

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK D. GUAJARDO and DEPARTMENT OF THE AIR FORCE,
OKLAHOMA CITY AIR LOGISTICS CENTER, Oklahoma City, Okla.

*Docket No. 98-37; Submitted on the Record;
Issued July 16, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On December 4, 1994 appellant, then a 54-year-old metalizing equipment operator, filed a notice of traumatic injury alleging that he injured his back on August 30, 1994 when he picked up a fixture.

By decision dated April 3, 1995, the Office rejected appellant's claim inasmuch as fact of injury was not established. In an accompanying memorandum, the Office indicated that there was insufficient or conflicting evidence regarding whether or not the claimed event, incident, or exposure occurred at the time, place and manner, alleged.

On June 7, 1995 appellant requested reconsideration.

By decision dated June 20, 1995, the Office reviewed the merits of the claim and denied modification because the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision. The Office noted in an accompanying memorandum that the case was previously denied because of an inconsistent factual history. The Office further noted that the employing establishment provided evidence establishing that appellant did not work on the site where the injury was alleged to have occurred on August 30, 1994.

On July 3, 1997 appellant's representative requested reconsideration. In support, he submitted an affidavit from Paul Dial, appellant's coworker. Mr. Dial indicated that during the late summer of 1994 appellant came out of the spray booth and told him that he had hurt his back. He indicated that he could not recall the day or month of the event. Mr. Dial stated that appellant subsequently had to take off work due to a back problem. He stated that following the event he inquired if appellant required medical attention and that he was told he did not.

Mr. Dial indicated that appellant was working on rotating tire seals at the time of the injury and stated that he recalled appellant leaning over a bench in front of booth one in obvious pain.

By decision dated September 18, 1997, the Office denied appellant's request for reconsideration pursuant to 20 C.F.R. § 10.138(b)(2) because it was not filed within one year of its June 20, 1995 merit decision. The Office further found that pursuant to 20 C.F.R. § 10.138(a) appellant failed to demonstrate clear evidence of error. In an accompanying memorandum, the Office indicated that Mr. Dial's affidavit failed to show clear evidence of error because he failed to indicate a specific date of injury and the work injury remained unsubstantiated.

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 As appellant filed his appeal on September 25, 1997, the only decision properly before the Board is the Office's September 18, 1997 decision denying appellant's request for reconsideration.

The Board has duly considered the case record and concludes that the Office properly refused to reopen appellant's claim for further reconsideration of the merits in its September 18, 1997 decision under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b) and that the application failed to present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation and states in relevant part:

“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 previously awarded; or
- (2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office will not review, “... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision.” The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).²

¹ 20 C.F.R. §§ 501.2(c) , 501.3(d)(2).

² *Mamie L. Morgan*, 47 ECAB 281 (1996).

On July 3, 1997 appellant's representative requested reconsideration. The most recent decision on the merits prior to this request was the Office's June 20, 1995.³ The one-year limitation period, therefore, began to run on June 21, 1995 and appellant's July 3, 1997 request for reconsideration was clearly untimely.⁴

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.⁵ 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.⁶

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

³ In a statement of appeals rights accompanying the January 17, 1995 decision, the Office informed appellant of the following:

"RECONSIDERATION: If you have additional evidence which you believe is pertinent, you may request, in writing, that the Office reconsider this decision. Such a request must be made *within one year of the date of the decision*, clearly state the grounds upon which reconsideration is being requested and be accompanied by relevant evidence not previously submitted, such as medical reports or affidavits, or a legal argument not previously made." (Emphasis added).

⁴ *Larry J. Lilton*, 44 ECAB 243 (1992). With regard to when the one-year limitation period begins to run, the Office's Procedure Manual provides:

"The one-year [limitation] period for requesting reconsideration begins on the date of the original [Office] decision...."

⁵ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsiderations, Chapter 2.1602.3(b) (May 1991), states:

"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...."

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. 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.⁷

The Board finds that the evidence submitted in support of appellant's untimely July 3, 1997 request for reconsideration fails to establish clear evidence of error. The only new evidence submitted by appellant in support of reconsideration was the affidavit of Mr. Dial, appellant's coworker. He, however, stated that he could not recall the day or month in which the alleged incident occurred. Because the Office denied appellant's claim on the basis that the evidence failed to establish that the claimed event, incident or exposure occurred at the time, place and in the manner alleged, Mr. Dial's affidavit does not raise a substantial question as to the correctness of the Office's decision rejecting appellant's claim. As appellant's untimely request for reconsideration failed to demonstrate clear evidence of error, the Board finds that the Office properly denied appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated September 18, 1997 is affirmed.

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

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

⁷ *Thankamma Mathews*, 44 ECAB 765 (1993).