

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILL BROWN and U.S. POSTAL SERVICE,
HOLMDEL POST OFFICE, Holmdel, NJ

*Docket No. 99-1098; Submitted on the Record;
Issued June 14, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs, in its September 25 and November 12, 1998 decisions, properly determined that appellant's requests for reconsideration were untimely filed and did not demonstrate clear evidence of error.

On January 8, 1997 appellant filed a notice of traumatic injury and claim for compensation alleging that on November 26, 1996 he slipped off the loading dock at work and injured both his knees and his left hand. He did not stop work.

By decision dated February 21, 1997, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an injury causally related to his employment. The Office indicated that the evidence supported the occurrence of the alleged incident, however, the evidence did not establish that a condition had been diagnosed in connection with the incident.¹

On August 24, 1998 the Office received a letter from appellant dated August 18, 1998 requesting reconsideration of the February 21, 1997 decision.²

Appellant submitted in support of his request a March 17, 1997 letter from Dr. Robert B. Grossman, an attending orthopedic surgeon, which noted that appellant had been seen on January 9, 1997 for evaluation of bilateral knee complaints. He relayed appellant's version of

¹ The only medical evidence received by the Office prior to the February 21, 1997 decision was a duty status report (Form CA-17) on December 5, 1997. The duty status report was undated and contains an illegible signature and description of clinical findings.

² Appellant submitted a March 23, 1997 letter to the Board, which was interpreted to constitute a request for an appeal. By letter dated August 29, 1997, he requested that the Board return his file to the Office for reconsideration of the February 21, 1997 decision. The Board by Order dated October 31, 1997 (Docket No. 97-1533) noted that a formal written request for reconsideration should be submitted directly to the Office.

the facts surrounding the alleged work incident and summarized that appellant had full range of motion and mild chondromalacia complaints to his left knee.

By decision dated September 25, 1998, the Office found that appellant's reconsideration request was untimely filed and did not establish clear evidence that the Office's final decision was erroneous.

In a letter dated October 30, 1998 and received by the Office on November 2, 1998, R.J. Borgognoni, a union official, requested review of the February 21, 1997 decision on appellant's behalf. Mr. Borgognoni contended that appellant's March 23, 1997 request for reconsideration which was mistakenly mailed to the Board, fell within the one-year time requirement. He further contended that appellant's August 29, 1997 letter to the Board, which requested that his file be forwarded to the Office for reconsideration had also been received within the one-year requirement and that, therefore, the Office should have granted review of its prior decision.

By decision dated November 12, 1998, the Office found that appellant's reconsideration request was untimely filed and did not establish clear evidence of error by the Office.

The Board finds that the Office, in its September 25 and November 12, 1998 decisions, properly determined that appellant's requests for reconsideration were untimely filed and did not demonstrate clear evidence of error.

The only decisions before the Board in this appeal are the September 25 and November 12, 1998 decisions, in which the Office denied appellant's requests for reconsideration under 5 U.S.C. § 8128 on the grounds that they were untimely filed and failed to demonstrate clear evidence of error. Since more than one year has elapsed between the date of the Office's merit decision dated February 21, 1997 and the filing of appellant's appeal on January 28, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.³

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ the Office's regulations provide that a claimant must:

- “(1) Show that the Office erroneously applied or interpreted a point of law, or
- “(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.”

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, it is a matter of discretion

³ 20 C.F.R. § 501.3(d)(2).

⁴ 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 application.” 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.138(b)(2).

on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁶

In its September 25, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the February 21, 1997 decision, which stated that if he requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. The October 31, 1997 Order which dismissed the appeal that commenced as a result of his request for reconsideration to the Board, also informed appellant that he should submit a formal written request, with any new evidence directly to the Office. Appellant had more than three months before the one-year period for reconsideration expired, however, he did not request reconsideration until August 18, 1998. The Office issued its merit decision in this case on February 21, 1997 and as appellant's August 18, 1998 reconsideration request was outside the one-year time limit, which began the day after February 21, 1997, appellant's request for reconsideration was untimely.

The Office also properly determined that appellant's second reconsideration request was untimely. He requested reconsideration on October 30, 1998 and as the Office issued its merit decision in this case on February 21, 1997, his request was outside the one-year time limit, which began the day after February 21, 1997.

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 of the case to determine whether the application establishes "clear evidence of error."⁷ 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 manifested 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 This entails a limited review by the Office of

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *See Jeanette Butler*, 47 ECAB 128 (1995).

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

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

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² *See Leona N. Travis*, *supra* note 10.

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.¹³ 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.¹⁴ The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁵

In support of appellant's August 1998 request for reconsideration, the Office reviewed the undated duty status report submitted on December 5, 1997 along with Dr. Grossman's letter dated March 17, 1997, and determined that neither established that the Office's February 21, 1997 decision was in error or raised a substantial question as to the correctness of that decision. No further evidence was submitted with appellant's October 30, 1998 application for review. The critical issue in the case at the time the Office issued its February 21, 1997 decision was whether appellant had established that he sustained an injury causally related to an employment incident, which generally can only be established by rationalized medical opinion evidence. The undated duty status report did not relay a medical opinion regarding appellant's condition, as the description of medical findings was illegible and Dr. Grossman's letter simply gave appellant's version of the facts surrounding the work incident and noted his complaints and the limited range of motion of his knee. Neither were of probative value to establish that appellant sustained a knee injury causally related to his employment.¹⁶ Therefore, as appellant has not raised a substantial question as to the correctness of the merit decision or presented evidence, which on its face shows that the Office made an error, appellant failed to establish clear evidence of error.

In support of his October 30, 1998 request for reconsideration, appellant presented the argument that he properly requested reconsideration of the February 21, 1997 decision on March 23, 1997, but that his letter was inadvertently mailed to the Board and consequently fell outside the one-year requirement. He implied that because of this error, his reconsideration request should have been considered timely. The Board notes, however, that the Office had previously considered this matter and had determined the August 18, 1998 request to be untimely as it fell outside of the one-year requirement. As stated above, the relevant issue in this case is whether appellant had established that he sustained an injury causally related to an employment incident, which is essentially medical in nature. As appellant's arguments do not address this issue, such evidence lacks probative value to establish that appellant sustained a knee injury causally related to his employment and does not establish clear evidence of error on the part of the Office with respect to its February 21, 1997 decision.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁶ *Daniel Deparini*, 44 ECAB 657 (1993).

For the foregoing reasons, the decisions of the Office of Workers' Compensation Programs dated November 12 and September 25, 1998 are affirmed.

Dated, Washington, D.C.
June 14, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member