

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIM RICE, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Greensboro, N.C.

*Docket No. 96-618; Submitted on the Record;
Issued January 27, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not present clear evidence of error.

The Board has duly reviewed the case record and finds that appellant's request for reconsideration dated August 19, 1995 was untimely filed and did not establish clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).³ 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.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on August 17, 1994.

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 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 point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office. *See* 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *See* cases cited *supra* note 2.

Appellant requested reconsideration by letter dated August 19, 1995. The Office denied appellant's August 19, 1995 request for reconsideration by decision dated September 25, 1995 on the grounds that it was not timely filed and did not establish clear evidence of error. As appellant's reconsideration request was outside the one-year time limit which began the day after August 17, 1994, appellant's request for reconsideration was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁶ Office procedures state 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.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ 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.¹² 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.¹³

The Board finds that appellant's August 19, 1995 request for reconsideration fails to show clear evidence of error. In its August 17, 1994 decision, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate a causal relationship between the appellant's knee condition and his employment. In an accompanying memorandum to the Director, the Office noted that appellant had sustained a knee injury while bowling in

⁶ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon.* denied, 41 ECAB 458 (1990).

⁷ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ *See Leona N. Travis*, *supra* note 8.

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ *Gregory Griffin*, *supra* note 6.

1990; that he sought treatment on February 12, 1991 for right knee pain, 11 days prior to his employment at the employing establishment; that appellant was treated on September 10, 1991 for recurrent right knee pain “of many years duration”; that appellant had onset of knee symptoms while squatting, repairing a door at his father’s home on November 23, 1993; and that the only medical report of record which supported appellant’s allegation of a work-related injury was Dr. John A. Feagin, a Board-certified orthopedic surgeon’s, June 2, 1994 report which was based upon an erroneous history which indicated appellant’s injury occurred as he was required to squat at work. The issue, therefore, for purposes of establishing clear evidence of error, is whether appellant has submitted evidence establishing that his knee condition was caused or aggravated by factors of his federal employment, such that the Office’s August 17, 1994 decision denying appellant’s claim was clearly in error.

In support of his request for reconsideration appellant submitted a new medical report to the record from his physician Dr. Feagin. He concluded that irregardless of the length of time appellant had been employed by the postal service, the type of work he did which required “walking, etc.” would significantly aggravate his condition. While this report attempts to correct the history of injury, this report still does not provide the required medical rationale causally relating the diagnosed condition to specific factors of appellant’s employment. The Board finds appellant did not submit any medical evidence which explicitly establishes that appellant did sustain an aggravation of his knee condition due to factors of his federal employment. As the appellant did not submit evidence substantiating clear evidence of error, in the decision dated August 17, 1994, the Office did not abuse its discretion in denying merit review of the case.

The September 25, 1995 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
January 27, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member