U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDLE L. HOPE and DEPARTMENT OF THE ARMY,
Fort Stewart, Ga.

Docket No. 97-1610; Submitted on the Record;
Issued April 1, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's January 31, 1997 request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error.

The only final decision the Board may review on this appeal is the Office's February 13, 1997 decision denying appellant's request for reconsideration. Although appellant has asked the Board to review the Office's January 9, 1996 decision reducing his monetary compensation to reflect a capacity to earn wages as a merchant patroller on the grounds that he refused to cooperate with vocational rehabilitation efforts, he failed to file a timely appeal to the Board within one year of the date of that decision. Appellant filed his appeal on March 28, 1997. Federal regulations therefore prohibit the Board from reviewing the Office's January 9, 1996 decision.[1]

The Board has duly reviewed the record on appeal and finds that the Office properly denied appellant's January 31, 1997 request for reconsideration.

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."[2]

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[1] 20 C.F.R. § 501.3(d) (time for filing); *see id.* § 501.10(d)(2) (computation of time).

[2] 5 U.S.C. § 8128(a).

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. § 10.138(b)(2) provides that the Office 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.[3] Office procedures state, however, that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, 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 that was decided by the Office.[5] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[6] Evidence that 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 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 a merit review in the face of such evidence.[11]

Because appellant filed his January 31, 1997 request for reconsideration more than one year after the Office's January 9, 1996 decision reducing his monetary compensation, his request was untimely filed. To obtain a merit review of his claim, therefore, the request must show "clear evidence of error" on the part of the Office. The Board has carefully reviewed appellant's request, together with letters submitted to the Office following its January 9, 1996 decision, and finds that appellant has not shown clear evidence of error. The request itself is accompanied only by copies of letters written by the Office to appellant's congressional representative explaining the reason for the reduction of monetary compensation and addressing appellant's appeal rights. After the January 9, 1996 decision, the Office received several letters from

[3] *But see Leonard E. Redway*, 28 ECAB 242, 246 (1977) (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).

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

[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 Travis*, *supra* note 6.

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

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

[11] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

appellant's attorney. The letter dated December 29, 1995, accompanied by a physical capacities evaluation, was duplicative of evidence already before the Office when it issued its final decision on reduction. In letters dated March 8, April 29 and May 4, 1996, appellant's attorney reiterated that appellant was unable to commute to the position in question. He offered to settle the case, stated that appellant could not live on his reduced compensation, labeled the Office's treatment of appellant as unfair and requested a face-to-face conference.

The evidence supporting appellant's January 31, 1997 request for reconsideration and the letters written by appellant's attorney after the Office's February 13, 1997 decision fail to demonstrate that appellant did, in fact, present good cause for his failure or refusal to apply for, undergo, participate in or continue participation in the vocational rehabilitation effort when so directed by the Office. Nor does this evidence manifest on its face that the Office committed an error in reducing appellant's monetary compensation based on what probably would have been his wage-earning capacity had there not been such a failure or refusal. As appellant has failed to show clear evidence of error on the part of the Office, the Board finds that the Office properly denied a merit review of his claim.

The February 13, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
April 1, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member