U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD E. COPELAND and U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Washington, DC

Docket No. 00-2610; Submitted on the Record;
Issued July 9, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB

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

The only Office decision before the Board on this appeal is the Office's July 13, 2000 decision denying appellant's request for reconsideration. Since more than one year elapsed between the date of the Office's most recent merit decision on May 7, 1999 and the filing of appellant's appeal on August 29, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that appellant's request for reconsideration was not timely filed.

Section 8128(a) of the Federal Employees' Compensation Act[2] 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 --
>
> (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. § 10.607(a)

[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] 5 U.S.C. §§ 8101-8193.

provides that "an application for reconsideration must be sent within one year of 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).[3]

In this case, the most recent merit decision by the Office was issued on May 7, 1999. Appellant had one year from the date of this decision to request reconsideration and did not do so until June 28, 2000. Appellant's attorney, in his June 28, 2000 request for reconsideration, stated that he had previously filed a request for reconsideration and enclosed a copy of the previous request. However, this copy was undated. The June 28, 2000 request for reconsideration does not aver that the undated prior request was mailed before May 7, 2000. The "mailbox rule," therefore, cannot be applied to consider the earlier reconsideration request timely.[4]

The Office's July 6, 2000 letter states that appellant's case was forwarded on June 6, 2000 for assignment of a request for reconsideration, but that the request could not be located. While this letter does establish that the Office received a request for reconsideration by June 6, 2000, it does not establish that a request for reconsideration was filed before May 7, 2000. The Office properly determined that appellant's application for review was not timely filed within the one-year limitation set forth in 20 C.F.R. § 10.607(a).

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.[5] 20 C.F.R. § 607(b) provides: "[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."

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

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

[4] The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of counsel's practice, is presumed to have arrived at the mailing address in due course. This is known as the "mailbox rule." The Board has held that the presumption of receipt under the mailbox rule must apply to claimants and to the Office alike. Provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing, the mailbox rule may be used to establish receipt by the Office. *Dorothy Yonts*, 48 ECAB 549 (1997).

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

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

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

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]

The Board finds that appellant's request for reconsideration did not demonstrate clear evidence of error. The Office, by its November 13, 1998 and May 7, 1999 decisions, found that the surgery proposed by appellant's physicians was not causally related to his August 3, 1995 injury. Appellant's untimely request for reconsideration was not accompanied by any new evidence and merely suggested that the medical evidence in the record be construed to reach a different result. As noted above, such a request for reconsideration cannot establish clear evidence of error.

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

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

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

[11] *Leon D. Faidley, Jr.*, *supra* note 3.

[12] *Gregory Griffin*, *supra* note 5.

The July 13, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 9, 2001

Michael J. Walsh
Chairman

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member