

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEITH PRUETT and DEPARTMENT OF THE ARMY,
DEFENSE GENERAL SUPPLY CENTER, Richmond, VA

*Docket No. 98-2412; Submitted on the Record;
Issued March 13, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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 May 13, 1988 appellant, then a 30-year-old material classifier/sorter, was walking across a conveyer belt when he slipped and his left leg fell between two rollers on the belt. He filed a claim for contusions and a strain of the left knee. The Office accepted appellant's claim for contusions and hematoma of the left knee and paid medical benefits. He returned to work on June 6, 1988 and received continuation of pay for the period May 16 through June 6, 1988.

On June 2, 1992 appellant filed a claim for a recurrence of disability effective May 12, 1992. He indicated that his left knee was swollen, raised and discolored. In a December 21, 1992 decision, the Office rejected appellant's claim on the grounds that the evidence of record failed to demonstrate a causal relationship between the 1988 employment injury and the claimed condition. Appellant requested a hearing before an Office hearing representative which was held on November 17, 1993. In a January 6, 1994 decision, the Office hearing representative found that the medical evidence was deficient in relating appellant's left knee condition in May 1992 to the May 13, 1988 employment injury. He therefore affirmed the Office's December 21, 1992 decision. In an undated letter received by the Office on April 29, 1994, appellant requested reconsideration. In a June 6, 1994 merit decision, the Office denied modification of its prior decisions.

In a January 3, 1997 letter, appellant's representative forwarded an undated letter from appellant requesting that his case be investigated. After subsequent correspondence, he requested reconsideration in a March 3, 1998 letter. In an April 22, 1998 decision, the Office denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

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

Under section 8128(a) of the Federal Employees' Compensation 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 merit decision on June 6, 1994. As the Office did not receive the application for review until January 3, 1997 at the earliest, the application was not timely filed. 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 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 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 manifested 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 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

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).

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).

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 in the face of such evidence.¹²

Appellant, in alleging the error, contended that the employing establishment mischaracterized the severity of his May 13, 1988 employment injury at the time his original claim for compensation was submitted. He argued that he did not receive authorization for the appropriate medical examination at that time, which may have determined that he had sustained a torn anterior cruciate ligament due to the May 13, 1988 injuries, not a prior 1975 injury. Appellant's argument is irrelevant, however, to the issue in his case. His claim had been denied because he had not submitted a detailed, well-rationalized medical report which fully explained how his knee condition in May 1992 was caused by the employment injury four years previously. Appellant has not submitted any medical evidence since the June 6, 1994 decision which would establish that the Office's decision denying his claim for recurrence of disability was clearly in error.

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

¹² *Gregory Griffin*, *supra* note 5.

The decision of the Office of Workers' Compensation Programs, dated April 22, 1998, is hereby affirmed.

Dated, Washington, D.C.
March 13, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member