U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLORIA H. PRIVETTE and U.S. POSTAL SERVICE,
POST OFFICE, Greensboro, NC

Docket No. 03-1677; Submitted on the Record;
Issued September 5, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen 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.

This is the second appeal in this case. The Board issued a decision[1] on August 18, 2000 in which it affirmed the February 25, 1999 decision of the Office on the grounds that appellant did not meet her burden of proof to establish that she was entitled to a schedule award for permanent impairment of her lower extremities. The Office determined that the reports of Dr. Charles L. Branch, Jr., an attending Board-certified neurosurgeon, did not show that appellant was entitled to a schedule award.[2] The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

The Board finds that the Office properly refused to reopen appellant's case for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

[1] Docket No. 99-1936 (issued August 18, 2000).

[2] On July 18, 1996 appellant, then a 43-year-old mail carrier, sustained an employment-related L2 compression fracture. On July 20, 1996 she underwent a posterior lumbar fixation of L1 through L3 which was authorized by the Office. She later claimed entitlement to a schedule award and, by decision dated February 25, 1999, the Office denied appellant's claim on the grounds that the medical evidence of record did not establish that she was entitled to a schedule award.

The only decision before the Board on this appeal is the Office's June 10, 1993 decision denying appellant's request for a merit review of her claim. Because more than one year has elapsed between the issuance of the last merit decision of record[3] and June 23, 2003, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the prior merit decisions.[4]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[5] 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.[6] 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.[7] 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.[8]

In its June 10, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision of record is dated August 8, 2000 and appellant's request for reconsideration was dated April 23, 2003, more than one year after August 8, 2000.[9]

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 establishes "clear evidence of error."[10] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in

[3] The last merit decision of record is the Board's August 18, 2000 decision. According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but that the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including, *inter alia*, any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (June 2002).

[4] *See* 20 C.F.R. § 501.3(d)(2).

[5] 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).

[6] 20 C.F.R. § 10.606(b)(2).

[7] 20 C.F.R. § 10.607(a).

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

[9] Appellant submitted other letters to the Office prior to April 23, 2003, but none of these contained a request for reconsideration of her claim.

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

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.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17]

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 stated that it had reviewed the evidence submitted by appellant in support of her 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 her 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 her April 23, 2003 reconsideration request, appellant submitted medical reports dated June 20, 2001, May 21 and 22, 2002, and May 21, 2003 of Dr. Branch, an attending Board-certified neurosurgeon.[18] In

[11] 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...."

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

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

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

[15] *See Leona N. Travis*, *supra* note 13.

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

[17] *Leon D. Faidley, Jr.*, *supra* note 8.

[18] In October 2001 the Office determined that appellant sustained a recurrence of disability on June 20, 2001. The Office made no further determination regarding appellant's schedule award entitlement at that time.

these reports, Dr. Branch discussed appellant's back and lower extremity problems. Appellant also submitted the results of diagnostic testing from May 2002. However, none of these reports contains an opinion on the extent of the permanent impairment of her lower extremities and therefore they do not clearly show that the Office erred when it determined that she was not entitled to a schedule award.[19] Appellant also submitted copies of numerous letters which she sent to President Bush and Office officials between April 2001 and May 2003. In some of these letters, she argued that she had a permanent impairment of her lower extremities. However, the issue of the present case is medical in nature and these letters would not show that the Office erred when it determined that the medical evidence did not show that appellant was entitled to a schedule award for permanent impairment of her lower extremities.

The June 10, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
September 5, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[19] Appellant also resubmitted copies of January 15, 1997 and February 4, 1998 reports of Dr. Branch. However, it is unclear how these reports which were previously considered by the Office would show clear evidence of error in the Office's prior decisions.