

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILIP DIAZ, SR. and U.S. POSTAL SERVICE,
POST OFFICE, North Reading, MA

*Docket No. 99-1912; Submitted on the Record;
Issued October 26, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

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.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's February 19, 1999 decision denying appellant's request for a review on the merits of the February 9, 1995 Office decision.¹ Because more than one year has elapsed between the issuance of the Office's February 9, 1995 decision and May 26, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior Office decision.²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). The Office 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

¹ By decision dated February 9, 1995, the hearing representative denied appellant's alleged December 19, 1989 recurrence of disability.

² See 20 C.F.R. § 501.3(d)(2).

decision.³ When an application for review is untimely, the Office undertakes a limited review to determine whether there is clear evidence of error pursuant to the untimely request.⁴

In its February 19, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on February 9, 1995 and appellant's request for reconsideration was dated September 1, 1998, which was clearly more than one year after February 9, 1995. Therefore, appellant's request for reconsideration of his case on its merits was untimely filed.

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."⁵ 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence, which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ 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.¹² The Board makes

³ 20 C.F.R. § 10.607(a).

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990); see 20 C.F.R. § 501.3(d)(2).

⁵ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996).

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Leon D. Faidley, Jr.*, 41 ECAB 104.

an independent determination as to 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.¹³

In the present case, with his request for reconsideration of the February 9, 1995 decision, appellant submitted a January 5, 1998 narrative report from Dr. Howard N. Fixler, a Board-certified internist, which noted that appellant injured his back on or about May 27, 1986, that a subsequent computerized tomography scan revealed an L5-S1 herniated disc, that appellant underwent disc surgery but continued to have injury-related chronic pain and disability, that he attempted to return to work several times but was unsuccessful, that he also had nonwork-related exacerbation of his pain over the years and that he had further surgery in 1994 for a recurrent L5-S1 disc herniation. Dr. Fixler opined that as of March 9, 1995 appellant was totally and permanently disabled, with the disability etiology “more likely than not related to his original injury in May of 1986.”

The Office performed a limited review of this report to determine whether it established clear evidence of error on its face of the February 9, 1995 denial of appellant’s December 19, 1989 recurrence of disability claim. The Office found that Dr. Fixler’s report did not contain a complete history with regard to appellant’s nonwork-related back exacerbations of pain, nor did it offer any opinion on causal relationship between the original May 27, 1986 injury and the December 19, 1989 alleged recurrence of disability. The Office found this report to be of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant or to raise a substantial question as to the correctness of the Office’s February 9, 1995 decision. The Office, therefore, properly found that the evidence did not demonstrate any clear evidence of error on its face on the part of the Office in its February 9, 1995 decision.

The Board now finds that it is indeed insufficient to reopen appellant’s case for further consideration on its merits. As this evidence does not raise a substantial question as to the correctness of the prior February 9, 1995 Office decision or *prima facie* shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant’s case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant’s untimely request for a merit reconsideration on that basis.

The Office, therefore, 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.

¹³ *Gregory Griffin*, 41 ECAB 186 (1989), *aff’d on recon.*, 41 ECAB 458 (1990).

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 19, 1999 is hereby affirmed.

Dated, Washington, DC
October 26, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member