

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ADEL HADDOCK and DEPARTMENT OF THE NAVY,
MARINE CORPS AIR STATION, Cherry Point, NC

*Docket No. 98-2301; Submitted on the Record;
Issued July 20, 2000*

DECISION and ORDER

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

The issue is whether the Office of Worker's Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On April 3, 1989 appellant, then a 41-year-old tool and part attendant, filed a traumatic injury claim (Form CA-1) alleging that on February 3, 1989 he injured his back while in the performance of duty.

By letter dated June 30, 1989, the Office accepted appellant's claim for temporary aggravation of disc disease. Subsequently, the Office expanded the acceptance of appellant's claim to include depression.

By letter dated October 4, 1996, appellant's counsel, Gary M. Janis, submitted an application for approval of a fee in the amount of \$9,035.00 for 52.2 hours of work performed in appellant's case from January 17, 1992 to April 24, 1996.

By decision dated November 13, 1996, the Office approved the attorney fee request in the amount of \$9,035.00.

In an undated letter received by the Board on February 12, 1997, appellant stated that he disagreed with the Office's decision. By letter dated February 12, 1997, the Board advised appellant that his letter was being returned to him because it was unclear whether he was seeking reconsideration of the Office's decision or an appeal to the Board. The Board advised appellant

to forward his request to the Office if he wished to seek reconsideration. Alternatively, the Board advised appellant to complete an enclosed AB-1 form if he wished to appeal the Office's decision to the Board.

In a July 28, 1997 letter received by the Office on August 22, 1997 accompanied by factual evidence, appellant requested reconsideration of the Office's November 13, 1996 decision.¹ On July 28, 1997 appellant submitted an AB-1 Form dated February 20, 1997 to the Board indicating that he wished to appeal the Office's decision.²

By order dismissing appeal dated October 10, 1997, the Board granted appellant's September 16, 1997 request to withdrawal his appeal so that he could submit new evidence to the Office.

In a January 29, 1998 letter, appellant again requested reconsideration of the Office's November 13, 1996 decision.

By decision dated March 18, 1998, the Office denied appellant's January 29, 1998 request for reconsideration without a review of the merits on the grounds that it was untimely filed and that it did not establish 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 Inasmuch as appellant filed his appeal with the Board on July 21, 1998, the only decision properly before the Board is the Office's March 18, 1998 decision denying appellant's request for reconsideration.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act. The Office 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.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).⁵

¹ The Board notes that in addition to requesting reconsideration of the Office's November 13, 1996 decision, appellant requested an oral hearing before an Office representative in a letter dated August 16, 1997 that was received by the Office on August 22, 1997. The Board further notes that the Office did not issue a decision regarding either appellant's request for reconsideration or a hearing. Inasmuch as there is no final decision of the Office adjudicating appellant's July 28, 1997 request for reconsideration or his August 16, 1997 request for an oral hearing, the Board does not have jurisdiction to consider this aspect of the claim. See 20 C.F.R. § 501.2(c).

² The Board assigned appellant's appeal docket number 97-2418.

³ 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

⁴ 20 C.F.R. § 10.138(b)(2); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶ The Office issued its last merit decision in this case on November 13, 1996 wherein it approved the request of Mr. Janis, appellant's counsel, for a fee in the amount of \$9,035.00 for hours worked on appellant's case from January 17, 1992 to April 24, 1996. Inasmuch as appellant's January 29, 1998 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁷ Office procedures state that the Office 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹²

In this case, the only evidence appellant submitted with his January 29, 1998 request for reconsideration was an August 19, 1997 letter from Shirley A. Neal, of the North Carolina Spine Center advising appellant that a review of his medical records did not indicate that copies of the file were requested from or released to a law firm, which is the one that worked on appellant's case. Mr. Janis' fee petition reveals that he reviewed medical records dated October 17, 1991 from the North Carolina Spine Center for .2 hours. Therefore, the evidence submitted by appellant fails on its face to manifest that the Office committed clear evidence of error in its November 13, 1996 decision.

⁶ *Larry L. Lilton*, 44 ECAB 243 (1992).

⁷ *Gregory Griffin*, *supra* note 3.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (the Office 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); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, *supra* note 4.

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *Jesus D. Sanchez*, *supra* note 4.

¹² *Leona N. Travis*, *supra* note 9.

Because appellant's January 29, 1998 request for reconsideration was untimely filed and failed to show clear evidence of error in the Office's November 13, 1996 decision, the Board finds that the Office properly denied that request.

The March 18, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
July 20, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member