

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RODERICK ROMAN and DEPARTMENT OF THE NAVY,
PEARL HARBOR NAVAL SHIPYARD, Pearl Harbor, HI

*Docket No. 98-1938; Submitted on the Record;
Issued January 24, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

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

On March 15, 1995 appellant, then a 40-year-old mail clerk, was lifting a 20-pound mailbag onto a pickup truck when the lock on the mailbag broke, causing the contents to shift. Appellant indicated that he immediately felt pain in his lower back, left hip and right shoulder and arm. Appellant stopped working on March 16, 1995. The Office accepted appellant's claim for back and neck strain. Appellant received continuation of pay for the period March 16 through April 28, 1995. Appellant returned to work part time on April 17, 1995. The Office paid compensation for the hours appellant did not work for the period April 29 through May 14, 1995. Appellant was released for light duty, full-time work on May 23, 1995.

On June 8, 1996 appellant filed a claim for compensation effective for the period beginning June 13, 1996, the date he received disability retirement. In a September 19, 1996 decision, the Office denied appellant's claim for compensation on the grounds that his disability due to the employment injury had ceased and that there was no evidence that his disability was causally related to the March 15, 1995 employment injury. In a November 27, 1996 letter, appellant requested a hearing before an Office hearing representative, claiming that he had not received the September 19, 1996 decision until he visited the employing establishment on November 12, 1996. In a January 13, 1997 decision, the Office denied appellant's request for a hearing as untimely and, in discretionary review, found that his cause could equally be addressed by requesting reconsideration and submitting evidence not previously considered which established that his disability had not ceased. In a December 23, 1997 letter, appellant requested reconsideration. In a March 2, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely and lacked clear evidence of error in the Office's September 19, 1996 decision.

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

Under section 8128(a) of the Act,¹ 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 regulations² 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."³ In *Leon D. Faidley, Jr.*,⁴ 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.

The Office issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on September 19, 1996. As the Office did not receive the application for review until December 23, 1997 the application was not timely filed. Appellant had submitted medical evidence that was received by the Office on April 11, 1997. However, as this evidence was not accompanied by a request for reconsideration or further review, it cannot, by itself, be considered a timely request for reconsideration. 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 ground 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.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.138(b).

³ 20 C.F.R. § 10.138(b)(2).

⁴ 41 ECAB 104 (1989).

⁵ *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."

⁶ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *Leona N. Travis*, 43 ECAB 227 (1991).

establish clear evidence of error.⁸ It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ 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.¹¹ 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 on the face of such evidence.¹²

The only evidence submitted by appellant was an April 5, 1997 report by Dr. D. Scott McCaffrey, Board-certified in emergency medicine, who diagnosed lumbar disc syndrome with reactive muscular spasm and chronic pain, reactive depression related to his lumbar disc syndrome, moderate sleep disorder related to lumbar disc syndrome and depression, and carpal tunnel syndrome. Dr. McCaffrey stated that it appeared that the back injury and wrist disorder were related to appellant's employment because of the lack of symptoms and medical treatment for the conditions prior to the employment injury as well as an acute incident while lifting and twisting his back. He indicated that there was no alternate activity outside of appellant's employment which might account for a repetitive motion or cumulative trauma injury to the wrists. However, the mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship between the condition and the employment.¹³ Dr. McCaffrey's opinion on the issue of causal relationship is based solely on this type of rationale, that appellant had no medical problem before the employment injury but had a chronic medical problem after the injury. His report therefore lacks the probative weight to establish clear evidence of error in the denial of appellant's claim for compensation after June 13, 1996.

⁸ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁹ See *Leona N. Travis*, *supra* note 7.

¹⁰ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon Faidley, Jr.*, *supra* note 4.

¹² *Gregory Griffin*, *supra* note 5.

¹³ *Juanita C. Rogers*, 34 ECAB 544, 546 (1983).

The decision of the Office of Workers' Compensation Programs dated March 2, 1998 is hereby affirmed.

Dated, Washington, D.C.
January 24, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member