U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRITT W. DUNN and U.S. POSTAL SERVICE,
POST OFFICE, San Antonio, TX

Docket No. 03-1231; Submitted on the Record;
Issued July 8, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On April 8, 1994 appellant, then a 41-year-old mail carrier, filed a traumatic injury claim alleging that he sustained a stress-related condition on April 7, 1994, which caused him to become dizzy and collapse on the floor. Appellant claimed that on that date John Puga, a supervisor, yelled at him in a vulgar and abusive manner in his office and on the work floor in front of his coworkers. He claimed that Mr. Puga made threatening gestures towards him and that he developed stress from these actions, which caused him to collapse.[1]

By decision dated July 25, 1994, the Office denied appellant's claim on the grounds that he did not establish that the claimed event, incident or exposure occurred at the time, place and in the manner alleged. The Office found that appellant did not establish the occurrence of an injury in the performance of duty on April 7, 1994. By decision dated October 5, 1995 and finalized October 6, 1995, an Office hearing representative affirmed the Office's July 25, 1994 decision.

By letter dated November 8, 2002, appellant requested reconsideration of his claim. Appellant asserted that a report from his physician showed he sustained a panic attack due to supervisory wrongdoing. Appellant claimed that he had filed a request for reconsideration in July 1996 and indicated that he was resubmitting documents, which he had submitted to the Office in connection with that request. By decision dated January 8, 2002, the Office denied reopening appellant's case for merit review on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

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[1] The record contains several witness statements concerning the claimed events of April 7, 1994.

The Board finds that the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's January 8, 2003 decision denying appellant's request for a review on the merits of its October 6, 1995 decision. Because more than one year has elapsed between the issuance of the Office's October 6, 1995 decision and April 14, 2003, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 6, 1995 decision.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[4] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[5] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[6]

In its January 8, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on October 6, 1995 and appellant's request for reconsideration was dated November 8, 2002, more than one year after October 6, 1995.[7] Appellant claimed that he filed a reconsideration request in 1996 and submitted two letters, dated July 21 and August 14, 1996, in which he requests reconsideration of his claim. However, there is no evidence of record, which shows that these letters were received by the Office at any point prior to November 2002.[8]

The Office, however, may not deny an application for review solely on the ground that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 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 her own motion or on application." 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.607(a).

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

[7] Appellant claimed that he filed a reconsideration request in 1996, but he did not provide any support for this assertion.

[8] In addition to bearing the file number for the present claim (A16-240477), these letters contain the file number A16-247581. The nature of this possible additional claim remains unclear. The record also contains a letter to the Office dated July 27, 2002, in which appellant claimed that he had filed a reconsideration request in August 1996. However, this letter would not be sufficient to show that a timely reconsideration request was in fact filed.

establishes "clear evidence of error."[9] Office procedures provide 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[11] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[12] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. In support of his reconsideration request, appellant submitted several documents, including medical documents dated April 13 and July 25,

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[9] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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

[11] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[14] *See Leona N. Travis*, *supra* note 12.

[15] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[16] *Leon D. Faidley, Jr.*, *supra* note 6.

1994 and various administrative records such as a copy of his April 8, 1994 traumatic injury claim form, a May 3, 1994 memorandum from an employing establishment official, which discusses the witness statements of record and the Office's July 25, 1994 decision. However, these documents do not show that the Office committed error in its October 6, 1995 decision, as they were in the record and considered by the Office prior to the issuance of the October 6, 1995 decision.[17] Appellant also submitted portions of a January 22, 1996 Equal Employment Opportunity Commission hearing. This document contains brief excerpts of testimony of appellant's coworkers and supervisors, but it does not contain any substantive account of the events of April 7, 1994.[18] For these reasons, the evidence and argument of appellant's untimely reconsideration request does not show clear evidence of error in the Office's prior decision.

The decision of the Office of Workers' Compensation Programs dated January 8, 2003 is hereby affirmed.

Dated, Washington, DC
July 8, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[17] With particular regard to the medical reports, it should be noted that appellant's claim was denied on a factual rather than a medical basis. Therefore, appellant's argument that a report from his physician showed that he sustained a panic attack due to supervisory wrongdoing would not be relevant to the main issue of the present case.

[18] The July 21, 1996 letter submitted by appellant contains some argument, but this argument is similar to previous argument submitted by appellant.