U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of ERNEST A. STANCO and U.S. POSTAL SERVICE,
POST OFFICE, Waterbury, CN

*Docket No. 02-1944; Submitted on the Record;*
*Issued January 14, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office's regulations provide that a claimant must (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[2] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[3] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[4] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[5]

In its May 28, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on December 16, 1996

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[1] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.606(b)(2).

[3] 20 C.F.R. § 10.607(a).

[4] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[5] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

and appellant's request for reconsideration was dated March 24, 2002, more than one year after December 16, 1996.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[6] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[8] The evidence must be positive, precise and explicit and must manifest 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]

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[6] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (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 denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case."

[8] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[9] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[10] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

[12] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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

[14] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

The Office proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for further merit review. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

Appellant is a 74-year-old former postal worker with severe, deforming, psoriatic and/or rheumatoid arthritis. The issue on appeal is whether appellant's medical evidence causally related his medical condition to his employment factors.

In support of his request for reconsideration appellant submitted a December 6, 2001 report from Dr. Brian Peck, rheumatologist, a January 10, 1996 report from Dr. Robert Porzio, a chiropractor, and x-ray reports dated May 6, 1994 and November 3, 1998.

The opinion of Dr. Porzio has no probative value on the issue of whether appellant sustained an employment-related injury because his reports do not constitute medical evidence within the meaning of the Act. Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[15] However, Dr. Porzio did not diagnose a subluxation demonstrated by x-rays to exist.

The Office's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebra anatomically which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[16]

The report from Dr. Peck is repetitive of earlier reports he submitted. It is insufficient to overcome the opinion of the independent medical examiners' report that is the weight of the evidence in this case and, therefore, does not establish clear evidence of error.

[15] 5 U.S.C. § 8107(a). *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

[16] 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121, 126 (1990).

The May 28, 2002 decision of the Office of Workers' Compensation is hereby affirmed.

Dated, Washington, DC
January 14, 2003

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member