

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BENJAMIN R. TABARANGO and DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE, Calif.

*Docket No. 96-1185; Submitted on the Record;
Issued March 5, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's application for review dated February 3, 1996 was untimely filed and did not establish clear evidence of error.

The Board finds that appellant's February 3, 1996 request for reconsideration was untimely filed.

In the present case, appellant filed a claim on October 10, 1987 alleging that he had sustained an emotional condition in the performance of his federal employment. The Office denied appellant's claim on February 23, 1988 on the grounds that appellant had not submitted a detailed factual statement outlining the factors of employment he believed caused his emotional condition and appellant had not submitted the medical evidence necessary to establish causal relationship between the alleged factors of employment and his alleged emotional condition. On April 26, 1989 the Office denied appellant's March 16, 1989 request for reconsideration as untimely filed. On September 19, 1989, upon appellant's request, the Board dismissed an appeal dated May 17, 1989. On March 13, 1990 the Office denied appellant's January 24, 1990 request for reconsideration, after merit review, on the grounds that appellant's allegations of "aids victim" harassment and stress arising from a fitness-for-duty examination were not established as compensable factors of employment pursuant to the Federal Employees' Compensation Act. On February 3, 1996 appellant again requested that the Office reconsider the case. On February 21, 1996 the Office denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

The Office properly determined in this case that appellant failed to file a timely application for review. Section 8128(a) of the Act¹ does not entitle a claimant to a review of an

¹ 5 U.S.C. § 8128(a).

Office decision as a matter of right.² 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.³ 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).⁴

In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁵ The Office issued its last merit decision in this case on March 13, 1990 wherein it denied modification of the denial of appellant's claim on the grounds that appellant had not established that his alleged emotional condition arose from factors of employment which were compensable pursuant to the Act. Appellant's February 3, 1996 request for reconsideration was therefore untimely filed. While in his most recent request for reconsideration appellant has alleged that incompetence precluded his timely filing of a request for reconsideration, the Board has previously affirmed that section 10.138(b)(2) of the Office's regulations⁶ is unequivocal in setting forth the time limitation period and does not indicate that late filing may be excused by extenuating circumstances, such as mental incompetence.⁷

The Board also finds that appellant's February 3, 1996 request for reconsideration did not establish clear evidence of error.

In his request for reconsideration dated February 3, 1996, appellant alleged that the Office could reopen and modify an award within its discretionary authority at any time; that lump sum awards were payable pursuant to the Act; that after the death of an employee, beneficiary payment is proscribed by law; that latent disability claims may be filed when the employee becomes aware of the disability; and that time limitation provisions of the Act do not apply to mentally incompetent individuals.

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.⁸ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 20 C.F.R. § 10.138(b)(2).

⁴ See cases cited *supra* note 2.

⁵ *Larry L. Lilton*, 44 ECAB 243 (1992).

⁶ 20 C.F.R. § 10.138(b).

⁷ *Bradley L. Mattern*, 44 ECAB 809 (1993).

⁸ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ 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.¹⁵

Appellant's allegations in his petition for reconsideration are not relevant in any manner to appellant's claim for an emotional condition. None of appellant's allegations made in 1996 address the relevant issue of whether appellant has established that he sustained an emotional condition in the performance of duty. As appellant did not present clear evidence that the Office's denial of his claim on March 13, 1990, the last merit review of this claim, was in error, the Office properly denied the February 3, 1996 request for reconsideration.

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 2.

¹⁵ *Gregory Griffin*, *supra* note 8.

The decision of the Office of Workers' Compensation Programs dated February 21, 1996 is hereby affirmed.

Dated, Washington, D.C.
March 5, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

A. Peter Kanjorski
Alternate Member