

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JIMMY R. CASILLAS and DEPARTMENT OF THE AIR FORCE,  
KELLY AIR FORCE BASE, Tex.

*Docket No. 96-2636; Submitted on the Record;  
Issued July 21, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

On March 25, 1991 appellant submitted a claim for an injury occurring on that date in the performance of duty. The Office accepted that appellant sustained lumbar strain and paid him the appropriate compensation until his return to limited-duty employment in November 1991. On September 10, 1993 the employing establishment separated appellant from employment due to medical disability. The Office placed appellant on the periodic rolls effective March 30, 1994. On April 13, 1994 the Office informed appellant that it proposed to terminate his compensation benefits on the grounds that his employment-related disability had ceased. By decision dated June 2, 1994, the Office terminated appellant's benefits effective May 16, 1994. By letter dated March 25, 1996, appellant requested that he again receive disability compensation. By letter dated June 9, 1996, appellant, through his representative, requested reconsideration of his claim. By decision dated July 23, 1996, the Office found that appellant's request for reconsideration was untimely and that the request did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's July 23, 1996 decision denying appellant's request for a review on the merits of its June 2, 1994 decision terminating his compensation on the grounds that he had no further disability causally related to his March 25, 1991 employment injury. Because more than one year has elapsed between the

issuance of the Office's June 2, 1994 decision and August 20, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the June 2, 1994 Office decision.<sup>1</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>6</sup>

In its July 23, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on June 2, 1994 and appellant requested reconsideration on June 9, 1996, which was more than one year after June 2, 1994.

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."<sup>7</sup> 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>8</sup>

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 20 C.F.R. § 1.138(b)(1), (2).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>6</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>8</sup> *Anthony Lucszynski*, 43 ECAB 1129 (1992).

The Office's procedure manual discusses "clear evidence of error" as follows:

"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 a mistake (for example, proof that a schedule awards 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 on the Director's own motion."<sup>9</sup>

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 manifest 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.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</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>14</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>15</sup> The Board makes an independent determination as to 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>16</sup>

In the present case, the Office properly conducted a limited review of the evidence submitted by appellant in support of his application for review. Appellant submitted a report dated October 31, 1994, received by the Office on May 2, 1996, from Dr. Henderson, an osteopath.<sup>17</sup> Dr. Henderson diagnosed a herniated disc at L5-S1 with radiculopathy and found

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

<sup>13</sup> See *Leona N. Travis*, *supra* note 11.

<sup>14</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>15</sup> See *Leon D. Faidley, Jr.*, *supra* note 6.

<sup>16</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

<sup>17</sup> Appellant's representative argued that appellant had previously submitted Dr. Henderson's report and requested reconsideration; however, the record contains no evidence to support this argument.

that appellant “will require a surgical intervention in the near future and in my opinion he is unreliable for continued employability.” Dr. Hernandez, however, offered no opinion, rationalized or otherwise, on the relationship between appellant’s condition and his March 25, 1991 employment injury, and for this reason his opinion is of little probative value and is insufficient to raise a substantial question as to the correctness of the Office’s last merit decision.

As appellant has failed to submit evidence of clear error, the Office did not abuse its discretion in denying further review of the case.<sup>18</sup>

The decision of the Office of Workers’ Compensation Programs dated July 23, 1996 is hereby affirmed.

Dated, Washington, D.C.  
July 21, 1998

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>18</sup> Appellant submitted additional evidence to the Board. The Board cannot review any evidence received for the first time on appeal; *see* 20 C.F.R. § 501.2(c).