

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLTON R. BROWN and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Hazelwood, MO

*Docket No. 00-1667; Submitted on the Record;
Issued April 9, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

On November 1, 1987 appellant, then a 32-year-old clerk, filed a claim for an injury to the middle finger of her right hand sustained on that date. The Office accepted that he sustained a contusion of the right middle finger. On June 6, 1988 appellant filed a claim for a schedule award.

By decision dated July 12, 1989, the Office found that the medical evidence did not support that appellant had any permanent impairment of the right middle finger as a result of his November 1, 1987 employment injury. The Office noted that his attending physician stated that appellant did not have any permanent impairment. Appellant appealed this decision to the Board, which, by order dated February 1, 1990, remanded the case to the Office for reconstruction of the case record and issuance of an appropriate decision.¹ By decision dated May 1, 1990, the Office found that the medical evidence did not support that appellant had any permanent impairment of the right middle finger as a result of his November 1, 1987 employment injury. By letter dated February 22, 1991, appellant requested reconsideration and submitted additional medical evidence. By decision dated August 29, 1991 the Office found that the additional evidence was not sufficient to warrant modification of its prior decision. Appellant appealed this decision to the Board, which, by decision and order dated April 29, 1992 found that he had not established that he had any permanent impairment to his finger.²

By letter dated June 4, 1992, appellant requested reconsideration and submitted a March 6, 1992 report from his attending physician, Dr. David N. Kantor, stating that he had

¹ Docket No. 89-1772.

² Docket No. 91-1961.

sustained a five percent loss of function in his right middle finger. By decision dated August 8, 1992, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions, as Dr. Kantor did not provide any information to support his percentage of impairment.

By undated letter received by the Office on October 4, 1999, appellant requested that the Office reopen his claim for a schedule award. By letter dated December 7, 1999 the Office advised him that he should follow the appeal rights provided with its prior decision. By letter dated December 9, 1999, appellant requested reconsideration and submitted a May 9, 1988 report from Dr. Farida Farzana stating that he had a 10 percent permanent impairment of the right middle finger. By decision dated March 29, 2000, the Office found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the Office's March 29, 2000 decision denying appellant's request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.607(a)³ and that it did not present clear evidence of error. Since more than one year elapsed between the date of the Office's most recent merit decision on August 8, 1992 and the filing of appellant's appeal on April 6, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.⁴

The Board finds that the Office properly found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

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, 20 C.F.R. § 10.607(a) provides: “An application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought.” 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).⁵

³ This section provides that an application for reconsideration must be sent within one year of the date of the Office's decision for which review is sought.

⁴ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

In the present case, the most recent merit decision by the Office was issued on August 8, 1992. Appellant had one year from the date of this decision to request reconsideration and did not do so until December 9, 1999. The Office properly determined that his application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows “clear evidence of error” on the part of the Office.⁶ The Office’s regulations state that the Office “will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.”⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² 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.¹³ 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.¹⁴

⁶ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁷ 20 C.F.R. § 10.607(b).

⁸ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ *See Leona N. Travis*, *supra* note 9.

¹² *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁴ *Gregory Griffin*, *supra* note 6.

The Board finds that appellant's application for reconsideration did not demonstrate clear evidence of error. The report from Dr. Farzana suffered from the same deficiency as the report of Dr. Kantor: it did not contain any information supporting the doctor's estimate of a permanent impairment of the finger. Appellant's application for reconsideration did not establish that the Office's denial of a schedule award was clearly erroneous.

The decision of the Office of Workers' Compensation Programs dated March 29, 2000 is affirmed.

Dated, Washington, DC
April 9, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member