

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFIO FRULLANI and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Erie, PA

*Docket No. 00-1390; Submitted on the Record;
Issued August 28, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607, and that the application failed to present clear evidence of error.

This case has previously been on appeal before the Board. By decision dated November 16, 1998, the Board found that the Office met its burden of proof in terminating appellant's compensation benefits on the grounds that his accepted emotional condition had resolved.

In a request for reconsideration dated November 30, 1999, appellant argued that his case should be reconsidered because he settled a dispute with the employing establishment regarding a letter of separation, the Office made arrangements for him to see Dr. Rudolph E.M. Janosko, a second opinion referral psychiatrist, in September 1994 and Dr. Donald J. Coleman, a Board-certified psychiatrist, in January 1995, and that he could not go back to work because the employing establishment's settlement agreement preceded the actions taken by the Office.

By decision dated January 7, 2000, the Office found that appellant's request for reconsideration was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607, as it was not filed within one year of the last merit decision, that of the Board dated November 16, 1998. The Office further found that appellant's request failed to present clear evidence of error, as it did not establish that appellant's employment-related disability had not ceased.

The Board finds that the Office properly refused to reopen appellant's claim for further consideration of the merits, under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607, and that the application failed to present 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.¹ Because more than one year has elapsed between the issuance of the Board's November 16, 1998 merit decision which extended appellant's right to request review up to one year and March 8, 2000, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review any prior merit decisions. Therefore, the only decision before the Board is the Office's January 7, 2000 nonmerit decision denying appellant's application for a review of the Office prior merit decision which was affirmed on appeal by the Board on November 16, 1998.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.² 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).³

In this case, the most recent merit decision on the issue of appellant's termination was the Board's decision dated November 16, 1998. Appellant had one year from the date of this decision to request reconsideration, and did not do so until November 30, 1999.⁴ The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607.

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.⁵ 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. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁶

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

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. § 501.2(c), 501.3(d)(2).

² 20 C.F.R. § 10.607(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ See generally, *Mamie L. Morgan*, 47 ECAB 281 (1996) (appellant's right to request reconsideration within one year of the last merit decision which includes a merit decision issued by the Board).

⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

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 Office properly found that appellant's arguments that he settled a dispute with the employing establishment regarding a letter of separation, that the Office made arrangements for him to see two different physicians at two different times and that he could not go back to work because the settlement agreement preceded the actions taken by the Office, failed to show clear evidence of error. The arguments put forth by appellant in his request did not address the underlying issue of termination of appellant's compensation benefits. As the Board pointed out in the last merit decision, the weight of the medical evidence established that the employment-related disability had ceased. Appellant submitted no new evidence to support his contention that he continued to suffer from any residuals causally related to factors of his federal employment. Appellant's arguments that he settled a dispute with the employing establishment and that he had to see two different physicians are irrelevant to the issue at hand and do not demonstrate clear evidence of error. Appellant's argument that the settlement agreement preceded the actions taken by the Office is erroneous and also does not demonstrate clear evidence of error.

⁹ *Jesus D. Sanchez*, *supra* note 3.

¹⁰ *Leona N. Travis*, *supra* note 8.

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

¹² *Leon D. Faidley, Jr.*, *supra* note 3.

¹³ *Gregory Griffin*, *supra* note 5.

The January 7, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 28, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member