U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEWIS T. DERSHEM and U.S. POSTAL SERVICE,
POST OFFICE, Lock Haven, PA

Docket No. 98-2242; Submitted on the Record;
Issued February 18, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
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 his application was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case with respect to the issue of denial of merit review and finds that the Office properly refused to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The most recent decision before the Board on this appeal is the Office's April 23, 1998 decision, denying appellant's request for a review on the merits of the Office's decision dated January 13, 1995.[1] Because more than one year has elapsed between the issuance of the Office's January 13, 1995 and September 23, 1994 decisions, and July 20, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior Office decisions.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] 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.[4] To be entitled to a merit review of an Office decision

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[1] By this decision, the Office denied appellant's request for reconsideration of its September 23, 1994 decision denying appellant's claim for a recurrence of disability. The Office had accepted appellant's claim for lumbosacral sprain which he sustained on November 23, 1992.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 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).

[4] 20 C.F.R. § 10.138(b)(1),(2).

denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[5] 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.[6] 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.[7]

In its April 23, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on January 13, 1995, and appellant's request for reconsideration was dated January 29, 1998, which was clearly more than one year after January 13, 1995. Therefore, appellant's request for reconsideration of his case on its merits was 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."[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.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be

[5] 20 C.F.R. § 10.138(b)(2).

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

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

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

[9] 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 as 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 and would not require a review of the case on the Director's own motion."

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

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

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

construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] 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.[16]

In the present case, with his January 29, 1998 request for reconsideration of the January 13, 1995 decision, appellant submitted a June 20, 1996 medical report from Dr. A. Loren Amacher, a neurologist, who noted appellant's reference to a November 1992 back injury, a May 21, 1996 postoperative report from Dr. Amacher who stated that he had removed appellant's L4-5 disc, and an August 22, 1997 magnetic resonance imaging (MRI) scan of appellant's lumbar spine. None of these reports refers to a causal relationship between appellant's condition and his work-related injury. Appellant also submitted an August 12, 1997 medical report from Dr. Brian Holmes, a neurological surgeon, who notes appellant's November 1992 work-related injury but makes no reference to whether appellant's current medical condition was causally related to the November 1992 injury. Further, appellant submitted a medical report from Dr. Michael R. Greenberg, Board-certified in family practice, who similarly noted appellant's November 1992 work-related injury and his subsequent surgery without providing a rationalized medical opinion to relate appellant's lumbosacral strain/sprain to his herniated disc.[17]

As appellant's request for reconsideration did not raise a substantial question as to the correctness of the prior Office decisions or shift the weight of the evidence in favor of the claimant, it did 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 his application for review was not timely filed and failed to present clear evidence of error.

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[13] *See Leona N. Travis, supra* note 11.

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

[15] *Leon D. Faidley, Jr., supra* note 7.

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

[17] The Board notes that Dr. Greenberg incorrectly referred appellant's discectomy as having occurred in May 1995. The date of the procedure was May 21, 1996.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken, which are contrary to both logic and probable deductions from established facts.[18] Appellant has made no such showing here.

Accordingly, the April 23, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
February 18, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[18] *Daniel J. Perea*, 42 ECAB 214 (1990).