

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SAMUEL D. ALLEN and U.S. POSTAL SERVICE,  
POST OFFICE, Columbus, Ohio

*Docket No. 97-2758; Submitted on the Record;  
Issued June 25, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On October 22, 1991 appellant filed a claim alleging that he hurt his back when delivering mail. The Office accepted the condition of a lumbar strain/herniated disc L5 through S1. By decision dated February 23, 1993, the Office denied appellant's claim for wage loss from September 9, 1992 forward. This denial was based on a finding that the medical evidence did not support an inability to continue work as had been assigned based on medical residuals from the accepted injury of October 22, 1991.

After the issuance of the February 23, 1993 denial, the Office received periodic contacts first from appellant, asking how to exercise his review rights and later from other agencies such as the Social Security Administration and a homeless shelter requiring about the case status.

On August 6, 1997 the Office received a letter dated July 28, 1997 from appellant seeking reconsideration of the February 23, 1993 decision. Within the letter, appellant wrote that he was injured on October 22, 1991, was found to have a herniated disc in two locations of his back and that he was put on limited duty. Appellant stated that he went on sick leave and did not return to his duties. He stated that since leaving work in September 1992, he has not worked full time and has only worked temporary jobs now and then. Appellant stated that he started receiving a pension from the Veterans Administration in January 1997. He also stated that he feels he is due compensation from 1992 to 1996. No medical evidence was submitted.

By decision dated August 11, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). The Office 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.<sup>1</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence of error that the Office's final merit decision was in error.<sup>2</sup> Since more than one year elapsed from the February 23, 1993 merit decision of the Office to appellant's July 28, 1997 reconsideration request, the request for reconsideration is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.<sup>3</sup> In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's 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>4</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>5</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>6</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>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>8</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>9</sup> To

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<sup>1</sup> 20 C.F.R. § 10.138(b)(2). *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>2</sup> *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>3</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (May 1991). 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, a proof of miscalculation in a schedule award). Evidence such as a well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case...."

<sup>5</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>6</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>7</sup> *See Jesus D. Sanchez*, *supra* note 2.

<sup>8</sup> *See Leona N. Travis*, *supra* note 6.

<sup>9</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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>10</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>11</sup>

In this case, the evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in this case is medical in nature and appellant has failed to submit any medical evidence. Appellant has merely presented disagreement with the February 23, 1993 decision stating that he feels he is due compensation from 1992 to 1996. Thus, the lack of medical evidence and appellant's disagreement is insufficient to establish clear evidence of error.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The August 11, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
June 25, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Bradley T. Knott  
Alternate Member

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<sup>10</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>11</sup> *Gregory Griffin*, *supra* note 1.