U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONSTANCIA A. ROWE and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 98-952; Submitted on the Record;
Issued December 9, 1999

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
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 application for review was 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 application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's January 9, 1998 decision, denying appellant's request for a review on the merits of its June 15, 1996 decision. Because more than one year has elapsed between the issuance of the Office's June 15, 1996 decision and January 21, 1998, the date appellant filed the present appeal with the Board, the Board lacks jurisdiction to review the June 15, 1996 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 a 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 benefits, a claimant must also file his or her application for

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[1] *See* 20 C.F.R. § 501.3(d)(2); *Annie L. Billingsley*, 50 ECAB ___ (Docket No. 96-2547, issued December 24, 1998).

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

review 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 limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[6]

In the present case, the Office properly determined in its January 9, 1998 decision, that appellant filed an untimely reconsideration request.

On October 10, 1997 appellant filed a request for reconsideration of the Office's June 15, 1996 decision.[7] Therefore, appellant's reconsideration request was untimely in that it was filed more than one year after the issuance of the Office's June 15, 1996 decision.

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."[8] 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.

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 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 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

[4] 20 C.F.R. § 10.138(b)(2).

[5] *Annie L. Billingsley*, *supra* note 1; *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

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

[7] The Office also issued a decision on August 26, 1995 but that decision preceded appellant's alleged recurrence of disability on December 1, 1995.

[8] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[9] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992). The Office also issued a decision on August 26, 1995 but this decision preceded appellant's alleged recurrence of disability on December 1, 1995.

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

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

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

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 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.[15]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review 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 application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of her application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

In its June 15, 1996 decision, the Office denied appellant's claim for a recurrence of disability, finding that the evidence failed to establish that the claimed medical condition or disability was causally related to the August 13, 1991 employment injury. To support her request for reconsideration, appellant submitted medical evidence that could support that she sustained a new employment injury on December 1, 1995 rather than a recurrence of disability on that date. For example, in a report dated June 12, 1997, Dr. Leonard G. Schuchman, an osteopath, diagnosed, *inter alia*, post-traumatic headaches and exacerbated lumbar myofascitis and lumbar radiculopathy. He stated that her accident on December 1, 1995 exacerbated the August 13, 1991 employment injury and caused her new injuries. In an undated letter received by the Office on June 13, 1997, appellant stated that on December 1, 1995 after she "clocked out" at 12:30 a.m., she slipped on the ice on her way to take the train. She also submitted diagnostic tests consisting of magnetic resonance imaging scans, x-rays and an electroencephalogram report dated from December 14, 1995 through September 25, 1996 of her right wrist, right knee or her cervical and lumbar spine. Further, appellant submitted medical reports, including one by Dr. Schuchman dated December 18, 1995 in which he opined that the December 1, 1995 injury caused appellant's present condition which included cervical and lumbar myofascitis and cervical and lumbar radiculopathy. An undated report from Dr. Mark Greenbaum, a physiatrist, received by the Office on September 19, 1996, stated that appellant

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

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

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

sustained an injury leaving work on December 1, 1995 when she slipped on the ice. He diagnosed a right knee strain and myofascial neck and low back pain.

None of the evidence appellant submitted, however, contained a probative opinion, supported by medical rationale showing that appellant sustained a recurrence of disability on or after December 1, 1995 due to her August 13, 1991 employment injury. Rather, the evidence suggested that appellant sustained a new injury on December 1, 1995. Given the limited probative value of this evidence,[16] it is not sufficient to clearly show that the Office erred when it denied appellant's claim for recurrence of disability.

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

The decision of the Office of Workers' Compensation Programs dated January 9, 1998 is hereby affirmed.

Dated, Washington, D.C.
December 9, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[16] *See Annie L. Billingsley*, *supra* note 1.