U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERENCE E. FISKE and U.S. POSTAL SERVICE,
POST OFFICE, Essex Junction, VT

Docket No. 01-1776; Submitted on the Record;
Issued March 6, 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 denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error.

On September 19, 1999 appellant, then a 54-year-old mailhandler, filed a claim alleging that he sustained an injury to his left shoulder and neck while throwing bundles of flats into hampers.

In a duty status report dated September 19, 1999, Dr. Susan H. Olsen diagnosed cervical arthritis and disc disease and indicated that appellant could return to work with restrictions.[1]

In a form report dated September 19, 1999, Dr. Olsen diagnosed degenerative joint and disc disease and a strain of the neck and trapezius muscle aggravated by appellant's job.

By amended decision dated November 9, 1999, sent to appellant's correct address of record, the Office denied appellant's claim on the grounds that the medical evidence of record was not sufficient to establish causal relationship between his medical condition and the work incident on September 19, 1999.[2]

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[1] Appellant also submitted reports from a nurse. However, a nurse practitioner is not a "physician" as defined in the Federal Employees' Compensation Act. A "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law and chiropractors only to the extent that their reimbursable services are limited to treatment of a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2). Lay individuals such as physician's assistants, nurse practitioners and social workers are not competent to render a medical opinion; *see Robert J. Krstyen*, 44 ECAB 227, 229 (1992).

[2] This decision was an amended decision. The Office had earlier sent appellant a decision dated November 9, 1999 referencing a claim number and injury date for a claim for an injury on March 25, 1999.

In a letter dated February 16, 2000, appellant's representative advised the Office that appellant was confused concerning the November 9, 1999 amended Office decision and the incorrect November 9, 1999 decision and asked about the status of his claim.

The Office responded that appellant's claim for an injury on September 19, 1999 was denied in the Office's amended November 9, 1999 decision and advised that appellant had one year from the November 9, 1999 decision to exercise his right to request reconsideration.

By letter dated February 2, 2001, received by the Office on February 12, 2001, appellant requested reconsideration and submitted additional medical evidence. He also alleged that he did not receive his copy of the Office's November 9, 1999 decision until March 2000.

Appellant submitted progress notes dated April 1 through 30, 1999 from a Jonathan E. Fenton, D.O. regarding a claimed work injury on March 25, 1999.

In an undated report received by the Office on February 12, 2001, Dr. Olsen stated that she examined appellant on September 18, 1999 at the hospital for pain in his shoulder, neck and back after lifting tubs and bundles of heavy magazines and newspapers. She stated that x-rays revealed preexisting degenerative disc disease in the cervical area of his spine and that his cervical strain at work was caused by his work activity and his preexisting condition.

By decision dated May 10, 2001, the Office denied appellant's claim on the grounds that the request was not timely made within one year of its November 9, 1999 decision and failed to present clear evidence of error.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of the merits of his claim, on the grounds that his untimely request did not demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[3] As appellant filed his appeal with the Board on May 30, 2001, the only decision properly before the Board is the Office's May 10, 2001 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's November 9, 1999 decision denying appellant's claim for an injury on September 19, 1999.[4]

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

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

Section 8128(a) of the Act[5] does not entitle a claimant to a review of an Office decision as a matter of right.[6] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[7]

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, 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]

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[10] In accordance with this holding, 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.[11]

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

In this case, appellant filed his request for reconsideration by letter dated February 2, 2001 and received by the Office on February 12, 2001. This was clearly more than one year after the Office's November 9, 1999 merit decision was issued and thus the application for review was not timely filed.[12] In accordance with its implementing regulations and Board

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[5] 5 U.S.C. § 8128(a).

[6] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, *supra* note 4.

[7] *Leon D. Faidley, Jr.*, *supra* note 4. *Compare* 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

[8] 20 C.F.R. § 10.607.

[9] *See Gregory Griffin*, *supra* note 6 and *Leon D. Faidley, Jr.*, *supra* note 4.

[10] *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

[11] 20 C.F.R. § 10.607(b).

[12] Although appellant alleged that he did not receive a copy of the Office's November 9, 1999 decision until March 2000, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual; *see A.C. Clyburn*, 47 ECAB 153, 159 (1995). This presumption arises when it appears from the record that the notice was properly addressed and duly mailed; *see Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991). The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee; *see Larry L. Hill*, 42 ECAB 596, 600 (1991). In this case, it appears from the record that a copy of the November 9, 1999 decision was sent to appellant's correct address of record and there is insufficient evidence to contradict the presumption that the November 9, 1999 decision was timely received by appellant.

precedent, the Office properly found that the request was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error which would warrant reopening appellant's case for merit review under 5 U.S.C. § 8128(a), notwithstanding the untimeliness of his application.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application for review was sufficient to show clear evidence of error.

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

In support of his February 2, 2001 request for reconsideration, appellant submitted an undated report received by the Office on February 12, 2001 from Dr. Olsen who stated that she examined appellant on September 18, 1999 for pain in his shoulder, neck and back after lifting heavy magazines and newspapers. She stated that x-rays revealed preexisting degenerative disc disease in the cervical area of his spine and opined that appellant's cervical strain at work was caused by his work activity and his preexisting condition. This report is insufficient to show clear evidence of error. As noted above, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Later medical evidence supporting causal relationship such as that submitted with appellant's February 2, 2001 request for reconsideration, may be contrary to the evidence of record but does not establish that the decision of the Office was incorrect.[19] Consequently, the evidence submitted in support of appellant's untimely request in no way shows that the Office's November 9, 1999 decision was erroneous. Thus, the evidence submitted by appellant did not raise a substantial question as to the correctness of the Office's November 9, 1999 decision. As appellant's untimely application for review failed to

[13] *See Dean D. Beets,* 43 ECAB 1153, 1158 (1992).

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

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

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

[17] *Leon D. Faidley, Jr., supra* note 4.

[18] *Gregory Griffin*, *supra* note 6.

[19] *Dean D. Beets, supra* note 13.

present clear evidence of error, the Board finds that the Office's refusal to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.[20]

The decision of the Office of Workers' Compensation Programs dated December 10, 2001 is affirmed.

Dated, Washington, DC
March 6, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[20] The progress notes submitted by appellant that were dated in April 1999 concerned his claim for a work injury on March 25, 1999. They are of diminished probative value regarding his claim for an injury on September 19, 1999 and are not sufficient to show clear evidence of error in the Office's November 9, 1999 decision.