

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSEPH P. POYNTON and DEPARTMENT OF THE ARMY,  
AVIATION SYSTEM COMMAND, St. Louis, MO

*Docket No. 97-2451; Submitted on the Record;  
Issued August 24, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's May 8, 1997 request, for reconsideration of the Office decision dated January 30, 1986.

This case has previously been on appeal before the Board. In its January 19, 1989 decision,<sup>1</sup> the Board found that the Office's refusal to reopen appellant's case for further consideration of the merits of his claim did not constitute an abuse of discretion and affirmed the Office's May 27, 1988 decision. The facts and circumstances of the case as set out in the Board's January 19, 1989 decision, are incorporated herein by reference.

On April 26, 1989 the Board issued an order denying appellant's petition for reconsideration of the January 19, 1989 decision, on the grounds that appellant's petition presented no error of fact or law.

On August 30, 1990 appellant filed a second appeal with the Board requesting appellate review of the decisions dated "Jan[uary] 19, 1989 or Apr[il] 26, 1990." This appeal was docketed as No. 90-1948.

On February 5, 1991 the Board issued an order returning the case record to the custody of the Office for the purpose of copying records or for making it available for inspection by appellant or his representative. The Board noted that the appeal would be held in abeyance until the case record was returned.

On September 30, 1991 the Board issued its order dismissing the appeal for want of jurisdiction.

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<sup>1</sup> Docket No. 88-1661.

On December 16, 1991 the Board issued an order denying appellant's request for reconsideration as appellant's petition for reconsideration failed to set forth any error of fact or law warranting further consideration.

By letter dated April 26, 1997, which the Office received May 8, 1997, the Office received more documentation from appellant concerning his compensation claim.

By decision dated May 16, 1997, the Office denied appellant's request as untimely and did not present clear evidence of error.

The Board finds that the Office properly denied appellant's May 8, 1997 request for reconsideration on the grounds that it was untimely filed and he presented no clear evidence of error.

The only decision the Board may review on appeal is the May 16, 1997 decision of the Office, which denied appellant's request for reconsideration, because this is the only final Office decision issued within one year of the filing of appellant's appeal on June 23, 1997.<sup>2</sup>

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> Rather, the Office has the discretion to reopen a case for review of the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b), which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.<sup>5</sup> The Board has held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>6</sup>

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.<sup>7</sup> The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.<sup>8</sup> Thus, if reconsideration is requested more than one year after the issuance of the decision,

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<sup>2</sup> *Joseph L. Cabral*, 44 ECAB 152, 154 (1992); *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>3</sup> 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8128(a).

<sup>4</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

<sup>6</sup> *Leon D. Faidley, Jr.*, *supra* note 4 at 111.

<sup>7</sup> *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

<sup>8</sup> *Howard A. Williams*, 45 ECAB 853, 857 (1994).

the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.<sup>9</sup>

Clear evidence of error is intended to represent a difficult standard.<sup>10</sup> The claimant must present evidence which on its face shows that the Office made an error, for example, proof of a miscalculation in a schedule award. Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.<sup>11</sup>

To establish clear evidence of error, a claimant must submit positive, precise and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.<sup>12</sup> The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>13</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 on the face of such evidence.<sup>14</sup>

The record indicates that on May 3, 1985 an Office hearing representative affirmed the Office's finding that the weight of the medical evidence, as represented by Dr. Dooley, established that appellant's symptoms between December 3, 1981 and May 25, 1982 did not constitute a contusion and/or a concussion of the brain and was not causally related to either the December 3, or 23, 1981 employment injuries. The hearing representative remanded the case for a determination of whether appellant was entitled to compensation benefits for the effects of the two employment injuries. In a June 28, 1985 letter decision, the Office determined that appellant was disabled for work during December 24, 1981 through February 4, 1982 as a result of the December 23, 1981 employment injury and authorized continuation of pay for that period of absence. The Office did not authorize continuation of pay, nor did it pay compensation benefits for time lost by appellant as a result of the December 3, 1981 employment injury as the record revealed that appellant lost no time from work. In a January 30, 1986 letter decision, the Office further found that the medical evidence of record did not support any employment-related disability after February 4, 1982. In each of these decisions, the Office properly informed appellant of his options to request reconsideration within one year or appeal the decision to the

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<sup>9</sup> *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>11</sup> *Id.*; see *Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition for recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

<sup>12</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>13</sup> *Bradley L. Mattern*, *supra* note 7 at 817.

<sup>14</sup> *Gregory Griffin*, *supra* note 11.

Board. Appellant's request for reconsideration was received by the Office on May 8, 1997, approximately 11 years after the last merit decision and, therefore, untimely filed.

Given the untimely filing, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of the untimely reconsideration established clear evidence of error, thereby entitling him to a merit review of his claim. As the Office found, appellant offered no new evidence on the issue of whether appellant suffered from any residuals of either the December 3 or 23, 1981 employment injuries. Rather, appellant provided documentation he used in pursuing his rights through the federal court process and arguing that his constitutional rights were violated. Appellant also submitted some evidence which was previously of record, such as the initial injury reports and medical diagnosis of his condition. Inasmuch as this evidence was previously considered by the Office, this evidence is insufficient to meet the clear evidence of error standard required to reopen appellant's case. Finally, appellant does not allege any misapplication of the law or procedural error by the Office in processing his claim. Inasmuch as appellant's request for reconsideration was indisputably untimely and he failed to submit evidence substantiating clear evidence of error, the Board finds that the Office did not abuse its discretion in denying merit review of the case.

The May 16, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
August 24, 1999

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member