U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUZANA FERIN and NATIONAL ARCHIVES RECORDS, Waltham, MA

Docket No. 00-2746; Submitted on the Record;
Issued April 11, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

On August 20, 1988 appellant, then a 30-year-old archives technician, injured her back when she lifted boxes in the performance of duty. The Office accepted the case for low back strain and aggravation of a pain disorder. Appellant stopped work on the date of injury and received compensation for wage loss on the periodic rolls.

On December 23, 1997 appellant's attending physician approved her for light duty with restrictions. She was referred for rehabilitation services on April 2, 1998. Placement efforts were impeded when appellant took a position of employment in Bratislava, Slovakia. In a rehabilitation report dated June 30, 1998, the rehabilitation counselor indicated that appellant was qualified to work as a counselor under the *Dictionary of Occupational Titles* (045.107-010) and that the position was available in sufficient numbers in appellant's commuting area to make it reasonably available.

On October14, 1998 the Office issued a notice of proposed reduction of compensation, finding that appellant was no longer disabled and that she had the capacity to earn wages as a counselor at the rate of $560.00 a week.[1]

In a November 16, 1998 decision, the Office reduced appellant's compensation on the grounds that the selected position of counselor represented her wage-earning capacity.[2]

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[1] The Office determined that based on the counselor position appellant had zero loss of wage-earning capacity.

[2] A copy of the decision was mailed to appellant's last known address in the United States and an address she provided in Slovakia.

In a letter dated May 3, 2000, appellant requested reconsideration and submitted a February 23, 1999 report from Dr. Uma Aggarwal, which diagnosed appellant as suffering from fibromyalgia based on a requisite number of tender points. Physical findings included limited range of motion of the cervical spine and normal range of motion for the lumbar spine. Strength in all extremities was negative and her sensory examination was intact.

In a May 25, 2000 decision, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decision issued within one year prior to the filing of the appeal.[3] As appellant filed her appeal with the Board on August 15, 2000, the only decision properly before the Board is the Office decision dated May 25, 2000 involving the Office's refusal to perform a merit review of the record under 5 U.S.C. § 8128.

The Board finds that the Office properly determined that appellant filed an untimely reconsideration request and that she failed to demonstrate clear evidence of error, which would have entitled her to a merit review.

Section 8128(a) of the Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[8] 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).[9]

In the instant case, appellant filed a request for reconsideration of the Office's November 16, 1998 decision, by letter postmarked May 3, 2000. Inasmuch as the May 3, 2000

[3] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[4] 5 U.S.C. § 8128(a).

[5] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[6] 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 on application."

[7] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b) (1999).

[8] 20 C.F.R. § 10.607(a) (1999).

[9] *See Leon D. Faidley, Jr., supra* note 5.

letter was not postmarked within one year of the November 16, 1998 Office decision, the Office correctly determined that each request for reconsideration was untimely filed.

The Board also notes that the Office correctly sent a copy of the November 16, 1998 decision to appellant's last known address in the United States and her foreign address so the decision was presumed to have been delivered in accordance with the mailbox rule.[10] The Board rejects appellant's contention that she did not receive notice of the decision and, therefore, could not file a timely reconsideration request. The record indicates that appellant was provided an additional copy of her appeal rights by Office letter dated September 1, 1999, which gave her sufficient time to file a timely reconsideration request.

In accordance with section 10.607(a)-(b) of the regulations, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, 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 that was decided by the Office.[12] The evidence must be positive, precise and explicit and must be 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] 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.[18]

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[10] Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *Larry L. Hill*, 42 ECAB 596 (1991); *Michele R. Littlejohn*, 42 ECAB 463 (1991); *George F. Gidicisin*, 36 ECAB 175 (1984).

[11] *See* 20 C.F.R. § 10.607(b).

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

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

[14] *See Jesus D. Sanchez*, *supra* note 5.

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

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

[17] *Leon D. Faidley, Jr.*, *supra* note 5.

[18] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Board finds that appellant's evidence on reconsideration fails to demonstrate clear evidence of error on behalf of the Office in reducing her compensation based on the counselor position. Dr. Aggarwal's report is of no probative value since he does not state that appellant was unable to work in the position selected. Accordingly, the Board finds that the Office properly refused to perform a merit review.

The Board notes, however, that on May 3, 2000 appellant submitted medical evidence relevant to her request for reimbursement for expenses pertaining to pool therapy, which was not discussed in the May 25, 2000 decision. The Board finds that the case must be remanded to the Office for consideration of this issue.

The decision of the Office of Workers' Compensation Programs dated May 25, 2000 is hereby affirmed.

Dated, Washington, DC
April 11, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member