

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ULYSEE TYE and DEPARTMENT OF THE TREASURY,
BUREAU OF ENGRAVING & PRINTING, Washington, D.C.

*Docket No. 97-1127; Submitted on the Record;
Issued December 23, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing 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 Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

On September 21, 1993 appellant filed an occupational disease claim for poor circulation in his legs which he attributed to factors of his federal employment. The Office accepted appellant's claim for a temporary aggravation of preexisting venous deficiency. By letter dated October 6, 1994, the Office informed appellant that he should submit a rationalized medical opinion in support of his claim for compensation after September 12, 1994. By decision dated November 16, 1994, the Office denied appellant's claim on the grounds that the evidence did not establish that he had any current condition or disability causally related to the accepted employment injury. After further development, the Office again denied appellant's claim for continuing compensation by decision dated March 22, 1995. On April 25, 1995 appellant, through his attorney, requested a hearing which the Office denied in a decision dated May 8, 1995 as untimely. By decision dated October 2, 1995, the Office denied modification of its prior merit decision. By letter dated October 11, 1996, received by the Office on October 16, 1996, appellant, through his attorney, requested reconsideration. By decision dated December 20, 1996, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to establish clear evidence of error.

The only decision before the Board on this appeal is the Office's December 20, 1996 decision denying appellant's request for a review on the merits of its October 2, 1995 decision denying his request for modification. Because more than one year has elapsed between the

issuance of the Office's October 2, 1995 decision and February 3, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 2, 1995 merit decision.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.³ 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.⁴ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

In its December 20, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on October 2, 1995 and appellant's request for reconsideration was received by the Office on October 16, 1996 which was more than one year after October 2, 1995.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, 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."⁷ 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁸

The Office's procedure manual discusses "clear evidence of error" as follows:

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.138(b)(1), (2).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Joseph W. Baxter*, 36 ECAB 228 (1984).

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

⁷ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁸ *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

“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 a mistake (for example, proof that a schedule awards 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 on the Director’s own motion.”⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵ The Board makes an independent determination as to 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.¹⁶

In the present case, the Office conducted a limited review of the evidence submitted by appellant in support of his application for review. Appellant submitted medical reports from Dr. Robert W. Yancey, Jr., an internist, dated November 5, 1993 and July 19, 1995 which were previously of record and considered by the Office in the prior merit decision. Appellant also submitted a March 1992 discharge summary already of record. As this evidence is duplicative it is insufficient to establish clear evidence of error.

In a report dated March 31, 1996, Dr. Yancey discussed his treatment of appellant for ulcers on the left lower extremity. He opined that appellant’s sedentary work during his federal

⁹ Federal (FECA) Procedure Manual, Part 2 – Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ See *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *reaff’d on recon.*, 41 ECAB 458 (1990).

employment aggravated his preexisting venous condition. While Dr. Yancey noted that the ulcers on appellant's legs reoccurred when he returned to work due to his sedentary position, the physician did not address the relevant issue of whether appellant has any current disability due to his accepted employment-related temporary aggravation of his venous insufficiency.¹⁷ Thus, his opinion is insufficient to raise a substantial question as to the correctness of the Office's last merit decision.

As appellant has failed to submit evidence of clear error, the Office did not abuse its discretion in denying further review of the case.

The decision of the Office of Workers' Compensation Programs dated December 20, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 23, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁷ Where an aggravation of a preexisting condition is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even when the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, his disqualification for continued employment is due to the underlying condition, without any contribution by the employment. *Laymon C. Christie*, 35 ECAB 389 (1983).