

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ODIE A. WALLER and U.S. POSTAL SERVICE,  
POST OFFICE, Memphis, TN

*Docket No. 97-2242; Submitted on the Record;  
Issued October 20, 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 abused its discretion in denying appellant's request for reconsideration on the grounds that his request was untimely and failed to show clear evidence of error.

On July 29, 1993 appellant, then a 44-year-old letter carrier, sustained a right knee sprain and right lateral meniscus tear in the performance of duty.

On October 2, 1995 appellant filed a claim alleging that he sustained a recurrence of disability on September 29, 1995 which he attributed to his July 29, 1993 employment injury.

By decision dated January 25, 1996, the Office denied appellant's claim for a recurrence of disability on the grounds that the evidence of record failed to establish that his claimed recurrence of disability on September 29, 1995 was causally related to his July 29, 1993 employment-related right knee sprain and right lateral meniscus tear.

By letter dated January 29, 1996, appellant requested reconsideration of the denial of his claim but submitted no new evidence.

By decision dated February 9, 1996, the Office denied appellant's request for reconsideration.

By letter dated May 21, 1997, received by the Office on May 28, 1997, appellant requested reconsideration of the denial of his claim and submitted additional evidence.

In a report dated February 7, 1996, Dr. Mark S. Harriman, a Board-certified orthopedic surgeon, noted that appellant had a work-related injury on July 29, 1993 and that he had previous surgery and degenerative arthritis in his knee which predated his work-related injury. He stated his opinion that appellant's job had exacerbated the degenerative arthritis in his knee.

In notes dated February 20, 1996, Dr. Harriman stated that there was no evidence that appellant had any significant knee injury prior to his July 29, 1993 employment injury with the exception of an injury, which he sustained approximately 30 years previously while he was attending high school.

In clinical notes dated October 29, 1996, Dr. Harriman provided findings on examination and noted that new x-rays showed a worsening of the patellofemoral and lateral compartment arthritis. He stated that appellant's symptoms were primarily due to aggravation of his degenerative arthritis.

By decision dated June 9, 1997, the Office denied appellant's request for reconsideration of the January 25, 1996 decision on the grounds that his May 21, 1997 letter requesting reconsideration was not received within the one-year time limitation and failed to show clear evidence of error in the prior decision.<sup>1</sup>

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of the merits of his claim, on the grounds that his untimely request 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.<sup>2</sup> As appellant filed his appeal with the Board on June 24, 1997 the only decision properly before the Board is the Office's June 9, 1996 decision denying appellant's request for reconsideration.

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> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup>

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, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for

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<sup>1</sup> On June 30, 1997 the Office received from appellant another copy of his May 21, 1997 letter requesting reconsideration. By decision dated July 8, 1997, the Office denied appellant's request for reconsideration on the grounds that his request was untimely and failed to show clear evidence of error. As the Office's July 8, 1997 decision was issued after appellant docketed his appeal with the Board, this decision is null and void. *See Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>2</sup> 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> *Leon D. Faidley, Jr.*, *supra* note 3. Compare 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

review is filed within one year of the date of that decision.<sup>6</sup> 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).<sup>7</sup>

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.<sup>8</sup> In accordance with this holding, the Office has stated in its procedure manual that it 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.<sup>9</sup>

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

In this case, appellant filed his request for reconsideration by letter dated May 21, 1997 and received by the Office on May 28, 1997. This was clearly more than one year after the Office's last merit decision dated January 25, 1996, was issued and thus the application for review was not timely filed. In accordance with its internal guidelines and with Board precedent, the Office properly found that the request was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under 5 U.S.C. § 8128(a) notwithstanding the untimeliness of his application.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application for review was sufficient to show clear evidence of error.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>11</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. It is not enough merely to show that the evidence could be

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<sup>6</sup> 20 C.F.R. § 10.138(b)(2).

<sup>7</sup> See *Gregory Griffin and Leon D. Faidley, Jr.*, *supra* note 3.

<sup>8</sup> *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). The Office therein 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 that a schedule award was miscalculated). Evidence such as a detailed well-rationalized medical report which, if submitted before the Office's denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case...."

<sup>10</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

construed so as to produce a contrary conclusion.<sup>12</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>13</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>14</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>15</sup>

In support of his request for reconsideration, appellant submitted additional medical evidence.

In a report dated February 7, 1996, Dr. Harriman, a Board-certified orthopedic surgeon, noted that appellant had a work-related injury on July 29, 1993 and that he had previous surgery and degenerative arthritis in his knee which predated his work-related injury. He stated his opinion that appellant's job had exacerbated the degenerative arthritis in his knee. However, degenerative arthritis is not an accepted work-related condition in this case. Furthermore, Dr. Harriman provided insufficient medical rationale in support of his opinion that appellant's arthritis condition was causally related to factors of his employment. Due to these deficiencies, this report does not show clear evidence in the Office's January 25, 1996 decision and is not sufficient to warrant a reopening of the case for further merit review.

In notes dated February 20, 1996, Dr. Harriman stated that there was no evidence that appellant had any significant knee injury prior to his July 29, 1993 employment injury with the exception of an injury, which he sustained approximately 30 years previously while he was attending high school. However, these notes do not specifically address the issue of appellant's claim for a recurrence of disability in 1995 and are, therefore, not sufficient to show clear evidence in the Office's January 25, 1996 decision.

In clinical notes dated October 29, 1996, Dr. Harriman provided findings on examination and noted that new x-rays showed a worsening of the patellofemoral and lateral compartment arthritis. He stated that appellant's symptoms were primarily due to aggravation of his degenerative arthritis. However, these notes did not address the issue in this case, whether appellant sustained a recurrence of disability on September 29, 1995 causally related to his July 29, 1993 employment injury. Therefore, these notes do not show clear evidence of error in the Office's January 25, 1996 decision.

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<sup>12</sup> *Id.*

<sup>13</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>14</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

<sup>15</sup> *Gregory Griffin*, *supra* note 3.

As appellant's untimely application for review failed to present clear evidence of error, the Board finds that the Office's refusal to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

The June 9, 1997 decision of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.  
October 20, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member