

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAY T. JONES and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Poplar Bluff, MO

*Docket No. 97-2274; Submitted on the Record;  
Issued September 27, 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 determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, the Office accepted that appellant sustained a low back strain in the performance of duty on August 21, 1991. By decision dated December 13, 1995, the Office terminated appellant's compensation on the grounds that the medical evidence established that appellant did not have continuing residuals of the employment injury. The Office also determined that appellant's emotional condition was not causally related to the employment injury.

By decision dated March 31, 1997, the Office found that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

The jurisdiction of the Board is limited to final decisions of the Office issued within one year of the filing of the appeal.<sup>1</sup> Since appellant filed his appeal on June 26, 1996, the only decision over which the Board has jurisdiction on this appeal is the March 31, 1997 decision denying his request for reconsideration.

The Board has reviewed the record and finds that the Office properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

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<sup>1</sup> 20 C.F.R. § 501.3(d).

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> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>5</sup> 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 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>

In this case, appellant submitted a request for reconsideration and cover letter by facsimile transmission on January 20, 1997.<sup>8</sup> The cover letter stated that a request for reconsideration had been sent on December 11, 1996 and indicated that a copy of the request, with a certified mail receipt, was attached. The record, however, includes only an undated request for reconsideration and accompanying medical evidence. There was no evidence before the Office at the time of the March 31, 1997 decision establishing that a request for reconsideration had been submitted within one year of the December 13, 1995 decision.<sup>9</sup> The evidence indicated that on January 20, 1997 the Office received a request for reconsideration and since this is more than one year after the December 13, 1995 decision, it was properly considered untimely.

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>10</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

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

<sup>5</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

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

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

<sup>8</sup> The cover letter is dated January 21, 1997, although the facsimile transmission information stamped on the letter indicates that it was sent on January 20, 1997.

<sup>9</sup> The record contains evidence submitted after the March 31, 1997 Office decision. The Board's jurisdiction is limited to evidence that was before the Office at the time of the final decision. 20 C.F.R. § 501.2(c).

<sup>10</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

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>11</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>12</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>13</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>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</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>16</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>17</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>18</sup>

The evidence submitted with the January 20, 1997 request for reconsideration included a December 3, 1996 report from Dr. Charles P. McGinty, a surgeon. Dr. McGinty provided results on examination, reviewed medical records and opined that appellant had a chronic pain syndrome causally related to the August 21, 1991 employment injury. The Board notes that the Office had terminated appellant's compensation based on the report of Dr. Jerome Piontek, a Board-certified orthopedic surgeon serving as an impartial medical specialist, who opined that appellant did not have a continuing employment-related condition. To establish clear evidence of error, the evidence must be of such probative value that it would *prima facie* shift the weight in favor of appellant. The December 3, 1996 report from Dr. McGinty is not of sufficient probative value to establish clear evidence of error in this case.

Appellant also submitted an August 30, 1996 report from Dr. Eugene Taub, an osteopathic psychiatrist, diagnosing recurrent depression with psychotic features. In a

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>12</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>13</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>14</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>15</sup> See *Leona N. Travis*, *supra* note 13.

<sup>16</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>17</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

<sup>18</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

September 18, 1996 report Dr. Taub opined that appellant's psychiatric problems a result of the continuing pain and disability from his employment injury, without further explanation.

In a report dated January 19, 1996, Dr. K.P.S. Kamath, a psychiatrist, stated that although he had previously stated that appellant's depression was related to the denial of benefits by the Office, the actual cause of the depression was the injury and the inability to work. Dr. Kamath did not provide any further explanation or rationale for his opinion.

As noted above, the clear evidence of error standard is a difficult standard to meet. The evidence submitted by appellant is not of sufficient probative value to establish clear evidence of error in this case.

The decision of the Office of Workers' Compensation Programs dated March 31, 1997 is affirmed.

Dated, Washington, D.C.  
September 27, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member