U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE L. BRIMM and U.S. POSTAL SERVICE,
POST OFFICE, Fort Wayne, IN

Docket No. 00-706; Submitted on the Record;
Issued January 24, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed pursuant to 20 C.F.R. § 10.607 and failed to present clear evidence of error.

On November 20, 1996 appellant, filed an occupational disease claim alleging that he suffered an emotional condition due to employment factors. By decision dated February 24, 1997, the Office denied appellant's claim for the reason that fact of injury had not been established.

In a letter dated November 4, 1998, appellant requested reconsideration of the February 24, 1997 decision and submitted evidence. By decision dated April 28, 1999, the Office found that appellant's reconsideration request was untimely filed and did not establish clear evidence that the Office's final decision was erroneous.

The Board finds that the Office in its April 28, 1999 decision, properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate 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 appellant filed his appeal with the Board on November 9, 1999 the only decision properly before the Board is the April 28, 1999 Office decision.

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

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that a claimant's application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; and (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[3] To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[4] The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish on its face, that such decision was erroneous.[5]

In its April 28, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the February 24, 1997 decision, which stated that if he requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. As appellant's November 4, 1998 reconsideration request was outside the one-year time limit, which began the day after February 24, 1997, appellant's application for review was untimely.

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 of the case to determine whether the application establishes "clear evidence of error." 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.[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 manifested 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 merely to show that the evidence could be

[2] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application." 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b)(2) (1999).

[4] 20 C.F.R. § 10.606(a) (1999).

[5] 20 C.F.R. § 10.607(b) (1999).

[6] 20 C.F.R. § 10.607(a) (1999).

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

[8] *See Leona N. Travis*, 43 ECAB 0227 (1991).

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

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, 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.[12] The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[13]

In the instant case, the Office denied appellant's claim for a stress condition and depression because the evidence was insufficient to establish that appellant sustained his emotional condition in the performance of duty.[14] In support of his reconsideration request, appellant submitted congressional correspondence, excerpts from newspaper articles and newsletters reporting on employment matters and correspondence from the Office and employing establishment. Appellant also submitted medical reports, from Dr. Robert Wilkins, a Board-certified family practitioner, dated February 21, 1997[15] and reports from Dr. Mary Maloney, a Board-certified psychiatrist, dated March 4 and October 14, 1997. The Board finds that the evidence submitted by appellant does not establish clear evidence of error, as it does not raise a substantial question as the correctness of the Office's merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. With regard to the medical evidence, the reports submitted by Drs. Wilkins and Maloney are of no probative value in determining whether appellant has identified any compensable factors of employment. Neither physician discussed employment factors that caused appellant's diagnosed condition but only discussed appellant's mood symptoms and various periods of disability. Appellant did not provide any additional evidence to substantiate his allegations. Because he was unable to establish a compensable factor of employment, the medical evidence submitted on reconsideration is moot with regard to the issue of clear evidence of error. With regard to the remaining evidence submitted on reconsideration, the Board notes that it is not relevant to establish that appellant developed his emotional condition in the performance of duty.

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

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

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

[13] *See Gregory Griffin*, 41 ECAB 458 (1990).

[14] To establish that an injury was sustained in the performance of duty, a claimant must submit the following: (1) medical evidence establishing the presence or existence of a disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant; *see Victor J. Woodhams*, 41 ECAB 345 (1989).

[15] The Board notes that the Office did not receive Dr. Wilkins' February 21, 1997 report until February 25, 1997, subsequent to the February 24, 1997 decision.

Appellant argued on reconsideration that the Office neglected to respond to Dr. Maloney's report dated January 24, 1997 and that the one-year limitation to file an appeal should be waived in his case due to improper and inappropriate personnel actions by the employing establishment. The Board notes that Dr. Maloney's report dated January 24, 1997, which discussed appellant's increasing stress due to job insecurity, was previously considered by the Office in the February 24, 1997 decision. The Board further notes that regarding appellant's argument to waive the filing requirement, appellant must raise a substantial question as to the correctness of the Office decision in order to be granted a merit review despite his late filing. The Office found in the February 24, 1997 decision, that appellant failed to establish compensable work factors. On reconsideration, appellant argued that the employing establishment had engaged in improper behavior regarding personnel matters, however, he did not discuss which actions of the employing establishment were improper. Therefore, the Board notes that appellant's general and unsubstantiated allegations on reconsideration do not establish the presence of any compensable factors of employment and as such, appellant is not entitled to merit review.

Appellant further argued on reconsideration that the Social Security Administration had reversed a prior decision since the February 24, 1997 Office decision, finding that he was in fact medically disabled. Appellant submitted documentation from the Social Security Administration and Office of Personnel Management indicating such and argued that the evidence should be considered. Disability determinations by other governmental agencies, however, are not binding on the Board.[16] Thus, the fact that appellant was found to be totally disabled and entitled to social security benefits does not mean that he is totally disabled under the Act. The two Acts have different standards of medical proof on the issue of disability.[17] Therefore, the social security decision submitted by appellant has no evidentiary value in this case.[18]

Because appellant's untimely reconsideration request failed to present clear evidence of error, the Board finds that the Office's refusal to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

[16] Under the Act, the employee's disabling injury must be shown to be causally related to an accepted injury or factors of employment. For this reason, the determinations of other administrative agencies or courts, while sometimes instructive, are not determinative with regard to disability as defined by the Act. *See generally George A. Johnson*, 43 ECAB 712 (1992); *Constance G. Mills*, 40 ECAB 317 (1988); *Fabian W. Fraser*, 9 ECAB 367 (1957).

[17] *See Daniel Deparini*, 44 ECAB 657, 660 (1993) (noting that under the Social Security Act, mental and physical conditions which are not employment related may be considered in determining disability).

[18] *See Paul Trotman-Hall*, 45 ECAB 229, 236 (1993); *Maximo Calderon*, 1 ECAB 117, 121 (1948) (finding that a state court judgment that appellant was the widow of the federal employee is not binding on the Board's determination of her status under the Act).

For the foregoing reasons, the decision of the Office of Workers' Compensation Programs dated April 28, 1999 is hereby affirmed.

Dated, Washington, DC
January 24, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member