

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BILLEY J. WILDER and U.S. POSTAL SERVICE,  
POST OFFICE, Louisville, Ky.

*Docket No. 97-1709; Submitted on the Record;  
Issued March 12, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and presenting no clear evidence of error.

On March 11, 1994 appellant, then a 58-year-old letter carrier, filed a notice of traumatic injury, claiming that he injured his left elbow, shoulder, and hip as well as his right arm and experienced pain in his neck and back when he fell down a set of stairs at home while on his lunch break. The Office accepted the claim for a left rotator cuff tear and a ruptured right biceps tendon. Subsequently, appellant was reemployed as a limited-duty rural carrier, effective July 19, 1994, and the Office determined that this position fairly and reasonably represented his wage-earning capacity.

On September 20, 1995 the Office denied appellant's claim for the repair of three teeth that he stated he had injured in the March 11, 1994 fall down the stairs. The Office noted that appellant waited five months before seeking dental treatment and, despite inquiries from the Office, failed to explain the delay. In response to an October 29, 1995 letter from appellant, the Office explained that no medical evidence indicated that his current back condition was also a consequence of the 1994 fall.

Appellant requested reconsideration and submitted documents from Dr. Robert F. Sexton, his treating physician and a Board-certified urologist, Dr. Walter Badenhausen, a Board-certified orthopedic surgeon, and Teri Trail on behalf of Dr. Carl R. Heeb, a licensed dentist. On January 22, 1996 the Office denied modification of its prior decision on the grounds that the evidence submitted in support of reconsideration was insufficient to establish any causal relationship between the March 11, 1994 injury and appellant's broken teeth.

In a letter dated January 29, 1996, appellant stated that the Office had not addressed his back condition in its January 22, 1996 decision and noted that his back had "been mentioned

since day one of the accident,” that his back condition required surgery in June 1995, and that the medical report from his neurosurgeon, Dr. Sexton, had not been considered. Appellant added that the Office had “made a wrongful judgment” about his teeth because his dentist had explained why he developed a dental problem five months after the accident.<sup>1</sup>

On February 20, 1997 appellant requested reconsideration and asked the Office to pay his medical and dental bills as well as reimburse him for the annual and sick leave he had taken. Appellant explained that at the time of the accident he had no visible damage to his teeth or back, but that five months later while he was sitting in his family room, one tooth fell out and two others became loose, resulting in dental repair. Appellant added that a magnetic resonance imaging (MRI) scan found damage to his L-4 disc, resulting in surgery.

On March 4, 1997 the Office denied review of its prior decision on the grounds that appellant’s request was untimely filed and contained no clear evidence of error. The Office noted that appellant’s claim had received a limited review to ensure that the prior decision was correct under its policies and procedures.

The Board finds that the Office acted within its discretion in declining to reopen appellant’s claim for merit review.<sup>2</sup>

Section 8128(a) of the Federal Employees’ Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> Rather, the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.<sup>5</sup> The Board has held that the imposition of the one-year limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>6</sup>

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.<sup>7</sup> The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant’s

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<sup>1</sup> Appellant also requested a copy of his file.

<sup>2</sup> The Board’s scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Inasmuch as appellant filed his notice of appeal on April 16, 1997, the only decision before the Board is that dated March 4, 1997.

<sup>3</sup> 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8128(a).

<sup>4</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

<sup>6</sup> *Leon D. Faidley, Jr.*, *supra* note 4 at 111.

<sup>7</sup> *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

case.<sup>8</sup> Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.<sup>9</sup>

Clear evidence of error is intended to represent a difficult standard.<sup>10</sup> The claimant must present evidence that 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 that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.<sup>11</sup>

To establish clear evidence of error, a claimant must submit positive, precise, and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.<sup>12</sup> The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* 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 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 this case, the Office denied appellant's February 20, 1997 request for reconsideration of the January 22, 1996 on the grounds that his letter was not received within one year of the January 22, 1996 decision and failed to provide any legal argument or medical evidence to support procedural or evidentiary error on the part of the Office. While appellant wrote to the Office within the one-year limitation, he did not request reconsideration in this letter or follow any of the appeal rights outlined in the document attached to the January 22, 1996 decision. Therefore, the Board finds that appellant's request for reconsideration was untimely filed.

Given the untimely filing, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of the untimely reconsideration established clear evidence of error, thereby entitling him to a merit review of his claim.<sup>15</sup>

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<sup>8</sup> *Howard A. Williams*, 45 ECAB 853, 857 (1994).

<sup>9</sup> *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

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

<sup>11</sup> *Id.*; *cf. Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

<sup>12</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>13</sup> *Bradley L. Mattern*, *supra* note 7 at 817.

<sup>14</sup> *Gregory Griffin*, 41 ECAB 458, 466 (1990).

<sup>15</sup> *See Robert M. Pace*, 46 ECAB 551, 552 (1995) (finding that in determining clear evidence of error, Office procedures require a brief evaluation of the evidence so that a subsequent reviewer will be able to address the issue of Office discretion).

Appellant offered no new evidence with his letter but argued that the damage to his teeth did not become apparent until five months after the accident and that he had suffered with back pain for nine months before the cause was found and surgery done.

The record contains a medical report dated September 5, 1995 from Dr. Badenhausem stating that appellant first began complaining of discomfort in his back in January 1995 and that a computerized axial tomographic (CAT) scan showed spinal stenosis at L3-5 and some arthritic changes at L4-5 with mild bulging. A March 2, 1995 report from Dr. Sexton diagnosed lumbar discopathy with radiculopathy and stated that appellant “always had back pain since the accident.” Dr. Sexton added in a November 8, 1995 letter that, based on the history given by appellant, his back disease was “in direct correlation with his injury” in March 1994. However, Dr. Sexton failed to provide any medical rationale for his conclusion that there was a causal relationship between appellant’s back surgery and the March 1994 injury.

Further, even if Dr. Sexton’s conclusion were well rationalized, his reports would be insufficient to meet the clear evidence of error standard required to reopen appellant’s case. Dr. Sexton believed that appellant’s continuing complaints of back pain since the injury supported some causal relationship, but Dr. Badenhausem stated that appellant began to complain of back discomfort only in January 1995. At best, these differing opinions demonstrate that appellant may have hurt his back in the fall. However, such a supposition is insufficient to establish clear evidence of error because the submitted evidence must not only be sufficiently probative to create a conflict in medical opinion or establish a procedural error, but also be *prima facie* probative enough to shift the weight of the evidence in favor of appellant and raise a substantial question regarding the correctness of the Office’s January 22, 1996 decision.<sup>16</sup>

Similarly, appellant’s assertion that the damage to his teeth was not apparent until August 1994 and the October 31, 1994 report from Dr. Heeb, stating that his dental treatment directly resulted from the accident because there was no other history of trauma, do not rise to the requisite standard.<sup>17</sup> As the Office stated in its January 22, 1996 decision, the medical evidence failed to explain why, if appellant had sustained an injury severe enough to cause him to lose teeth, he waited five months before seeking treatment.

Finally, appellant does not allege any misapplication of the law or procedural error by the Office in processing his claim. Inasmuch as appellant’s request for reconsideration was indisputably untimely filed and he failed to submit evidence substantiating clear evidence of

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<sup>16</sup> See *Fidel E. Perez*, 48 ECAB \_\_\_\_ (Docket No. 95-2188, issued August 26, 1997) (finding that the medical evidence submitted in support of appellant’s untimely request for reconsideration, while sufficient to create a conflict in medical opinion, did not rise to the level of clear evidence of error).

<sup>17</sup> See *John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992) (same).

error,<sup>18</sup> the Board finds that the Office did not abuse its discretion in denying merit review of the case.

The March 4, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
March 12, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

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<sup>18</sup> Compare *Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) with *Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office's failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).