

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT A. ROBINSON and DEPARTMENT OF THE NAVY,  
NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 99-2173; Submitted on the Record;  
Issued December 18, 2000*

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DECISION and ORDER

Before MICHAEL E. GROOM, PRISCILLA ANNE SCHWAB,  
VALERIE D. EVANS-HARRELL

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 acted within its discretion in declining appellant's request for a merit review of his claim.

On August 10, 1983 appellant, then a 31-year-old propeller finisher, sustained an employment-related acute lumbosacral sprain. On January 7, 1985 he sustained an employment-related left frontal parietal contusion. The Office also accepted that appellant sustained an early peripheral neuropathy due to toxin exposure at work. The Office paid compensation for various periods of disability, including total disability after appellant stopped work in February 1985.

By decision dated February 8, 1996, the Office adjusted appellant's compensation effective February 4, 1996 based on its determination regarding his wage-earning capacity in the constructed position of security clerk.<sup>1</sup> By decision dated January 30, 1997 and finalized January 31, 1997, an Office hearing representative affirmed the Office's February 8, 1996 decision. By decision dated June 10, 1997, the Office denied modification of its prior decisions. By decision dated December 15, 1998, the Office denied appellant's request for merit review 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 December 15, 1998 decision denying appellant's request for a review on the merits of its June 10, 1997 decision. Because more than one year has elapsed between the issuance of the Office's June 10, 1997

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<sup>1</sup> The position was sedentary in nature and required lifting up to 10 pounds.

decision and January 8, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the June 10, 1997 decision.<sup>2</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> 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.<sup>4</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

In its December 15, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on June 10, 1997 and appellant's request for reconsideration was received on September 2, 1998, more than one year later.

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."<sup>8</sup> Office procedures provide that the Office will reopen a claimant's

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<sup>2</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>3</sup> 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).

<sup>4</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>7</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

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.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>11</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup>

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 decisions were in error.

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). 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 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...."

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

<sup>11</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>12</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>13</sup> See *Leona N. Travis*, *supra* note 11.

<sup>14</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>15</sup> *Leon D. Faidley, Jr.*, *supra* note 7.

<sup>16</sup> *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's prior decisions and is insufficient to demonstrate clear evidence of error.

In support of his untimely reconsideration request, appellant submitted several medical reports. In reports dated March 13 and December 10, 1997, Dr. Eric I. Mitchell, an attending Board-certified orthopedic surgeon, indicated that appellant reported lower extremity symptoms related to cold weather. However, the reports do not contain any opinion that appellant had employment-related disability or otherwise could not perform the security clerk position which served as the basis for the reduction in his compensation. Appellant also submitted other reports from Dr. Mitchell which showed normal findings, the findings of September 1998 diagnostic testing which showed a slight bulge at L5-S1 without impingement, excerpts from articles on herniated discs and copies of documents which had already been submitted and considered. However, these documents do not show that the Office erred in its prior decisions by reducing appellant's compensation based on his ability to perform the security clerk position.

The decision of the Office of Workers' Compensation Programs dated December 15, 1998 is affirmed.

Dated, Washington, DC  
December 18, 2000

Michael E. Groom  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member