

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNIE EVERAGE and U.S. POSTAL SERVICE,
POST OFFICE, Milwaukee, WI

*Docket No. 97-2512; Submitted on the Record;
Issued October 25, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that his request was untimely and failed to show clear evidence of error.

On July 6, 1992 appellant, then a 41-year-old custodian, filed an occupational disease claim alleging that he sustained an emotional condition which he attributed to factors of his federal employment.

By decision dated January 9, 1995, an Office hearing representative affirmed a July 21, 1993 Office decision which denied appellant's claim for an emotional condition.¹ The Office hearing representative found that there was no evidence of error or abuse in the employing establishment's handling of administrative or personnel matters concerning appellant and insufficient evidence of harassment by appellant's supervisor, Mr. Roberson.

By letter dated April 8, 1997, appellant requested reconsideration of the denial of his claim and submitted new evidence as well as evidence previously submitted and considered by the Office.²

In his April 8, 1997 request for reconsideration, appellant also alleged that his attorney had submitted a request for reconsideration on January 4, 1996 and, therefore, he had made a timely request for reconsideration of the Office's January 9, 1995 decision. However, the record shows that the only copy of a January 4, 1996 letter from appellant's attorney requesting reconsideration was stamped by the Office as received on May 14, 1997.

¹ The record shows that the Office faxed a copy of appellant's appeal rights in connection with the January 9, 1995 decision to his Senator on October 24, 1995.

² Three documents submitted with the April 8, 1997 request for reconsideration were previously of record.

In support of his April 8, 1997 request for reconsideration, appellant submitted a written statement dated February 21, 1995 in which appellant described his reasons for disagreeing with the Office's January 9, 1995 decision.

In a September 18, 1995 written statement, a coworker, Mr. Westmoreland, related that appellant's supervisor, Mr. Roberson, had revealed to him information concerning appellant's marital problems and difficulty with reading and writing even though appellant had believed that Mr. Roberson would hold the information in confidence.

In a written statement dated December 7, 1995, Michelle McCormack, stated that she was appellant's best friend and related information concerning appellant's allegations against Mr. Roberson which appellant had related to her.

By decision dated April 28, 1997, the Office denied appellant's request for reconsideration on the grounds that the request was not timely filed within one year of the January 9, 1995 decision and failed to show clear evidence of error.

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration on the grounds that his request was untimely 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.³ As appellant filed his appeal with the Board on July 25, 1997, the only decision properly before the Board is the Office's April 28, 1997 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's last merit decision of January 9, 1995.

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶

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

³ 20 C.F.R. §§ 501.2(c); 501.3(d)(2). Following the April 28, 1997 decision, appellant submitted evidence contending that his attorney had submitted a timely reconsideration request. As this evidence has not been considered by the Office it may not be reviewed for the first time on appeal. *Id.*

⁴ 5 U.S.C. § 8128(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 108-09 (1989).

⁶ *Leon D. Faidley, Jr.*, *supra* note 5 at 109. 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.⁷ 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).⁸

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.⁹ 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.¹⁰

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 April 8, 1997. This was clearly more than one year after the Office's January 9, 1995 merit decision 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.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ See *Leon D. Faidley, Jr.*, *supra* note 5 at 111.

⁹ *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (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...."

¹¹ See *Jeanette Butler*, 47 ECAB 128, 131 (1995).

¹² See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷

In support of his April 8, 1997 request for reconsideration, appellant submitted a written statement dated February 21, 1995 in which he described his reasons for disagreeing with the Office's January 9, 1995 decision. He submitted a September 18, 1995 written statement in which a coworker, Mr. Westmoreland, related that appellant's supervisor, Mr. Roberson, had revealed to him information concerning appellant's marital problems and difficulty with reading and writing although appellant, in conveying this information to Mr. Roberson, had the expectation that Mr. Roberson would hold the information in confidence. In a written statement dated December 7, 1995, Ms. McCormack, stated that she was appellant's best friend and related information concerning appellant's allegations against Mr. Roberson which appellant had told her.

This evidence submitted by appellant in support of his untimely request for reconsideration is insufficient to show clear evidence of error. Appellant's statement describing his disagreement with the Office's January 9, 1995 decision, the statement from a coworker alleging that appellant's supervisor revealed information about appellant which appellant thought would be held in confidence and a friend's statement relating information appellant had told her about his supervisor, all constitute evidence that does not raise a substantial question as to the correctness of the Office's January 9, 1995 decision that his claimed emotional condition was not causally related to compensable factors of employment. 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.

¹⁴ See *Leona N. Travis*, *supra* note 12 at 241.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ *Jeanette Butler*, *supra* note 11.

¹⁷ *Id.*

The April 28, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
October 25, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member