

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

In the Matter of WARNER LAJSZKY and U.S. POSTAL SERVICE,
POST OFFICE, Flushing, NY

*Docket No. 99-2275; Submitted on the Record;
Issued December 18, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration on the grounds that the application was untimely filed.

On May 7, 1990 appellant, then a 29-year-old letter carrier, was injured in the performance of duty when he slipped on a flight of stairs while delivering mail. The Office accepted the claim for a lumbar sprain. Appellant missed time from work for two weeks and received continuation of pay and medical benefits. He returned to full duty effective June 11, 1990.

Appellant next injured his knee at work on December 17, 1990 and received three months of wage-loss compensation. He was placed on light duty for the remainder of 1991.

Appellant filed a claim for a recurrence of disability beginning January 10, 1992. The Office issued a decision on July 6, 1993, denying appellant's claim for a recurrence of disability. An Office hearing representative affirmed the Office's July 6, 1993 decision on March 9, 1994.

Appellant filed a request for reconsideration on December 21, 1995.

On January 30, 1996 the Office issued a decision denying modification of the prior Office decision following a merit review of the record.

Appellant requested reconsideration on January 21, 1997.

In a decision dated March 7, 1997, the Office denied modification following a merit review of the record.¹

¹ The Office indicated that it was reviewing evidence submitted by appellant on reconsideration that may or may

Appellant next filed an application dated March 2, 1998 requesting reconsideration.

In an April 24, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted along with the application was repetitious and immaterial in nature and, therefore, insufficient to warrant a merit review.

On July 1, 1998 the Office received an undated letter from appellant requesting reconsideration.

In a decision dated September 29, 1998, the Office denied appellant's request for reconsideration as untimely filed. The Office also determined that appellant failed to show clear evidence of error.

In a March 22, 1999 letter, appellant requested reconsideration and stated:

"The reason I feel compelled to ask this of you is because prior to the April 2, 1998 decision, I was never properly informed as to what your Office requires of a narrative. This is why my prior narratives I submitted might have seemed insufficient. I need this opportunity for my physician to submit the narrative you require so we can better understand my situation."

In an April 30, 1999 decision, the Office advised appellant that his request for reconsideration was denied on the grounds that his application was not timely filed and failed to establish 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.² As appellant filed his appeal with the Board on July 14, 1999, the only decisions properly before the Board are the Office's decisions dated April 30, 1999 and September 29, 1998.

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ As one such limitation, the Office has stated

not have been previously considered, but it wanted to afford due process to appellant.

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 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."

⁶ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against

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.⁷ 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).⁸

In those cases where a request for reconsideration is not timely filed, the Board has held 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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

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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b)(2); *see also* 20 C.F.R. § 10.138.

⁷ 20 C.F.R. § 10.607(a) (1999); *see* 10.138(b)(2).

⁸ *See Leon D. Faidley, Jr., supra* note 5.

⁹ *Leonard E. Redway*, 28 ECAB 242 (1977).

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 5.

¹³ *See Leona N. Travis, supra* note 12.

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

¹⁵ *Leon D. Faidley, Jr., supra* note 5.

¹⁶ *Thankamma Matthews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

In the present case, the Board has duly reviewed the record and finds that the Office properly denied appellant's last two reconsideration requests as untimely filed. Appellant filed two more reconsideration requests with the Office on July 1, 1998 and March 22, 1999. Because each of these reconsideration requests were not filed within one year of the last merit decision of record dated March 7, 1997, the Office properly denied each of them as untimely filed.

The Board notes that the Office properly determined in its September 29, 1998 decision that appellant failed to show clear evidence of error on behalf of the Office in denying his claim for a recurrence of disability. With respect to the April 30, 1999 decision, although the Office did not specifically make a finding as to clear evidence of error, the Board notes that appellant did not advance an argument or submit evidence along with his reconsideration request to warrant a finding of clear evidence of error.

The decisions of the Office of Workers' Compensation Programs dated April 30, 1999 and September 29, 1998 are hereby affirmed.

Dated, Washington, DC
December 18, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member