

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARRY S. KOHL and U.S. POSTAL SERVICE,
POST OFFICE, Van Nuys, CA

*Docket No. 00-411; Submitted on the Record;
Issued November 16, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration dated June 17, 1999 was not timely filed and did not demonstrate clear evidence of error.

This case has previously been before the Board on four occasions. In its most recent prior decision, dated November 25, 1998, the Board found that the Office properly determined that appellant's request for reconsideration dated January 2, 1996 was untimely filed and did not demonstrate clear evidence of error.¹

On June 17, 1999 appellant filed a request for reconsideration with the Office, in which he raised objections to the report of Dr. Earl F. Jordan, the impartial medical specialist who resolved a conflict of medical opinion in appellant's case.

By decision dated October 5, 1999, the Office found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

The Board finds that appellant's June 17, 1999 request for reconsideration was not timely filed.

¹ Docket No. 96-1363.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that “An application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought.” 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).²

In the present case, the most recent merit decision was a decision issued by the Board on December 11, 1992. Appellant's June 17, 1999 request for reconsideration is beyond the one-year limit set forth in 20 C.F.R. § 10.607(a). 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(a).

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.³ 20 C.F.R. § 10.607(b) provides: “OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.”

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁴ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁵ Evidence which does not raise a

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁵ *See Leona N. Travis*, 43 ECAB 227 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ 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.⁸ 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.⁹ 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.¹⁰

The Board finds that appellant's June 17, 1999 request for reconsideration did not demonstrate clear evidence of error. Appellant's contentions, which consist of his objections to the report of Dr. Jordan, are essentially the same as those raised repeatedly by appellant before the Office and the Board. On three prior occasions, the Board, in light of essentially the similar contentions by appellant, found that the reports of Dr. Jordan constituted the weight of the medical evidence.¹¹ Given these prior reviews, appellant's reiteration of essentially the same arguments cannot be found to demonstrate clear evidence of error.

⁶ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ See *Leona N. Travis*, *supra* note 5.

⁸ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ *Leon D. Faidley, Jr.*, *supra* note 2.

¹⁰ *Gregory Griffin*, *supra* note 3.

¹¹ Docket No. 92-705 (issued December 11, 1992); Docket No. 88-550 (issued June 30, 1988); Docket No. 85-2015 (issued March 14, 1986).

The decision of the Office of Workers' Compensation Programs dated October 5, 1999 is affirmed.

Dated, Washington, DC
November 16, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member