U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SEAN P. ALLEN and U.S. POSTAL SERVICE,
POST OFFICE, Altoona, PA

*Docket No. 01-455; Submitted on the Record;*
*Issued October 18, 2001*

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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 determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On June 6, 1990 appellant, then a 37-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2). Appellant alleged that as a result of "watching safety films over and over eight hours a day" he suffered from emotional distress and stress.

By letter dated January 7, 1991, the Office accepted appellant's claim of adjustment disorder with anxious mood. The Office specifically noted:

> "Although we have approved the claim, the medical evidence of record does not support any disability due to the accepted medical condition, therefore, based on the present record there is no basis to pay compensation for wage loss. However, any bills related to the adjustment disorder may be submitted to this Office for payment."

On July 15, 1993 appellant filed a notice for a recurrence of disability causally related to the June 1990 accepted injury of adjustment disorder. The Office denied the claim for recurrence by decision dated June 22, 1994.

By letter dated June 5, 1994, appellant requested reconsideration. The Office reviewed appellants claim on the merits and in a decision dated June 12, 1995, denied modification of its June 22, 1994 decision.

Since this decision on the merits, appellant has filed for review numerous times. The Office denied reconsideration, without merit review, in a decision dated June 14, 1996 and on September 3, 1997 found that appellant's request for reconsideration was untimely and did not

present clear evidence of error. The Branch of Hearings and Review denied an oral hearing by decision dated December 18, 1997.

On April 10, 1998 appellant filed another notice of recurrence of disability, alleging a recurrence on April 15, 1991 causally related to his accepted June 1990 employment injury. On December 7, 1998 appellant filed a claim for an occupational disease (Form CA-2), also alleging adjustment disorder and anxious mood caused by his duties for the employing establishment.

By letter dated May 27, 1999, the Office requested that appellant submit further evidence in support of his claim for an occupational disease. In a letter to appellant dated August 4, 1999, the Office told appellant that although it had appeared that appellant's new claim was a duplicate of his previous claim, it chose to develop the claim in the event that additional information would provide a new aspect to the previous condition. However, the Office determined that all of the evidence submitted showed that this claim was a duplicate of the earlier claim, which was accepted and then later denied for a 1992 recurrence. Accordingly, the Office combined this case with the previous case.

By letter dated July 31, 2000, appellant once again requested reconsideration. Appellant asked that the Office consider the report of Daniel Palmer, Ph.D. in support of the request for reconsideration. Dr. Palmer saw appellant on April 24, May 1 and 15, 2000. He opined that appellant's "depression appears chronic in nature and related to alleged harassment and mistreatment, sustained in the early 1990s, at his place of employment." Dr. Palmer was also impressed by the fact that the Social Security Administration found appellant disabled from 1991 to 1993.

By decision dated November 14, 2000, the Office denied appellant's request for reconsideration. The Office noted that the request for review was not timely filed and did not establish clear evidence of error on the part of the Office.

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(a) and that the application failed to present clear evidence of error.

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 --
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> (1) end, decrease or increase the compensation previously awarded; or
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> (2) award compensation previously refused or discontinued."[1]

[1] 5 U.S.C. § 8128(a).

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 the Office will not review a decision unless the application for review is filed within one year of the date of that decision. Appellant's recent request for reconsideration was filed on July 31, 2000 well over one year since the Office's last merit decision on June 12, 1995. Accordingly, appellant did not file a timely request for reconsideration.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision.[2] To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[3] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[4] It is not merely enough to show that the evidence could be construed so as to produce a contrary conclusion.[5] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[6] The Board makes an independent determination of whether the claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.

Appellant has had this case reviewed by the Office on numerous occasions. In support of his most recent request, appellant submitted the opinion of Dr. Palmer stating that his emotional condition was caused by his federal employment in the early 1990s. Dr. Palmer's opinion appears to be based on appellant's recitation of the facts and upon the fact that the Social Security Administration issued an award of benefits. Dr. Palmer's opinion which was written well after the alleged incidents appellant suffered at work and based largely on appellant's recitation of facts from almost a decade prior to his visit with Dr. Palmer, is not sufficient to establish clear evidence of error on the part of the Office. 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 a mistake (for example proof that a schedule award was miscalculated). Evidence such as a detailed well-rationalized medical report, which if submitted before the denial was issued, 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.[7]

[2] 20 C.F.R. § 10.607(b).

[3] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[4] *Jimmy L. Day*, 48 ECAB 654 (1997).

[5] *Id.*

[6] *Id.*

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

The November 14, 2000 decision of the Office of Worker's Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 18, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member