U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DRAYTON SLIGH and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

Docket No. 99-716; Oral Argument Held December 1, 1999;
Issued February 15, 2000

Appearances: *John K. Foster, III, Esq.*, for appellant; *Cornelius S. Donoghue, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On March 1, 1988 appellant, then a 25-year-old mail processor, filed a claim for a lower back strain sustained on January 2, 1988 by lifting trays of mail. By decision dated March 18, 1988, the Office found that appellant was not entitled to continuation of pay for the reason that he had not filed a claim within 30 days of his employment injury. The Office accepted that the January 2, 1988 injury occurred as alleged by appellant, but by decision dated September 26, 1988, the Office found that the medical evidence did not support that appellant had any disability due to this injury. By decision dated September 16, 1996, the Office denied appellant's request for a hearing on the basis that a hearing was not requested within 30 days after its final decision and that the issue in the case could be addressed by submitting medical evidence of employment-related disability in conjunction with a request for reconsideration.

By letter dated April 28, 1998, appellant requested reconsideration of the Office's decisions denying continuation of pay and finding that the medical evidence did not support that he had any disability causally related to his January 2, 1988 employment injury. With this request appellant submitted copies of employing establishment letters assigning him to limited or light duty from January 12, 1988 to September 11, 1994, employing establishment health unit notes from December 7, 1986 to December 8, 1994, and notes and reports from his physicians dated from January 1988 to September 1997.

By decision dated August 3, 1998, the Office found that appellant's April 28, 1998 request for reconsideration was not timely filed and that it did not show clear evidence of error in the Office's prior decisions.

The only Office decision before the Board on this appeal is the Office's August 3, 1998 decision denying appellant's request for reconsideration on the basis that it was not filed with the one-year time limit set forth by 20 C.F.R. § 10.138(b)(2), and that it did not present clear evidence of error. Since more than one year elapsed between the date of the Office's most recent merit decision on September 26, 1988 and the filing of appellant's appeal on December 16, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.[1] For the same reason, the Board lacks jurisdiction to review the Office's September 16, 1996 decision denying appellant's request for a hearing and the Office's March 18, 1988 decision denying entitlement to continuation of pay.

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
>
> '(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). 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 is filed within one year of the date of that decision." The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[2]

In the present case, the most recent merit decision by the Office was issued on September 26, 1988 and the most recent decision on appellant's entitlement to continuation of pay was issued on March 18, 1988. Appellant had one year from the date of these decisions to request reconsideration, and did not do so until April 3, 1998. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[3] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in

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[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

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

[3] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] Evidence which 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 merit review in the face of such evidence.[11]

The Board finds that the evidence submitted by appellant with his April 28, 1998 request for reconsideration does not show clear evidence of error.

In his request for reconsideration, appellant contended that the light-duty assignment letters from the employing establishment, the earliest of which is dated January 12, 1988, show that his claim was timely filed for continuation of pay. A claim for continuation of pay must be filed within 30 days of a traumatic injury.[12] Appellant filed a claim for his January 2, 1988

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

[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 Leona N. Travis*, *supra* note 6.

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

[10] *Leon D. Faidley, Jr.*, *supra* note 2.

[11] *Gregory Griffin*, *supra* note 3.

[12] 5 U.S.C. § 8118 provides for payment of continuation of pay to an employee "who has filed a claim for a period of wage loss due to traumatic injury with his immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title." Section 8122(a)(2) provides that written notice of injury must be given in writing within 30 days after the injury.

injury on March 1, 1988, and he does not contend that this claim was timely for continuation of pay. The limited-duty assignment letters also do not constitute a timely claim. The Board has consistently required that a notice for compensation must contain "words of claim" to be construed as a claim for continuation of pay. Notice submitted within 30 days of the injury which does not contain "words of claim" is not sufficient to claim continuation of pay under section 8118 of the Act. As the limited-duty assignment letters and the health unit notes do not contain words indicating appellant is filing a claim for compensation, they cannot show that appellant timely filed for continuation of pay and thus do not show clear evidence of error in the Office's March 18, 1988 decision denying continuation of pay.

The health unit notes and the notes and reports from appellant's physicians also do not show clear evidence of error in the Office's September 26, 1988 decision, which denied payment of compensation on the basis that the medical evidence did not show that appellant had any disability due to his January 2, 1988 employment injury. The health unit notes indicate either that appellant could perform limited duty or that he was sent home to take medication at his request. Many of the medical notes and reports indicate that appellant could perform limited duty. The notes that indicate appellant was unable to work either attribute this disability to other causes, such as a February 22, 1992 injury that is not involved in the Office's August 3, 1998 decision, or attribute this disability to back pain, without citing any specific injury. This information is insufficient to show clear evidence of error in the Office's September 26, 1988 decision.

The decision of the Office of Workers' Compensation Programs dated August 3, 1998 is affirmed.

Dated, Washington, D.C.
February 15, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member