

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNEST E. GOODWIN and U.S. POSTAL SERVICE,
LEESBURG STATION, Columbia, SC

*Docket No. 99-768; Submitted on the Record;
Issued November 27, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs, in its May 12, 1998 decision, properly denied appellant's request for reconsideration; and (2) whether the Office, in its August 27, 1998 decision properly denied appellant's request for reconsideration on the grounds that it was untimely filed and to establish clear evidence of error.

On August 16, 1994 appellant, then a 47-year-old rural letter carrier, filed an occupational disease claim alleging that he sustained an aggravation of his preexisting coronary artery disease as a result of stress in his job. By decision dated November 23, 1994, the Office denied appellant's claim on the grounds that the claimed injury was not sustained in the performance of duty. By decisions dated January 24, 1996 and April 22, 1997, the Office denied modification of its November 23, 1994 decision.

By letter dated April 18, 1998, appellant requested reconsideration of the denial of his claim and submitted additional evidence. By decision dated May 12, 1998, the Office denied appellant's request for reconsideration.

By letter dated May 18, 1998, appellant requested reconsideration of the denial of his claim. By decision dated August 27, 1998, the Office denied appellant's request for reconsideration on the grounds that his request was not timely filed within one year of the Office's last merit decision on April 22, 1997 and on the grounds that the evidence submitted in support of the request for reconsideration failed to show clear evidence of error.

The Board finds that the Office, in its May 12, 1998 decision, did not abuse its discretion in denying appellant's request for reconsideration.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by

the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.²

In this case, in support of his April 18, 1998 request for reconsideration, appellant submitted evidence previously of record and new evidence.

Included in the new evidence submitted in support of appellant's request for reconsideration, was a March 11, 1997 letter to the employing establishment, in which appellant requested information concerning procedures to be followed after a worker sustains an injury and the employing establishment's responses with copies of pages from an injury compensation handbook and a March 25, 1998 letter from Dr. Wayne P. Chiu, an internist, stating that a review of appellant's medical chart showed that the treatment he received for his cardiac condition in 1994 was appropriate. This evidence does not constitute relevant and pertinent evidence not previously considered by the Office as it does not address the issue of whether appellant sustained a stress-related aggravation of his preexisting cardiac condition causally related to compensable factors of his employment.

Appellant also submitted a document dated April 15, 1998, in which he described his work activities on July 20, 1994 a March 24, 1997 statement from coworker Debbie Moore regarding appellant's July 20, 1994 workday a January 20, 1998 letter from appellant to the employing establishment alleging that it did not submit an account of appellant's July 20, 1994 work activities to the Office and a February 5, 1998 employing establishment response to appellant's January 20, 1998 letter with a copy of its April 2, 1997 letter describing appellant's July 20, 1994 work activities. This evidence does not constitute relevant and pertinent evidence not previously considered by the Office as the Office found, in its last merit decision issued on April 22, 1997, that, even if the work activities on July 20, 1994 were accepted as factual and compensable, the medical evidence of record did not establish that appellant sustained an injury on that date causally related to factors of his employment.³

Appellant also argued in his request for reconsideration that the August 24, 1994 report from Dr. Chiu supported his claim for a work-related injury on July 20, 1994. However, the record shows that this report from Dr. Chiu was previously submitted by appellant and considered by the Office in its April 22, 1997 decision. Therefore, the report does not constitute relevant and pertinent evidence not previously considered by the Office.

As appellant failed to show that the Office erroneously applied or interpreted a point of law, did not advance a point of law or a fact not previously considered by the Office, and did not

¹ 20 C.F.R. § 10.138(b)(1).

² 20 C.F.R. § 10.138(b)(2).

³ In its April 22, 1997 decision, the Office noted that the only medical evidence addressing the July 20, 1994 workday was an August 24, 1994 report from a Dr. Chiu who stated that he could not document any injury as a result of work activities on July 20, 1994.

submit relevant and pertinent evidence not previously considered by the Office, the Office properly denied his request for reconsideration.

The Board further finds that the Office, in its August 27, 1998 decision, did not abuse its discretion in denying appellant's May 18, 1998 request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it 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.⁷ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁸

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.⁹ In accordance with this holding, the Office has stated in its procedure manual that it 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.¹⁰

⁴ 5 U.S.C. § 8128(a).

⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *Leon D. Faidley, Jr.*, *supra* note 5. Compare 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ See *Gregory Griffin* and *Leon D. Faidley, Jr.*, *supra* note 5.

⁹ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996). 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 that a schedule award was miscalculated. Evidence such as a detailed well-rationalized medical report which, if submitted before the Office's denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case...."

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

In this case, appellant filed his request for reconsideration by letter dated May 18, 1998. This was more than one year after the Office's April 22, 1997 merit decision was issued and thus the application for review was not timely filed. In accordance with its internal guidelines and with Board precedent, the Office properly found that the request was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error which would warrant reopening appellant's case for merit review under 5 U.S.C. § 8128(a) notwithstanding the untimeliness of his application.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application for review was sufficient to show clear evidence of error.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷

In this case, appellant submitted only evidence which previously had been submitted and considered by the Office. Therefore, this evidence does not raise a substantial question as to the correctness of the Office's last merit decision issued on April 22, 1997. As appellant's untimely

¹¹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁷ *Gregory Griffin*, *supra* note 5.

application for review failed to present clear evidence of error, the Board finds that the Office's refusal to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated August 27 and May 12, 1998 are affirmed.

Dated, Washington, DC
November 27, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member