

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES F. PRESTON and U.S. POSTAL SERVICE,
POST OFFICE, North Reading, Mass.

*Docket No. 98-1373; Oral Argument Held February 18, 1999;
Issued May 11, 1999*

Appearances: *John L. Whitehouse, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
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 finds that the Office did not abuse 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 only decision before the Board on this appeal is the Office's March 2, 1998 decision, denying appellant's request for a review on the merits of its May 1, 1996 decision. By decision dated May 1, 1996, the Office denied modification of its June 5, 1992, October 22, 1993 and February 24, 1995 decisions, on the grounds that appellant did not show that he had more than a 31 percent permanent impairment of his left leg for which he received a schedule award.¹ Because more than one year has elapsed between the issuance of the Office's May 1, 1996 decision and March 27, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the May 1, 1996 decision.²

¹ The Office had accepted that appellant sustained an employment-related left lateral meniscus tear on June 10, 1991. By award of compensation dated June 5, 1992, the Office granted appellant a schedule award for a 31 percent permanent impairment of his left leg. The Office based its schedule award on the findings of Dr. Barry C. Dorn, an attending Board-certified orthopedic surgeon.

² See 20 C.F.R. § 501.3(d)(2). The record also contains an August 5, 1997 decision denying appellant's claim that he sustained an employment-related recurrence of disability on June 23, 1995. Appellant did not request reconsideration of this decision before the Office and did not request that the Board review the decision on appeal.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ 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 a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁴ 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.⁵ 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.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁷

In its March 2, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision regarding the permanent impairment of appellant's left leg on May 1, 1996 and appellant's request for reconsideration was dated December 1, 1997, more than one year after May 1, 1996.

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."⁸ 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.⁹

³ 5 U.S.C. §§ 8101-8193. 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." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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

"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 an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, 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...."

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 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 accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of his application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. In support of his reconsideration request, appellant argued that the Office did not take his preexisting left leg condition into consideration when calculating the permanent impairment of his left leg for schedule award purposes.¹⁷ The Board notes, however, that a review of the Office's decisions

¹⁰ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 7.

¹⁶ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹⁷ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included; see *Dale B. Larson*, 41 ECAB 481, 490 (1990); *Pedro M. DeLeon, Jr.*, 35 ECAB 487, 492 (1983).

and the relevant medical evidence shows that the Office considered the preexisting condition of appellant's left leg when calculating the permanent impairment of his left leg. Since the Office's May 1, 1996 decision, the record had been supplemented with additional reports, dated between mid 1996 and mid 1997, of Dr. Dorn. However, these reports do not demonstrate clear evidence of error by the Office in that they are of limited probative value because they lack an assessment of appellant's left leg impairment which was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.¹⁸

For these reasons, the Office did not abuse 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 decision of the Office of Workers' Compensation Programs dated March 2, 1998 is affirmed.

Dated, Washington, D.C.
May 11, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁸ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment). For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption. *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).