

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID W. JACKSON and DEPARTMENT OF THE AIR FORCE,
CANNON AIR FORCE BASE, N.M.

*Docket No. 95-1930; Submitted on the Record;
Issued February 16, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's July 7, 1994 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

This is appellant's third appeal before the Board in this case.¹ In the first appeal, by decision and order issued October 16, 1989,² the Board found that the Office abused its discretion in denying appellant's January 9, 1989 request for reconsideration as appellant submitted new, relevant evidence not previously considered by the Office. Therefore, the Board reversed the Office's February 27, 1989 decision, and remanded the case to the Office for further development and a *de novo* decision. In the second appeal, by decision and order issued September 13, 1991,³ the Board found that the Office did not abuse its discretion in denying appellant's January 17, 1991 request for reconsideration, as the evidence submitted in support thereof did not show that the Office erroneously interpreted or apply a point of law, advance a point of law or fact not

¹ Appellant filed his appeal with the Board on April 3, 1995 for review of the Office's August 18, 1994 decision. Appellant requested an oral argument, scheduled to be held on May 12, 1998. However, on August 27, 1997, without benefit of oral argument, the Board issued a decision. Subsequent to the issuance of this decision, by order issued June 2, 1998, the Board vacated the August 27, 1997 decision. Oral argument was then rescheduled for September 11, 1998. In a September 2, 1998 letter, appellant requested cancellation of the September 11, 1998 oral argument, and requested that oral argument be rescheduled no earlier than late October 1998. In a September 10, 1998 letter, the Board informed appellant that, as per his request, the September 11, 1998 oral argument had been canceled, but that oral argument would not be rescheduled and the case would proceed to a decision on the record. In a September 10, 1998 letter, appellant's attorney requested that he be allowed to review the case record. On October 5, 1998 the Board issued an order returning the case record to the Office for inspection by appellant and his attorney. Appellant was granted until December 3, 1998 to file a brief of any comments on the case record.

² Docket No. 89-1365.

³ Docket No. 91-856.

previously considered by the Office, or contain relevant and pertinent evidence not previously considered by the Office.⁴ The law and facts of the case as set forth in the September 13, 1991 decision and order are incorporated by reference.

In a July 7, 1994 letter, appellant requested reconsideration. He alleged that exposure to blowing air while installing an air duct caused him to sneeze, thereby injuring his back. Appellant enclosed a copy of a February 27, 1986 employing establishment work order to “[c]lose/remove vent over operators switchboard ... vent is causing discomfort because it blows directly down on the operators.”

In an August 11, 1994 letter, appellant accused the Office of racial discrimination and participation in a conspiracy against him. Appellant alleged that the Office’s actions would result in an unfavorable disposition of his case.

By decision dated August 18, 1994, the Office denied appellant’s request for review on the grounds that it was not timely filed within one year of the previous merit decision. The Office conducted a limited review of appellant’s two letters and the work order submitted in support of his request for reconsideration. Following this review, the Office found that appellant’s two letters and the work order did not show clear evidence of error.

The Board finds that the Office properly determined that appellant’s July 7, 1994 request for reconsideration was untimely filed and did not demonstrate 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.⁵ Appellant filed his appeal with the Board on April 3, 1995. Therefore, the only decision properly before the Board is the August 18, 1994 decision denying appellant’s request for a merit review.

Section 8128(a) of the Federal Employees’ Compensation Act⁶ does not entitle a claimant to review of an Office decision as a matter of right.⁷ 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 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.”

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990).

The Office, through its regulations, has imposed limitation on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁸ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefits unless the application for review is filed within one year of the date of that decision.⁹ 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).¹⁰

The Board finds that the Office properly found that appellant's July 7, 1994 request for reconsideration was not timely filed within the aforementioned one-year time limitation. In this case, the Office issued its last merit decision on December 6, 1989. As appellant's July 7, 1994 request for reconsideration was outside the one-year time limit which began the day after December 6, 1989 and ended on December 6, 1990, the Board finds that appellant's July 7, 1994 request for reconsideration was untimely.

However, in those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless conduct a limited review of the case, for the purpose of determining whether there is clear evidence of error pursuant to the untimely request.¹¹ The Office's procedures state that the Office will reopen a claimant's case for a 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.¹²

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹³ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

⁸ 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 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).

⁹ 20 C.F.R. § 10.138(b)(2).

¹⁰ *Jesus D. Sanchez*, *supra* note 7.

¹¹ *Rex L. Weaver*, Docket No. 91-701 (issued August 28, 1991), *petition for recon. denied* (issued February 25, 1993).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b)(May 1991). The Office therein states that 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 an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, 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...."

¹³ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ *See Leona M. Travis*, 43 ECAB 227 (1991).

establish clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶

In conducting the limited review of the evidence, the Office must determine how the evidence submitted with the request for reconsideration bears on the evidence previously of record, and whether the new evidence demonstrates clear error on the part of the Office.¹⁷ To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value not only to create a conflict of 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's decision.¹⁸ 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.¹⁹

In this case, the critical issue is whether appellant has established that the Office erred by denying his claim for a back injury in its December 6, 1989 decision. In support of his request for reconsideration, appellant submitted July 7 and August 11, 1994 letters, and the February 27, 1986 work order. After a thorough review of these documents, the Board finds that they do not contain relevant, pertinent information not previously considered by the Office, new or relevant points of fact or law, and do not allege that the Office erred in applying or interpreting a point of law.

The July 7, 1994 letter, which contains appellant's request for reconsideration, merely reiterates appellant's version of events and his theories on causal relationship. Appellant's correspondence previously of record contains these arguments, which therefore do not constitute new evidence. The August 11, 1994 letter alleges that the Office engaged in a racially motivated conspiracy against him for the purpose of denying his claim. As appellant did not submit any corroborating evidence to establish racism or other discriminatory activity against him by the Office, these arguments are not of any probative value and are irrelevant. The February 27, 1986 employing establishment work order directs the closure or removal of an air vent blowing directly on some switchboard operators." Appellant asserts that it was his work on this air vent which caused him to sneeze, and that the action of sneezing then injured his back. However, the work order itself does not mention appellant's alleged back injury, and is therefore irrelevant.

Therefore, the evidence submitted in support of appellant's request for reconsideration did not constitute a basis for reopening appellant's case for merit review under the criteria set forth in 20 C.F.R. § 10.138.²⁰

¹⁵ See *Jesus D. Sanchez*, *supra* note 7.

¹⁶ See *Leona M. Travis*, *supra* note 14.

¹⁷ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁹ *Gregory Griffin*, 41 ECAB 458 (1990).

²⁰ *Gaetan F. Valenza*, 35 ECAB 763 (1984).

The Board notes that accompanying the December 6, 1989 merit decision, appellant was provided with appropriate appeal rights and timely and accurate instructions as to how to submit any requests for reconsideration. However, appellant did not timely request reconsideration and submit evidence demonstrating clear evidence of error with his requests for reconsideration. Therefore, the Office did not commit any procedural error by denying appellant's request for reconsideration, and did not abuse its discretion in denying merit review of the case.

The decision of the Office of Workers' Compensation Programs dated August 18, 1994 is hereby affirmed.

Dated, Washington, D.C.
February 16, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member