U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONNIE LARAI LEWIS and DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, Bremerton, WA

Docket No. 97-2205; Submitted on the Record;
Issued February 2, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

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

Appellant, a 36-year-old engineering technician, filed a (Form CA-1) claim for benefits on June 11, 1993, alleging that on June 10, 1993 her supervisor called her into his office and gave her a notice of removal, whereupon she became emotionally upset. By decision dated July 23, 1993, the Office denied the claim for reason that the evidence of record failed to demonstrate that the claimed injury occurred in the performance of duty. By decision dated September 30, 1993, the Office denied appellant's request for review of the merits finding that the evidence was insufficient to warrant review of its earlier decision.

Appellant then filed a (Form CA-2) claim for benefits, which the Office received on January 25, 1994, alleging stress due to factors of her federal employment. She stated that she first became aware of her condition on June 10, 1993 and realized that her condition was caused or aggravated by her employment on December 1, 1993. The Office combined this claim with the earlier claim and, by decision dated August 6, 1994, denied the claim on the basis that the evidence of record failed to demonstrate that the claimed injury occurred in the performance of duty.

Appellant requested a hearing and, by decision dated February 20, 1996, an Office hearing representative affirmed the earlier decision finding that appellant failed to identify a compensable factor of employment.

In a February 19, 1997 letter, which the Office received on April 2, 1997, appellant requested reconsideration. Attached to her reconsideration request was a March 18, 1997 letter from the Clerk of the Board, which advised appellant that her letter was being returned without action as it was unclear whether she was seeking reconsideration from the Office or requesting an appeal to the Board. Appellant hand wrote on the March 18, 1997 letter "as per this letter I sent my request to the wrong address."

By decision dated May 15, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As the record indicates that appellant filed her appeal with the Board on June 4, 1997, the only decision properly before the Board is the May 15, 1997 Office decision.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle an employee to a review of an Office decision as a matter of right.[3] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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, or increase the compensation awarded; or
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> (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).[4] As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.[5] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).[6] This regulation, however, does not specify when an application is "filed" for the purpose of

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[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] 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, a claimant may obtain review of the merits of his claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.138(b).

[5] *See Leonard E. Redway*, 28 ECAB 242, 246 (1977) (a claimant had 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); Federal (FECA) Procedure Manual, Chapter 2.1602, paragraph 3(b) (January 1990) (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).

[6] *See* cases cited *supra* note 3.

determining timeliness. The Office has, therefore, administratively decided that the test used in 20 C.F.R. § 10.131(a) for determining the timeliness of a hearing request should apply to applications for review.[7] Accordingly, timeliness is determined by the postmark on the envelope, if available. Otherwise the date of the letter itself should be used.[8]

In the instant case, although appellant's letter requesting reconsideration was dated February 19, 1997, which would have brought it within the one-year filing time, the March 18, 1997 letter from the Clerk of the Board along with appellant's statement that she sent her request to the wrong address, constitutes probative evidence that her request was not mailed on February 19, 1997. The date the Office received appellant's request, April 2, 1997, is more than one year after February 20, 1996, the date the Office issued its last merit decision in this case. Thus, the Office properly determined in this case, that appellant's application for review was untimely as it was outside the one-year time limit.

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.[9] 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

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

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[7] Federal (FECA) Procedure Manual, Chapter 2.1602, paragraph 3(a) (January 1990).

[8] *Douglas McLean*, 42 ECAB 759 (1991); *William J. Kapfhammer*, 42 ECAB 271 (1990); *see Lee F. Barrett*, 40 ECAB 892 (1989).

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (May 1991). 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 an error (for example, a proof of miscalculation in a schedule award). Evidence such as a 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 review of the case…."

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

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

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

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

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.[15] 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.[16] 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 on the face of such evidence.[17]

In this case, the evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in this case is whether appellant has established a compensable factor of employment in order to bring her stress-related condition in the realm of occurring within the performance of duty. In her request for reconsideration, appellant merely reiterated previous arguments as to why she was entitled to benefits. These unsupported contentions by appellant, which were previously of record, fail to establish clear evidence of error with respect to the Office's February 20, 1996 decision.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied appellant's request for reconsideration.

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

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

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

The decision of the Office of Workers' Compensation Programs dated May 15, 1997 is hereby affirmed.

Dated, Washington, D.C.
February 2, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member