

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILBURN L. BURNETT, JR. and DEPARTMENT OF THE AIR FORCE,  
ROBINS AIR FORCE BASE, Ga.

*Docket No. 97-1053; Submitted on the Record;  
Issued November 10, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's October 25, 1996 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

This is the second appeal before the Board in this case. By decision and order issued on August 24, 1995,<sup>1</sup> the Board affirmed a decision of the Office dated May 9, 1994 and finalized May 10, 1994, finding that appellant had not met his burden of proof in establishing that he sustained a cervical spine condition in the performance of duty as alleged. The law and facts of this case as set forth in the August 24, 1995 decision and order are incorporated by reference.

Office file memoranda dated on or about May 20, 1996 indicate that appellant claimed a recurrence of disability.<sup>2</sup> In an August 28, 1996 letter, the Office advised appellant that his case record, which had been retired, had been received from the Federal Records Center, but that there was "no record of any 'recurrence' filed by [him]" under the case's file number.<sup>3</sup> The Office noted that "[r]egardless, [his] claim was denied in 1993 and upheld on hearing in 1994, therefore, a claim of recurrence on a case never accepted would not be considered valid."

In an October 18, 1996 letter, the Office responded to a telephonic request for information from appellant regarding the status of a request for reconsideration, stating that the record did not contain "any request for reconsideration. Please resubmit."

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<sup>1</sup> Docket No. 94-2079.

<sup>2</sup> There is no claim form of record for a recurrence of disability dated on or about May 20, 1996, or other correspondence from appellant dated after August 24, 1995 regarding a claim for recurrence of disability.

<sup>3</sup> Case No. 06-0564334.

In an October 22, 1996 letter, received by the Office on October 25, 1996, appellant requested reconsideration of his claim. He enclosed a copy of a July 5, 1994 letter requesting an appeal before the Board, and the Board's November 18, 1994 letter indicating that the case record was received from the Office. Appellant asserted that the July 5 and November 18, 1994 letters to and from the Board were a request for reconsideration. He did not submit any new medical evidence of record.

By letter decision dated January 9, 1997, the Office denied appellant's request for a merit review on the grounds that it was untimely filed. The Office found that appellant's request for reconsideration was received on October 25, 1996, more than one year following issuance of the Board's August 24, 1995 decision and order. The Office conducted a limited review of appellant's request for reconsideration, and found that it did not demonstrate clear evidence of error. The Office stated that appellant had "not submitted any medical evidence of probative value to establish that factors of [his] federal employment caused or aggravated any neck condition on or after September 1, 1991."

The Board finds that the Office properly determined that appellant's October 25, 1996 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act<sup>4</sup> does not entitle a claimant to review of an Office decision as a matter of right.<sup>5</sup> 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."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>6</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>7</sup> The Board has found that the

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</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>7</sup> 20 C.F.R. § 10.138(b)(2).

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).<sup>8</sup>

The Office properly determined in this case that appellant failed to file a timely application for review. The last merit decision in this case was issued on August 24, 1995. As appellant's October 25, 1996 reconsideration request was outside the one-year time limit which began the day after August 24, 1995 and ended on August 24, 1996, 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.<sup>9</sup> Office procedures state 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>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>11</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>12</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>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</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>15</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>16</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the

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<sup>8</sup> See cases cited *supra* note 5.

<sup>9</sup> *Rex L. Weaver*, Docket No. 91-701 (issued August 28, 1991), *petition for recon. denied*, 44 ECAB 535 (1993).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b) (May 1991).

<sup>11</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> See *Jesus D. Sanchez*, *supra* note 5.

<sup>14</sup> See *Leona N. Travis*, *supra* note 12.

<sup>15</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>16</sup> *Leon D. Faidley, Jr.*, *supra* note 5.

Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>17</sup>

The Board finds that appellant's October 25, 1996 request for reconsideration failed to show clear evidence of error. Appellant's letter dated October 22, 1996 enclosing his July 5, 1994 letter requesting an appeal and the Board's November 18, 1994 letter indicating that the case record was received by the Office, do not establish that the Office's prior denial of his cervical spine claim was in error or raise a substantial question as to the correctness of the Office's May 10, 1994 decision. These three letters do not contain new, relevant, pertinent evidence on the critical medical issue of causal relationship, and are thus of no probative value in establishing clear evidence of error. The Office's January 9, 1997 decision finding that appellant's October 25, 1996 request for reconsideration was untimely and did not establish clear evidence of error was correct.

The decision of the Office of Workers' Compensation Programs dated January 9, 1997 is hereby affirmed.<sup>18</sup>

Dated, Washington, D.C.  
November 10, 1998

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>17</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

<sup>18</sup> Accompanying his request for the second appeal, appellant submitted a copy of a May 8, 1987 report from Dr. David A. Krendel, an attending neurologist. This report was stamped "received" by the Office on May 28, 1987, and therefore appears to be previously of record.