

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN L. FRAZIER and U.S. POSTAL SERVICE, U.S. POSTAL
INSPECTION SERVICE, SECURITY FORCE, Memphis, Tenn.

*Docket No. 97-823; Submitted on the Record;
Issued December 11, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's August 17, 1996 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On June 15, 1993 appellant, then a 50-year-old police officer, filed a claim for cyclothymic disorder which he attributed to being placed on restricted sick leave by August 26, September 30, 1992 and January 9, 1993 letters, and conflicts with supervisors over leave usage.

By decision dated July 9, 1993, the Office denied appellant's claim on the grounds that the alleged emotional condition was not established to have occurred in the performance of duty. The Office found that appellant attributed his claimed emotional condition to conflicts with supervisors over leave requests and leave usage, administrative matters which were not covered factors of employment. The Office further found that appellant had not established that the employing establishment committed error by denying appellant's leave requests, issuing restricted leave letters, or other administrative matters relating to appellant's use of leave.

Appellant disagreed with this decision, and in a July 1, 1994 letter requested reconsideration. Appellant again asserted that his emotional condition arose over conflicts in leave usage, and submitted medical and factual evidence supporting this assertion.

By decision dated August 30, 1994, the Office denied reconsideration on the grounds that the evidence submitted in support thereof was repetitious in nature and therefore insufficient to warrant a merit review. The Office found that appellant submitted arguments relating to details of the conflicts over leave use, a noncovered factor of employment.

Appellant disagreed with this decision, and through his attorney representative, requested reconsideration by an August 17, 1996 letter of the July 9, 1993 and August 30, 1994 decisions.

Appellant asserted that the Office committed error by denying his claim, as a particular sick leave request was made in August 1992, after a claimed January 12, 1991 recurrence of disability. He argued that his July 1, 1994 request for reconsideration was not repetitious, and that Board precedent generally supported his allegations of harassment. Appellant submitted a March 14, 1996 report from Dr. William McClatchy, an attending internist, concluding that appellant's claimed emotional condition was work related, a March 26, 1991 chart note mentioning "stress at work," and a January 24, 1996 report from Dr. Roland Lee, a clinical psychologist, generally supporting a causal relationship between appellant's claimed emotional condition and stress at work.

By decision dated October 2, 1996, the Office denied appellant's request for a merit review on the grounds that it was untimely filed. The Office noted that the most recent merit decision in the case was July 9, 1993, while appellant's letter requesting reconsideration was dated August 17, 1996, more than three years after issuance of the merit decision, and well outside the one-year time limitation. The Office further found that the request did not demonstrate clear evidence of error.

The Board finds that the Office properly determined that appellant's August 17, 1996 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

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.¹ As appellant filed his appeal with the Board on January 2, 1997, the only decision properly before the Board is the October 2, 1996 decision denying appellant's request for a merit review of the August 30, 1994 and July 9, 1993 decisions denying his emotional condition claim.

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

"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."

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1900); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ 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.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁶

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on July 9, 1993. As appellant's August 17, 1996 reconsideration request was outside the one-year time limit which began the day after July 9, 1993 and ended on July 9, 1994, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request. The Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), 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 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

⁴ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a 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. *See* 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *See* cases cited *supra* note 3.

⁷ *Thankamma Mathews*, 44 ECAB 765 (1993).

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

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

¹⁰ *See Jesus D. Sanchez*, *supra* note 3.

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

¹² *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.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

The Board finds that appellant's August 17, 1996 request for reconsideration failed to show clear evidence of error. Appellant reiterated arguments related to leave usage, although the Office explained in its July 9, 1993 and August 30, 1994 decisions that leave usage was not a covered factor of employment, and that appellant had not established that the employing establishment committed an error or abuse regarding these administrative matters that would bring them under coverage of the Act. The attached medical reports do not establish that the Office committed error in denying appellant's claim. Thus, appellant has not established clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated October 2, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 11, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹³ *Leon D. Faidley, Jr., supra* note 3.

¹⁴ *Gregory Griffin*, 41 ECAB 458 (1990).