

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOMINIC GIANFELICE and U.S. POSTAL SERVICE,
MAIN OFFICE, Springfield, MA

*Docket No. 98-1392; Submitted on the Record;
Issued June 23, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has carefully reviewed the record evidence and finds that the Office improperly denied appellant's request for reconsideration. The only decision the Board may review on appeal is the February 3, 1998 nonmerit decision, which denied appellant's request for reconsideration, because this is the only final Office decision issued within one year of the filing of appellant's appeal on March 13, 1998.¹

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ Rather, 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) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.⁴ The Board has held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁵

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.⁶ The

¹ *Joseph L. Cabral*, 44 ECAB 152, 154 (1992); *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

⁴ 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

⁵ *Leon D. Faidley, Jr.*, *supra* note 3 at 111.

⁶ *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.⁷ Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request is accompanied by evidence which demonstrates clear evidence of error on the part of the Office.⁸

Clear evidence of error is intended to represent a difficult standard.⁹ The claimant must present evidence which on its face shows that the Office made an error such as, for example, proof of a miscalculation in a schedule award. Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.¹⁰

In this case, appellant filed a claim in 1972 which the Office accepted for acute low back strain and paid appropriate intermittent compensation for temporary total disability.¹¹ On December 17, 1981 the Office reduced appellant's compensation on the basis that he had the ability to earn the wages of an order clerk which was affirmed by an Office hearing representative on July 23, 1982.

On March 2, 1994 appellant filed a notice of recurrence of disability beginning on September 2, 1976 which the Office denied by decision dated January 26, 1996.

On February 14, 1996 appellant requested a hearing which was held on September 19, 1996.

⁷ *Howard A. Williams*, 45 ECAB 853, 857 (1994).

⁸ *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996).

¹⁰ *Id.*; see *Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition for recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

¹¹ Appellant had filed a prior traumatic injury claim for injuries sustained to his back on January 16, 1958.

By decision dated November 29, 1996 and finalized on December 6, 1996,¹² the hearing representative affirmed the January 26, 1996 Office decision denying appellant's recurrence claim.¹³

By letter dated December 1, 1997 and received on December 3, 1997, appellant's counsel requested reconsideration and submitted evidence in support of his request.

On February 3, 1998 the Office denied appellant's request for reconsideration on the basis that the request was untimely filed and did not show clear evidence of error.

The Board finds that the one-year time limit to submit a timely reconsideration request began on December 6, 1996, the date on which the hearing representative's decision was finalized. As appellant's letter requesting reconsideration was received by the Office on December 3, 1997, the request was timely. Accordingly, the Board finds that the December 1, 1997 letter was filed within one year of the December 6, 1996 decision of the Office hearing representative. Thus, as the reconsideration was timely filed, the Office must assess the reconsideration request under the appropriate standards.¹⁴ The case will therefore be remanded to the Office for proper consideration of appellant's timely request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated February 3, 1998 is set aside and the case remanded for further proceedings consistent with the above opinion.

Dated, Washington, D.C.
June 23, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² The original copy of the hearing representative's decision notes the date November 29, 1996 while the copy submitted by appellant does not contain this date and the date of the transmittal letter by the hearing representative is December 6, 1996. As the date of the hearing representative's transmittal letter, December 6, 1996, is later than the date noted only on the original decision, November 29, 1996, the December 6, 1996 date is considered the date upon which the decision was issued.

¹³ On this copy of the hearing representative's decision, the date November 29, 1996 is not present.

¹⁴ 5 U.S.C. § 8128(a).