U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALD F. CARINCI and DEPARTMENT OF THE ARMY, WATERVLIET DEPOT, Watervliet, NY

Docket No. 02-2021; Submitted on the Record;
Issued February 11, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

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 demonstrate clear evidence of error.

On February 14, 2001 appellant, then a 53-year-old maintenance mechanic leader, filed a claim for a traumatic injury for an infection of his hands and feet sustained on November 20, 2000 when cleaning a steering wheel with solvent.

By letter dated February 27, 2001, the Office advised appellant that it had accepted that he sustained an aggravation of dermatitis.

By decision dated March 12, 2001, the Office found that appellant was not entitled to continuation of pay for the period from November 21, 2000 to January 4, 2001[1] for the reason that his claim was not filed within 30 days of his injury. The Office noted that this decision did not affect his entitlement to other compensation benefits and that he could file a claim for wage loss.

By letter dated April 26, 2002, appellant, through his attorney, requested reconsideration, contending that he timely reported the accident to his supervisor but that the supervisor failed to file an accident report in the 30-day period. By letter dated May 20, 2002, appellant's attorney contended that appellant filled out a claim form immediately after his injury and the supervisor let it sit on his desk for over three months.

[1] On its side of appellant's claim form, the employing establishment indicated that appellant first stopped work following his November 20, 2000 injury on February 6, 2001. 20 C.F.R. § 10.205 states that, to be eligible for continuation of pay, an employee must "Begin losing time from work due to the traumatic injury within 45 days of the injury."

By decision dated May 22, 2002, the Office found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the Office's May 22, 2002 decision denying appellant's request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.607(a) 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 March 12, 2001 and the filing of appellant's appeal on July 30, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.[2]

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 --
>
> (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) provides: "An application for reconsideration must be sent within one year of the date of the [Office's] 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 the present case, the most recent merit decision by the Office was issued March 12, 2001. Appellant had one year from the date of this decision to request reconsideration and did not do so until April 26, 2002. 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. § 10.607(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.[4] 20 C.F.R. § 607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear

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

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

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

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.[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]

Section 8118[12] of the Act provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2)[13] of this title." The latter section provides that written notice of injury shall be given "within 30 days." The context of section 8122 makes clear that this means within 30 days of the injury.[14]

The Board has held that oral notice is not sufficient to satisfy the time limitation provision for continuation of pay.[15] The Board also has held that unawareness of the seriousness

[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*, *supra* note 3.

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

[12] 5 U.S.C. § 8118.

[13] 5 U.S.C. § 8122(a)(2).

[14] *Myra Lenburg*, 36 ECAB 487 (1985), *see George A. Harrell*, 29 ECAB 338 (1978).

[15] *Russell P. Chambers*, 32 ECAB 550 (1981).

of an injury is no excuse for waiving the applicable time limitation provision.[16] Further, the Board has held that section 8122(d)(3) of the Act, which allows the Office to excuse failure to comply with the time limitation provision for filing a claim for compensation because of "exceptional circumstances," is not applicable to section 8118(a) which sets forth the filing requirements for continuation of pay. There is, therefore, no provision in the Act for excusing an employee's failure to file a written claim for continuation of pay within 30 days of the employment injury. The rationale for this finding is set forth fully in the Board's decision in *William E. Ostertag*.[17]

The Board finds that appellant has not demonstrated clear evidence of error in the Office's March 12, 2001 decision denying his claim for continuation of pay. Appellant has not presented proof that he filed a claim within 30 days, as required by the statute and regulations.

The May 22, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
February 11, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[16] *Michael R. Hrynchuk*, 35 ECAB 1094 (1984).

[17] 33 ECAB 1925 (1982).