

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of VINCENT J. LaCROSS and U.S. POSTAL SERVICE,
POST OFFICE, Shamokin, Pa.

*Docket No. 95-2281; Submitted on the Record;
Issued January 6, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to review the merits of appellant's claim on the grounds that appellant's request for reconsideration was not timely filed and that it failed to present clear evidence of error.

The Board has duly reviewed the record and finds that the Office properly refused to review the merits of appellant's claim on the grounds that appellant's request for reconsideration was not timely filed and that it failed to present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.¹ The Office, through its regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office or Board.² 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).³ The Office has administratively decided that the timeliness of a reconsideration request should be determined by the postmark on the envelope, if available. Otherwise, the date of the letter should be used.⁴

¹ 5 U.S.C. § 8128(a); *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

² 20 C.F.R. § 10.138(b)(2) with respect to a merit decision of the Office; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3a (May 1991) with respect to a merit decision of the Board; *See also, Robin Bills*, 45 ECAB 784 (1994) (where the Board found a request for reconsideration timely filed within one year of a Board decision, and remanded the case to the Office to apply the appropriate standard to the request for reconsideration under 20 C.F.R. § 10.138(b)(i-iii)).

³ *Leon D. Faidley, Jr.*, *supra* note 1.

⁴ *Willie H. Walker, Jr.*, 45 ECAB 126 (1993); *Karen J. Mueller*, 45 ECAB 704 (1994).

On prior appeals, the Board issued an initial decision and order dated October 15, 1984, remanding the case to the Office for a *de novo* decision, and a decision and order dated November 29, 1985, affirming the termination of compensation benefits effective August 7, 1977, the date of appellant's retirement.⁵ Following a hearing held on March 20, 1987, an Office hearing representative found by decision dated July 8, 1987, that appellant's employment-related disability ceased on the date he retired. Between February 1990 and May 1991, appellant sought reconsideration of the Office's July 8, 1987 decision and submitted additional evidence. By decision dated September 8, 1992, the Office found that appellant's request for reconsideration was not filed within the one-year-time limitation and did not show clear evidence of error. The Board, by decision and order dated December 2, 1993, found that the Office did not abuse its discretion by refusing to review the merits of appellant's claim on the grounds that his request for reconsideration was untimely and did not constitute clear evidence of error.⁶

By letter dated December 1, 1994, appellant requested reconsideration and submitted a September 20, 1989 report from Dr. Leland J. Green, a Board-certified pulmonologist and allergist, which had not been submitted previously. The record reveals that appellant faxed a copy of his letter and the report by Dr. Green on December 1, 1994.

In a March 1, 1995 decision, the Office found that the December 1, 1994 letter was untimely based on the postmark and date of receipt of December 12, 1994, and found that the request for reconsideration did not establish clear evidence of error.⁷

The Board notes that the last merit decision of the Office was the July 8, 1987 decision of the Office hearing representative. Appellant had one year from the date of the July 8, 1987 decision to request reconsideration. While he subsequently filed an appeal, which was addressed by a December 1, 1993 order and decision of the Board, this decision did not review the merits of appellant's claim. Accordingly, appellant's subsequent reconsideration request of December 1, 1994 was not timely filed within one year of the latest merit decision in this case. Accordingly, the Office properly determined that appellant's request for reconsideration was untimely.

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.⁸ Office procedures state that the Office will reopen

⁵ Docket No. 84-1894 (issued October 15, 1984); Docket No. 85-1429 (issued November 29, 1985). The facts and history surrounding the circumstances of the prior appeals are contained within the respective decisions, herein incorporated by reference.

⁶ Docket No. 93-631 (issued December 2, 1993).

⁷ The Office also indicated that the postmark, which is not of record, was consistent with the date of its receipt on December 12, 1994.

⁸ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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.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 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.¹⁶

In his December 1, 1993 letter, appellant maintained that the Office had not fully considered the reports and opinions of Dr. Jaimee M. Singzon, a Board-certified pulmonologist. He objected to the phrasing of the questions asked by the Office to Dr. Charles E. Myers, a Board-certified pulmonologist, and the lack of Board certification in pulmonology of the Office medical adviser. Finally, in his November 20, 1989 report, Dr. Green addressed the findings of the hearing representative in the decision dated July 8, 1987. Dr. Green noted that he felt the assumption was wrong that appellant had a preexisting condition, based on the lack of episodes within a 10-year span after the first incident in 1963. He noted that based on the same evidence, he came to a different conclusion from that of Dr. Myers, namely that he felt appellant's condition on and after 1976 was related to his exposure in the work force. Dr. Green stated, "I have interpreted the evidence in one way and the hearing boards have interpreted the evidence in another way."

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

¹² See *Jesus D. Sanchez*, *supra* note 1.

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

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

¹⁵ *Leon D. Faidley*, *supra* note 1.

¹⁶ *Gregory Griffin*, *supra* note 8.

The Board finds appellant's request for reconsideration insufficient to establish clear evidence of error. While Dr. Green provides rationale for his opinion that appellant did not have a preexisting condition but developed a pulmonary condition as a result of his employment, Dr. Green's report does not establish clear evidence of error with respect to the termination of compensation benefits effective August 7, 1977. As stated above, it is insufficient to establish that the evidence could be construed differently. Instead, the evidence must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the appellant. As the request for reconsideration does not shift the weight of the evidence in favor of appellant, appellant has not established clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated March 1, 1995 is hereby affirmed.

Dated, Washington, D.C.
January 6, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member