

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MORENO S. GOLDSMITH and U.S. POSTAL SERVICE,  
NORTHWESTERN STATION, Detroit, MI

*Docket No. 98-31; Submitted on the Record;  
Issued October 4, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and insufficient to establish clear evidence of error.

The case has been on appeal five times previously.<sup>1</sup> Appellant, then a 44-year-old letter carrier, was injured on January 8, 1986 when he slipped on ice and tried to right himself with his right hand. The Office accepted appellant's claim for traumatic subluxation of the first carpal-metacarpal joint of the right hand. In a November 22, 1988 decision, the Office terminated appellant's temporary total disability compensation for refusal to accept suitable employment offered by the employing establishment. In a February 28, 1991 order, the Board remanded the case because the Office had denied appellant's request for reconsideration on the grounds that it was untimely but had not considered whether the evidence submitted by appellant showed clear evidence of error in the Office's November 22, 1988 decision. In a December 30, 1991 decision, the Board found that the Office had properly denied appellant's request for reconsideration as untimely and insufficient to show clear evidence of error. In a May 23, 1993 decision, the Board dismissed appellant's appeal pursuant to his request to withdraw his appeal to pursue a pending request for reconsideration. In decisions dated May 11, 1995 and February 19, 1997, the Board again found that the Office had properly denied appellant's requests for reconsideration as untimely and insufficient to establish clear evidence of error.

In an August 30, 1997 letter, appellant submitted a December 2, 1992 report from Dr. Said A. Moossavi, a Board-certified surgeon specializing in hand surgery, which appellant contended had not been previously considered by the Board or the Office. In the report,

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<sup>1</sup> Docket No. 95-3073 (issued February 19, 1997); Docket No. 94-27 (issued May 11, 1995); Docket No. 93-851 (Order Dismissing Appeal issued May 25, 1993); Docket No. 91-1399 (issued December 30, 1991); Docket No. 90-2030 (Order Remanding Case issued February 28, 1991). The history of the case is contained in the prior decisions and is incorporated by reference.

Dr. Moossavi stated that appellant had a history of injury to both hands and thumbs with dislocation of the first metacarpal joint. He commented that the surgery appellant underwent had not helped. Dr. Moossavi indicated appellant had developed arthritis of the carpometacarpal joint which he related to the employment injury and concluded was a permanent aggravation of the injury. He recommended further surgery on both of appellant's hands, stating that the prognosis after surgery would be satisfactory.

In a September 12, 1997 decision, the Office denied appellant's request for reconsideration as untimely and lacking in clear evidence of error in the Office November 22, 1988 decision.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

Under section 8128(a) the Federal Employees' Compensation Act,<sup>2</sup> 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) of the implementing federal regulations<sup>3</sup> which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also 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."<sup>4</sup> In *Leon D. Faidley, Jr.*,<sup>5</sup> the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's Procedure Manual provides:

"The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, and decision by the Employees' Compensation Appeals Board, but does not include preresoupment hearing/review decisions."<sup>6</sup>

The Office issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on November 22, 1988. As the Office did not receive the most recent application for

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.138(b).

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

<sup>5</sup> 41 ECAB 104 (1989).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (May 1991).

review until August 30, 1997 the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office 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 section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.<sup>7</sup>

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 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, however, 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 fundamental 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>

Appellant contended that the December 2, 1992 report of Dr. Moossavi had not been considered previously. However, appellant had previously submitted the report and the Office had considered the report prior to its January 14, 1993 decision denying appellant's request for reconsideration as untimely and lacking in clear evidence of error. The report is therefore duplicative of evidence already of record and previously considered by the Office and the Board.

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<sup>7</sup> *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which 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."

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

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

<sup>10</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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

<sup>13</sup> *Leon Faidley, Jr.*, *supra* note 5.

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

It was previously found not to constitute clear evidence of error. There is nothing in the record that would change the previous determination.

The decision of the Office of Workers' Compensation Programs dated September 12, 1997 is hereby affirmed.

Dated, Washington, D.C.  
October 4, 1999

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member