

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN E. SHELLY and DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, Long Beach, Calif.

*Docket No. 97-125; Submitted on the Record;
Issued November 18, 1998*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's application for review on April 9, 1996; and (2) whether the Office properly determined that appellant's April 25, 1996 request for reconsideration was untimely filed and did not constitute clear evidence of error.

In the present case, appellant, a special agent, filed a claim on January 2, 1994 alleging that he had sustained a depressive disorder due to mental stress at work. Appellant submitted a detailed statement of allegations that he had an ongoing unresolved conflict with his current supervisor, which caused his emotional condition. The Office denied appellant's claim by decision dated April 29, 1994, on the grounds that the evidence of record failed to establish that the alleged work factors arose out of or in the course of the claimant's employment duties. Appellant thereafter requested a hearing before an Office hearing representative.

In a decision dated March 15, 1995, an Office hearing representative affirmed the denial of appellant's claim. The hearing representative found that appellant had not established a compensable factor of employment and therefore the claimant had failed to establish that he sustained an injury in the performance of his federal employment. The hearing representative specifically found that appellant had not established that his supervisor erred or acted abusively towards him in carrying out his supervisory duties.

On March 11, 1996 appellant requested that the Office reconsider his claim. Appellant did not submit any evidence in support of this request for reconsideration. The Office denied appellant's March 11, 1996 application for review on April 9, 1996, without merit review.

The Board finds that the Office did not abuse its discretion by denying appellant's application for review on April 9, 1996.

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹

As appellant's representative merely advised the Office in his letter dated March 11, 1996 that he would be submitting additional documentation in the future, but did not submit any new evidence or argument in support of the March 11, 1996 request for reconsideration, the Office properly denied the request, without merit review.

On April 26, 1996 appellant again requested that the Office reconsider his case. On May 20, 1996 the Office determined that this request for reconsideration was untimely filed and did not establish clear evidence of error.

The Office properly determined that appellant's April 26, 1996 request for reconsideration was untimely filed. 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 The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.⁴ 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).⁵

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶ The Office issued its last merit decision in this case on March 15, 1995. As appellant's April 26, 1996 reconsideration request was outside the one-year time limit which began the day after March 15, 1995, appellant's request for reconsideration was untimely.

¹ 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ See cases cited *supra* note 3.

⁶ *Larry L. Lilton*, 44 ECAB 243 (1992).

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.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

In the present case, appellant submitted a number of medical reports with his April 26, 1996 request for reconsideration along with legal argument concerning the definition of disability, causation, and burden of proof. The issue in the case, however, is whether appellant has submitted the necessary corroborating evidence to establish that his superior's actions towards him were in error or abusive. To establish clear evidence of error, the medical reports and arguments of law appellant submitted would have to clearly and precisely establish that the supervisor's actions were in error or abusive. None of the evidence appellant submitted in support of his April 26, 1996 request for reconsideration was relevant to the issue at hand.

⁷ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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).

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

¹⁴ *Gregory Griffin*, *supra* note 7.

The decisions of the Office of Workers' Compensation Programs dated May 20 and April 9, 1996 are hereby affirmed.

Dated, Washington, D.C.
November 18, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member