with her requests for reconsideration of the January 24, 1994 decision, appellant submitted a July 13, 1992 medical report previously of record and considered by the Office and an October 27, 1995 medical report from Dr. Donald J. Mechling, a clinical psychologist, which stated that he agreed with the July 13, 1992 report. The Office performed a limited review of this evidence and determined that it was irrelevant as it was medical in nature, and as appellant's claim for causation and/or exacerbation of her preexisting atypical psychosis, bipolar disorder and paranoid schizophrenia had been denied on a factual basis because she failed to implicate any compensable factors of her employment as the cause. Therefore, these reports demonstrate no clear evidence of error on its face in the January 24, 1994 decision as the Office properly found. Consequently, the Board now finds that this evidence does not raise a substantial question as to the correctness of the prior January 24, 1994 Office decision or shift the weight of the evidence in favor of the claimant, and does not, therefore, constitute grounds for reopening appellant's case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, 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 application for review was not timely filed and failed to present clear evidence of error.

[12] *See Leona N. Travis, supra* note 10.

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

[14] *Leon D. Faidley, Jr., supra* note 6.

[15] *Gregory Griffin*, 41 ECAB 186 (1989), *aff'd on recon.*, 41 ECAB 458 (1990).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated November 22 and October 17, 1995 are hereby affirmed.

Dated, Washington, D.C.
March 13, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member