U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN M. BAUNCHAND and U.S. POSTAL SERVICE,
COMMERCE PARK POST OFFICE, Baton Rouge, LA

Docket No. 98-1576; Submitted on the Record;
Issued March 20, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and not establishing clear evidence of error.

The case has been on appeal twice previously.[1] In a January 13, 1992 decision, the Board found that appellant had not established that she was injured herself at the time, place and in the manner she alleged. In a March 8, 1996 decision, the Board found that the Office had properly concluded that appellant had not submitted a request for reconsideration within one year of the May 18, 1993 merit decision in her case and had not established clear evidence of error in the Office's initial decision rejecting her claim.

In a letter dated April 17, 1997 and received by the Office on December 19, 1997, appellant again requested reconsideration. She contended that under the Office's procedures, conflicting factual testimony of equal probative weight should result in the claimant getting the benefit of the doubt. Appellant claimed that she had been denied a copy of the employing establishment's log sheet for the date of her alleged injury, May 1, 1990, which she contended would show that several of the witnesses of the employing establishment made false statements. She also contended that the Office erred in not referring her to an impartial medical specialist for an examination to resolve a conflict in the medical evidence. Appellant claimed that she had met her burden of proof and that the Office had failed to follow its own procedures.

Appellant submitted with her request a May 12, 1997 letter from a friend or relative, Charles E. Jonese, Jr., who stated that on one day in August 1990 appellant was summoned to the employing establishment by Robert Creator. He indicated that appellant was reluctant to go to the employing establishment because she had been harassed by postal inspectors. Mr. Jonese stated that he agreed to accompany appellant to help her with her baby, who had been born premature. He reported that when they arrived at Mr. Creator's office, two postal inspectors

[1] Docket No. 95-1176 (issued March 8, 1996); Docket No. 91-666 (issued January 13, 1992).

jumped on appellant, causing her to drop her baby to the floor, breaking the heart monitor on the baby. Mr. Jonese picked up the baby while appellant was handcuffed, read her rights and led away. He indicated that approximately 15 minutes later he overheard Mr. Creator talking with the postal inspectors and a woman about forcing appellant to change her statement about her injury and getting witnesses to state that they did not see appellant get injured. Mr. Jonese related that the postal inspectors reported they had already talked to the office of appellant's treating physician and the secretary had responded that she would put on the forms whatever the inspectors told her. He indicated that he was able to arrange for a ride home. Mr. Jonese related that appellant came home a few hours later and stated that the postal inspectors had taken her to another room and had threatened to harm her baby if she did not make changes to her statement on her employment injury by changing the date of the injury on the form, the description of how she was injured and the nature of her injury. He stated that appellant claimed the inspectors had shown her a copy of a report from her physician which showed injuries different than the injuries she reported. Appellant indicated to her relative and others that she had changed the forms as instructed by the postal inspectors because she was afraid not to.

In a January 15, 1998 letter decision, the Office denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

Under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations[3] which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also 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."[4] In *Leon D. Faidley, Jr.*,[5] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

The Office issued its last merit decision, on May 18, 1993. As the Office did not receive the application for review until December 19, 1997, the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office 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

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b).

[4] 20 C.F.R. § 10.138(b)(2).

[5] 41 ECAB 104 (1989).

granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[7] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[10] 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.[11] To show clear evidence of error, however, 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 fundamental question as to the correctness of the Office decision.[12] 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.[13]

The evidence and arguments submitted by appellant do not establish clear evidence of error. The statement of Mr. Jonese, alleging that appellant was arrested while holding her baby, putting her baby's health at risk, and was coerced into changing statements and dates related to the injury, and while he overheard a conspiracy to destroy appellant's credibility, is insufficient to show clear evidence of error. The statement does not relate to whether the alleged employment injury occurred as alleged but to a claimed conspiracy by employees of the employing establishment to undermine appellant's credibility so as to result in a denial of her claim. If the statement were accurate, then it would be clear evidence of error in the Office's denial of appellant's claim. However, the statement was submitted almost seven years after the alleged occurrence of these events. There is no other evidence of record to substantiate any part

[6] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which 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."

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

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

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

[10] *See Leona N. Travis*, *supra* note 8.

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

[12] *Leon D. Faidley, Jr.*, *supra* note 5.

[13] *Gregory Griffin*, *supra* note 6.

of Mr. Jonese's allegations. The earlier findings that appellant had not established that she was injured at the time, place and in the manner alleged, established that appellant does not have a reputation for credibility. This finding undermines the credibility of the statements submitted on behalf of her claim. The Board deems it highly unlikely that employees of the employing establishment or appellant's physician's office would engage in such extreme measures in an effort to establish grounds to deny her claim for compensation and even more unlikely that the alleged conspirators would discuss the matter within the presence of Mr. Jonese. The statement has so little credibility and so little relation to the events that appellant claimed caused her employment injury that it must be considered irrelevant to appellant's claim to have been injured on May 1, 1990 as she alleged.

Appellant has contended that if two descriptions of an employment injury are equally probative that the statement of the claimant should be given the benefit of the doubt.[14] However, the Office found in its original decision that appellant's statements contained such contradictions that her description of the alleged employment injury could not be considered to have equal probative value with any other description of the events of May 1, 1990. Appellant contended that the Office should have referred her to an impartial medical specialist to resolve a conflict in the medical evidence. However, such a referral was not relevant as the Office concluded that appellant did not establish that her injury in the performance of duty occurred at the time, place and in the manner alleged. Since appellant did not establish that she sustained an injury, the issue of the causal relationship of any claimed medical condition is moot. Appellant, therefore, has submitted legal arguments that have no legal color of validity and are insufficient to show clear evidence of error in the Office's denial of her claim.[15]

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.3(c) (June 1984).

[15] *Constance G. Mills*, 40 ECAB 317 (1988).

The decision of the Office of Workers' Compensation Programs dated January 15, 1998 is hereby affirmed.

Dated, Washington, D.C.
March 20, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member