

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT N. JESSUP and U.S. POSTAL SERVICE,  
POST OFFICE, Gretna, La.

*Docket No. 97-674; Submitted on the Record;  
Issued May 13, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration; and (2) whether the Office abused its discretion in denying appellants' second request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

On September 4, 1992 appellant, then a 37-year-old letter carrier, sustained a lumbar strain when he fell onto a water meter. Appellant received appropriate compensation benefits.

By decision dated December 17, 1993, the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence of record established that appellant's residuals from his September 4, 1992 employment injury had resolved no later than September 17, 1993.

By decision dated March 7, 1995, an Office hearing representative vacated the Office's December 17, 1993 decision and remanded the case for further development. The Office's hearing representative determined that a conflict in medical opinion evidence existed in the case and directed the Office to refer appellant to an impartial medical specialist for an examination and evaluation in order to resolve the conflict as to whether appellant's employment injury had resolved.

By letter dated June 14, 1995, the Office referred appellant, along with a statement of accepted facts and copies of medical and factual records, to Dr. Donald C. Faust, a Board-certified orthopedic surgeon and an impartial medical specialist, for an examination and evaluation as to whether appellant had any continuing disability or medical condition causally related to his September 4, 1992 employment injury.

In a narrative report dated July 7, 1995, Dr. Faust provided a history of appellant's condition, findings on examination, a summary of the medical evidence and determined that appellant had a preexisting spinal condition with stenosis. He stated:

“[Appellant's] residual back problems are of a long-standing nature. The final stenosis [is] related to facet hypertrophy and not to specific disc herniation. It would appear the strain that occurred at the time of injury in September of [19]92 has resolved and he has reached maximum medical benefit.”

By decision dated October 5, 1995, the Office denied appellant's claim for continuing compensation benefits on the grounds that the weight of the medical evidence, as represented by the report of Dr. Faust, established that appellant's residuals from his September 4, 1992 employment injury had ceased.

By letter dated September 13, 1996, submitted through his representative, appellant requested reconsideration of the Office's October 5, 1995 merit decision. Appellant indicated that he was submitting with his request for reconsideration a June 20, 1996 letter from Dr. John B. Cazale, IV., a Board-certified orthopedic surgeon.

By decision dated October 11, 1996, the Office denied appellant's request for reconsideration on the grounds that the request had neither raised substantial legal questions nor included any new and relevant evidence. The Office noted that appellant's request for reconsideration had not included any medical reports from Dr. Cazale.<sup>1</sup>

By letter dated October 31, 1996, appellant requested reconsideration of the denial of his claim and submitted the June 20, 1996 report of Dr. Cazale.

In a report dated June 20, 1996, Dr. Cazale stated that appellant's employment-related 1992 lumbar strain had resolved. He stated:

“[T]he [1992] fall did aggravate the preexisting problem [degenerative disc disease] and he is symptomatic because of the problem. Now, how long his symptoms will persist cannot be determined from a medical standpoint. We have a gentleman who did not have any trouble with his back prior to the fall and since that time he has had persistent problems and, therefore, I think the symptoms of his degenerative arthritic back and the symptoms of his lumbar spinal stenosis exist and these were aggravated by his fall.”

By decision dated November 13, 1996, the Office denied appellant's October 31, 1996 request for reconsideration on the grounds that the request was not timely submitted within one year of the Office's last merit decision on October 5, 1995 and did not show clear evidence of error in the Office's merit decision.

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<sup>1</sup> The record shows that the Office received the June 20, 1996 report of Dr. Cazale on November 5, 1996 subsequent to the Office's October 11, 1996 decision.

The Board finds that the Office did not abuse its discretion in denying appellant's September 13, 1996 request for reconsideration.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant submitted his appeal to the Board on November 26, 1996, the only decisions properly before the Board are the October 11 and November 13, 1996 nonmerit decisions. The Board has no jurisdiction to review the Office's October 5, 1995 merit decision denying his claim for compensation benefits.<sup>3</sup>

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>5</sup>

In this case, appellant submitted no evidence or argument in support of his September 13, 1996 request for reconsideration and therefore the Office properly denied appellant's application for review in its October 11, 1996 decision.

The Board further finds that the Office did not abuse its discretion in denying appellant's October 31, 1996 request for reconsideration on the grounds that the request 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). 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.<sup>6</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>7</sup>

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

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<sup>2</sup> 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

<sup>3</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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

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

<sup>6</sup> 20 C.F.R. § 10.138(b)(2).

<sup>7</sup> See *Leon D. Faidley, Jr.*, *supra* note 3.

erroneous.<sup>8</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>9</sup>

In this case, the Board finds that the Office properly determined that appellant failed to file a timely application for review.

Appellant filed his request for reconsideration by letter dated October 31, 1996. This was more than one year after the Office's merit decision was issued on October 5, 1995 and thus the application for review was not timely filed. In accordance with its internal guidelines and with Board precedent, the Office properly found that the request was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error which would warrant reopening appellant's case for merit review under 5 U.S.C. § 8128(a) notwithstanding the untimeliness of his application.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application for review was sufficient to show clear evidence of error.

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 be manifested 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. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</sup> The Board makes an independent determination of

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<sup>8</sup> *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) ( 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 Office's denial was issued, 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>10</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

<sup>12</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

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>14</sup>

In support of his untimely request for reconsideration, appellant submitted a report dated June 20, 1996 from Dr. Cazale who stated that appellant's employment-related 1992 lumbar strain had resolved. However, he contradicted himself by indicating that appellant had continuing back problems which were attributable to the 1992 employment injury. Even if his opinion, as to whether appellant's employment injury had resolved, was clear, Dr. Cazale provided insufficient medical rationale to support his opinion. Therefore, this report does not show clear evidence of error in the Office's October 5, 1995 determination that his employment-related injury had resolved as of September 17, 1993 and therefore the Office properly denied appellant's request for reconsideration.

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<sup>14</sup> *Gregory Griffin*, 41 ECAB 186 (1989).

The November 13 and October 11, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.  
May 13, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member