

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TED L. HUGHES and U.S. POSTAL SERVICE,  
POST OFFICE, Grand Rapids, Mich.

*Docket No. 98-996; Oral Argument Held March 11, 1999;  
Issued July 6, 1999*

Appearances: *Robert P. Walsh, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,  
for the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration of the merits 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. § 10.138d(b)(2) and that the application failed to present clear evidence of error.

This case has previously been on appeal before the Board. By decision dated October 25, 1996,<sup>1</sup> the Board found that appellant had not met his burden of proof to establish that his cardiac condition was causally related to factors of his federal employment. On November 11, 1997 appellant's representative requested that the Office reconsider the case. In support of the request for reconsideration he submitted a report from Dr. R. Michael Kelly, Board-certified in internal medicine, dated September 11, 1997. By decision dated November 24, 1997, the Office found that appellant's November 11, 1997 request for reconsideration was untimely filed and did not present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> 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

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<sup>1</sup> Docket No. 94-1873 (issued October 25, 1996).

<sup>2</sup> 5 U.S.C. § 8128(a).

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

that decision.<sup>4</sup> 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).<sup>5</sup>

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.<sup>6</sup> The last merit decision in this case was the Board's October 25, 1996 decision. As appellant's November 11, 1997 reconsideration request was outside the one-year time limit, the 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>7</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.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>9</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>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</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>12</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>13</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

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<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> See cases cited *supra* note 3.

<sup>6</sup> *Larry L. Lilton*, 44 ECAB 243 (1992).

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

<sup>8</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> See *Jesus D. Sanchez*, *supra* note 3.

<sup>11</sup> See *Leona N. Travis*, *supra* note 9.

<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

In his report dated September 11, 1997, Dr. Kelly noted that he had not examined appellant, but had reviewed a number of administrative and medical records. Dr. Kelly summarized appellant's medical and occupational history. Dr. Kelly concluded that appellant was severely disabled as a result of cardiomyopathy, which had developed over several years and had resulted in severe cardiac impairment, pulmonary congestion, pulmonary insufficiency and renal insufficiency. He noted regarding the cause of the condition, that stress "in the development of cardiomyopathy may take on several forms," such as emotional stress, physical stress and obesity. He noted that these three factors seemed to be most prominent in appellant's history, and that chronic exposure to the subjective factors do lead to microvascular disease, which for appellant had been an important factor in the development of the cardiomyopathy.

In the present case, while the report of Dr. Kelly was of probative value, it was not sufficiently well rationalized to shift the weight of the evidence in favor of appellant and raise a substantial question to the correctness of the Office's decision which denied appellant's claim. Dr. Kelly did not explain in necessary detail, chronologically, how appellant's work stress paralleled his cardiac condition and how medically the work stress would in fact have physiologically caused the microvascular disease. Dr. Kelly's report was not sufficient, therefore, to establish that the denial of appellant's claim was clearly error.

The decision of the Office of Workers' Compensation Programs dated November 24, 1997 is hereby affirmed.

Dated, Washington, D.C.  
July 6, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>14</sup> *Gregory Griffin, supra* note 7.