

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT V. WASHINGTON and U.S. POSTAL SERVICE,
POST OFFICE, San Bernadino, CA

*Docket No. 99-902; Submitted on the Record;
Issued June 9, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On December 22, 1979 appellant, then a 41-year-old clerk, sustained an employment-related low back strain and a herniated nucleus pulposus at L4-5 with right sciatica. On December 8, 1992 appellant underwent a discectomy and laminectomy at L4-5 which was authorized by the Office. The Office accepted that appellant sustained an employment-related incisional hernia as a consequence of his surgery and authorized the performance of surgical repairs of the condition on August 5, 1993 and November 16, 1994. Appellant stopped work for the periods November 12, 1992 to March 1, 1993 and August 4 to October 3, 1993 and the Office paid appropriate disability compensation. He returned to light-duty work for the employing establishment after October 3, 1993.

Appellant claimed that he sustained a recurrence of disability in June 1994. He stopped work on June 28, 1994 and retired from the employing establishment one month thereafter.¹ By decision dated September 29, 1994, the Office denied appellant's claim for recurrence of disability and, by decision dated and finalized January 19, 1995, an Office hearing representative denied modification of the Office's September 29, 1994 decision.

By decision dated May 7, 1997, the Office determined that appellant ceased to have employment-related disability after July 12, 1994 and that he ceased to have any residuals of his

¹ On a compensation claim form (Form CA-7) dated October 26, 1993, appellant claimed entitlement to compensation for the period August 20, 1992 to October 1, 1993. He checked a "yes" box indicating that he wished to claim a schedule award.

employment injury after July 28, 1994.² The Office based its determination on the opinion of Dr. Thomas Dorsey, a Board-certified orthopedic surgeon to whom the Office referred appellant.³

On a Form CA-7 dated April 7, 1998, appellant claimed that he was entitled to disability for the period November 28, 1992 to July 28, 1994. He again checked a “yes” box indicating that he wished to claim a schedule award. In an informational letter dated June 16, 1998, the Office advised appellant that his recent claim was duplicative of his earlier claims which had previously been decided by the Office.⁴

In a letter to the Office dated September 5, 1998, appellant stated:

“[In] [r]eference to your letter dated June 16, 1998. I have no records of ever receiving any payment for compensation. I believe that an error was made. [I] request that I be compensated for all leave-without-pay time from August 1992 through December 1994.

“I request a reconsideration on the basis that an error was made in my leave without pay time. [I] request a review.”

The Office interpreted appellant’s September 5, 1998 letter as a request for reconsideration of its May 7, 1997 decision. By decision dated December 7, 1998, the Office denied appellant’s reconsideration request on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office’s December 7, 1998 decision denying appellant’s request for a review on the merits of its May 7, 1997 decision. Because more than one year has elapsed between the issuance of the Office’s May 7, 1998 decision and January 19, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the May 7, 1997 decision.⁵

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant’s case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

In its December 7, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on May 7, 1997

² The Office paid compensation to appellant for periods up until July 28, 1994.

³ The Office’s merit decisions in the present case effectively served to deny his entitlement to a schedule award.

⁴ The Office made note of the periods for which appellant had received compensation.

⁵ See 20 C.F.R. § 501.3(d)(2).

and appellant's request for reconsideration was dated September 5, 1998, more than one year after May 7, 1997.⁶

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁷ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁸ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.⁹ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹⁰ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.¹¹

The Office, however, may not deny an application for review 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 for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."¹² Office procedures provide 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.¹³

⁶ It should be noted that the June 16, 1998 letter of the Office is informational in nature and does not constitute a formal decision of the Office.

⁷ 5 U.S.C. §§ 8101-8193. 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." 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁹ 20 C.F.R. § 10.138(b)(2).

¹⁰ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹¹ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹² *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). The Office therein 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 (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 development, is not clear evidence of error and would not require a review of the case...."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁴ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed appellant's application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether appellant's application for review was sufficient to show clear evidence of error. The Board finds that it does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. Appellant did not submit any evidence in connection with his September 5, 1998 letter to support his assertion that he was entitled to additional compensation due to an employment-related condition. The main issue in the present case is medical in nature, *i.e.*, whether the medical evidence shows that appellant is entitled to compensation for employment-related disability after July 28, 1994 or for any other period for which he did not receive compensation. Appellant's mere assertion that he is entitled to additional compensation is not sufficient to show clear error in the Office's prior decisions.

¹⁴ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁵ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁶ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁷ See *Leona N. Travis*, *supra* note 15.

¹⁸ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁹ *Leon D. Faidley, Jr.*, *supra* note 11.

²⁰ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

For these reasons, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated December 7, 1998 is affirmed.

Dated, Washington, D.C.
June 9, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member