

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER C. HUDSON and U.S. POSTAL SERVICE,
PHILADELPHIA BULK MAIL CENTER, Philadelphia, Pa.

*Docket No. 96-2619; Submitted on the Record;
Issued September 22, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant failed to raise substantive legal questions or to submit new and relevant evidence; and (2) whether the Office abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

On July 2, 1991 appellant, then a mailhandler, filed a claim for an occupational disease (Form CA-2) alleging that he first became aware of his post-traumatic stress disorder on June 15, 1982 and that he realized that his condition was caused or aggravated by his employment on September 10, 1989.

By decision dated March 2, 1992, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition as alleged.

In a March 16, 1992 letter, appellant, through his representative, requested an oral hearing before an Office representative. By decision dated October 13, 1992, the Office found that appellant had abandoned his request for a hearing because he failed to appear at the hearing and did not provide good cause for his failure to appear within 10 days after the scheduled hearing.

In a November 5, 1992 letter, appellant through his representative requested a hearing. By decision dated August 2, 1994, the hearing representative found that appellant had

established compensable employment factors, but set aside the March 2, 1992 decision and remanded the case to the Office for further development of the medical evidence.

By decision dated November 17, 1994, the Office found the medical evidence of record insufficient to establish that appellant's emotional condition was caused by factors of his employment. In an undated letter, which was received by the Office on September 5, 1995, appellant requested reconsideration of the Office's decision.

By decision dated December 6, 1995, the Office denied appellant's request for reconsideration without a review of the merits of the claim on the grounds that appellant failed to raise substantive legal questions or to submit new and relevant evidence. By letter dated June 4, 1996, appellant, through his counsel, requested reconsideration of the Office's decision accompanied by medical evidence.

By decision dated August 14, 1996, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not 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.¹ Inasmuch as appellant filed his appeal with the Board on August 29, 1996, the only decisions properly before the Board are the Office's December 6, 1995 and August 14, 1996 decisions.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act.² Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the 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.³ 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 requirements, the Office will deny the application for review without review of the merits of the claim.⁴

In the present case, appellant failed to submit any legal arguments or evidence with his September 5, 1995 request for reconsideration. Therefore, the Board finds that appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or a fact not previously considered by the Office, or to submit relevant and pertinent

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 788 (1993); 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

evidence not previously considered by the Office. Therefore, the Board finds that the Office was not required to review the merits of appellant's claim.⁵

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under section 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. The Office 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.⁶ 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 section 8128(a).⁷

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.⁸ The Office issued its last merit decision in this case on November 17, 1994 wherein it found the evidence of record insufficient to establish that appellant's emotional condition was caused by factors of his employment. Inasmuch as appellant's June 4, 1996 request for reconsideration was made outside the one-year time limitation which began the day after November 17, 1994, the date of the last merit decision, appellant's request for reconsideration was untimely filed.⁹

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.¹⁰ 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.¹¹

⁵ *Nora Favors*, 43 ECAB 403 (1992).

⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); 20 C.F.R. § 10.138(b)(2).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *Larry L. Lilton*, 44 ECAB 243 (1992).

⁹ The Board lacks jurisdiction to consider the merits of appellant's claim inasmuch as the Office's last merit decision dated November 17, 1994 was issued more than one year prior to the date that appellant filed his appeal with the Board on August 29, 1996; *see* 20 C.F.R. § 501.3(d).

¹⁰ *Gregory Griffin*, *supra* note 6.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵

The only evidence submitted by appellant in support of his June 4, 1996 request for reconsideration alleging that his emotional condition was caused by factors of his employment is the May 16, 1996 medical report of Dr. Irma Csanalosi, a Board-certified psychiatrist. In this report, Dr. Csanalosi indicated a history of appellant's employment and emotional condition. Dr. Csanalosi opined that the changes in appellant's service-connected disability proved that there was a gradual increase in his post-traumatic stress disorder symptoms which included nightmares, withdrawal, flashbacks, startle reaction, sensitivity to noises, depression, anxiety, etc. Dr. Csanalosi also opined that the noises at work produced by the conveyor belt, metal cages falling, boxes of mail falling made the work situation intolerable. Dr. Csanalosi further opined that the noise produced more flashbacks, startle reaction and anxiety. Dr. Csanalosi's report failed to provide any medical rationale explaining how these factors of appellant's employment caused his emotional condition. Inasmuch as Dr. Csanalosi's report does not manifest on its face that the Office committed error in its November 17, 1994 decision, the Office did not abuse its discretion in finding that appellant failed to establish clear evidence of error.

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); *Thankamma Mathews*, *supra* note 3; *Jesus D. Sanchez*, *supra* note 7.

¹² *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *Jesus D. Sanchez*, *supra* note 7.

¹⁵ *Leona N. Travis*, *supra* note 13.

The August 14, 1996 and December 6, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
September 22, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member