

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EUGENE C. SMALLS and DEPARTMENT OF THE ARMY,  
FORT SHAFTER, Hawaii

*Docket No. 96-28; Submitted on the Record;  
Issued January 20, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, appellant filed a claim for a low back injury causally related to his federal employment.<sup>1</sup> By decision dated August 21, 1992, the Office denied the claim on the grounds that the factual and medical evidence was not sufficient to establish the claim. In a letter dated September 27, 1993, appellant requested reconsideration of his claim. By decision dated December 16, 1993, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

In a letter dated January 18, 1994, appellant requested an appeal before the Board, which was docketed as No. 94-987. By decision dated December 12, 1994, the Board dismissed the appeal on the grounds that appellant wished to request reconsideration and submit new evidence.

In a letter dated November 19, 1994, appellant requested reconsideration of his claim.<sup>2</sup> By decision dated August 7, 1995, the Office determined that appellant's request was untimely. In the accompanying memorandum, the Office indicated that the evidence submitted was insufficient to establish 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.<sup>3</sup> As

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<sup>1</sup> The record contains an occupational claim (Form CA-2) dated January 2, 1992 and a traumatic injury claim (Form CA-1) dated January 12, 1992. The case was apparently developed as an occupational claim.

<sup>2</sup> Appellant identified Docket No. 94-987, although the OWCP File No. he provided was associated with a different claim filed by appellant.

<sup>3</sup> *Oel Noel Lovell*, 42 ECAB 537(1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

appellant filed his appeal with the Board on September 26, 1995 the only decisions properly before the Board is the August 7, 1995 Office decision.

The Board has reviewed the record and finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act<sup>4</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>5</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>6</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>7</sup> 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>8</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>9</sup>

In the present case, the last decision on the merits of appellant's claim was August 21, 1992.<sup>10</sup> The December 16, 1993 Office decision was not a decision on the merits of the claim, but rather a decision that the request for reconsideration was untimely and failed to show clear evidence of error. The request for reconsideration dated November 19, 1994 is more than one year after the August 21, 1992 decision, and therefore it is considered 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>11</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

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> 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 his own motion or on application."

<sup>7</sup> 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).

<sup>8</sup> 20 C.F.R. § 10.138(b)(2).

<sup>9</sup> *See Leon D. Faidley, Jr.*, *supra* note 5.

<sup>10</sup> The one year right to reconsideration begins on the date of the original decision and any subsequent decision on the merits. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996).

<sup>11</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

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>12</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>13</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>14</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>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</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>17</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>18</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>19</sup>

The evidence submitted by appellant consists of a decision dated October 13, 1994 from an administrative law judge regarding appellant's claim for social security benefits, and a form report dated February 8, 1994 from Dr. V.G. Clark-Wismer, an osteopath.<sup>20</sup> It is well established that the findings of an administrative judge with respect to the Social Security Act is not determinative establishing disability under the Federal Employees' Compensation Act.<sup>21</sup> With regard to the medical evidence, Dr. Clark-Wismer does not discuss causal relationship between a lumbar condition and appellant's federal employment, and therefore the report is of limited probative value.

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<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>13</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>14</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>15</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>16</sup> See *Leona N. Travis*, *supra* note 14.

<sup>17</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>18</sup> *Leon D. Faidley, Jr.*, *supra* note 5.

<sup>19</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

<sup>20</sup> The Board received evidence submitted with this appeal. The Board cannot review evidence that was not before the Office at the time of its decision. 20 C.F.R. § 501.2(c).

<sup>21</sup> *Daniel Deparini*, 44 ECAB 657 (1993) (noting that the statutes governing social security benefits have different standards of medical proof than the Act, and nonemployment-related conditions may be taken into consideration).

As noted above, to establish clear evidence of error the evidence must *prima facie* shift the weight of the evidence to appellant. The Board finds that the evidence submitted in this case was not sufficient to establish clear evidence of error and the Office properly denied the request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated August 7, 1995 is affirmed.

Dated, Washington, D.C.  
January 20, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member