U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY D. SHERMAN and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

Docket No. 01-874; Submitted on the Record;
Issued December 4, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the basis that appellant's request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607(a) and did not present clear evidence of error.

The Board has duly reviewed the case record and finds that the Office properly denied appellant's request for reconsideration.

On May 21, 1993 appellant, then a flat sorter operator, filed a claim for occupational disease alleging that her right wrist and forearm pain were caused by factors of federal employment.

On August 5, 1993 the Office accepted appellant's claim for de Quervain's tenosynovitis. In a report received by the employing establishment on November 3, 1993, Dr. Glen Lardon released appellant to return to full duty effective November 1, 1993.

On July 8, 1997 appellant filed a claim for recurrence of disability, noting that she stopped work after her alleged recurrence on February 13, 1997.

On January 7, 1998 the Office received via facsimile an April 10, 1997 report from appellant's family doctor noting a February 7, 1997 onset of her "upper body muscle pain and spasm and paresthesias."

By letter dated January 22, 1998, the Office advised appellant to submit a position description for her position after she returned to work and her doctor's opinion, with a medical explanation, as to the causal relationship between her condition and her initial work-related injury.

By decision dated February 26, 1998, the Office denied appellant's claim for recurrence of disability.

By letter dated March 18, 1998, appellant requested an oral hearing.

In a report dated February April 23, 1998, Dr. Robert E. Jackson, appellant's treating physician and a Board-certified internist, stated that appellant had been under his care since September 9, 1997 and that she remained symptomatic with intractable pain with degenerative joint disease and progressive de Quervain's tenosynovitis. Dr. Jackson then noted a history of appellant's treatment by other doctors, including references to two surgical procedures, one to relive her de Quervain's condition and one for her neck condition. He also noted an April 26, 1994 hemilaminectomy on the left at C6-7 by Dr. Philip Peter. Dr. Jackson recommended permanent disability retirement because appellant had failed conservative and surgical treatment. His diagnosis was de Quervain's tenosynovitis, severe cervical spondylosis and chronic pain syndrome.

A hearing was held on October 28, 1998. Prior to the close of the record, appellant submitted an October 20, 1998 report from Dr. Jackson who stated that appellant had been totally disabled since February 13, 1997 "for de Quervain's tenosynovitis of the right wrist" and that "her injury occurred in April 1993."

The hearing representative's decision, dated and finalized on December 30, 1998, affirmed the Office's February 26, 1998 decision.

In a letter received by facsimile on December 19, 1999 and dated August 19, 1999, appellant requested reconsideration. By decision dated December 21, 1999, the Office denied appellant's request for review of its December 30, 1998 decision.

In a letter dated June 9, 2000, appellant again requested reconsideration and stated that she was enclosing her entire medical file including reports from 1993.

By decision dated August 10, 2000, the Office denied appellant's request for review of the December 30, 1998 decision on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.[1]

The Board finds that the Office, by its August 10, 2000 decision, properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a) of the Act, on the basis that her request for reconsideration was not timely filed within the one-year time-limitation period set forth in 20 C.F.R. § 10.607(a) and did not present clear evidence of error.

[1] The Board notes that this case record contains evidence which was submitted subsequent to the Office's August 10, 2000 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 (1952).

Section 8128(a) of the 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
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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). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review an application for reconsideration unless it is filed within one-year from the date of the Office decision for which review is sought. 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]

The only decision before the Board in this appeal is the Office's decision dated August 10, 2000 denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision, issued on December 30, 1998, and the date of appellant's appeal, February 14, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.[3]

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.[4] Office procedures state 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[5]

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

[3] 20 C.F.R. § 501.3(d).

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

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996) 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."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10] 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.[11] 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.[12]

In this case, the evidence submitted by appellant does not establish clear evidence of error because 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 only new evidence that appellant submitted pursuant to her June 9, 2000 request for reconsideration was an October 10, 1996 report from a doctor[13] who placed appellant on total disability for one day with the comment: "No work involving right thumb." This report is insufficient to warrant review because it does not render a diagnosis nor does it relate appellant's thumb to her work-related injury. As such the medical evidence submitted fails to substantiate clear evidence of error in the Office's August 10, 2000 decision.

The evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.606, noted above. For these reasons, the Office's refusal to reopen the case for a merit review did not constitute an abuse of discretion.

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

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

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

[9] *Leona N. Travis*, *supra* note 7.

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

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

[12] *Gregory Griffin*, *supra* note 4.

[13] The doctor's signature is illegible.

The August 10, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 4, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member