

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RUSSELL M. MIURA and U.S. POSTAL SERVICE,  
POST OFFICE, Santa Anna, CA

*Docket No. 99-2054; Submitted on the Record;  
Issued October 25, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, PRISCILLA ANNE SCHWAB,  
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

Appellant filed an occupational disease claim on June 28, 1996 alleging that he sustained an emotional condition causally related to factors of his federal employment. By decision dated October 1, 1996, the Office denied the claim on the grounds that he had not established an emotional condition causally related to compensable employment factors. In a decision dated August 14, 1997, an Office hearing representative affirmed the prior decision.

By decision dated May 14, 1999, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

The Board has reviewed the record and finds that the Office properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.<sup>1</sup> As appellant filed his appeal on May 25, 1999, the only decision over which the Board has jurisdiction on this appeal is the May 14, 1999 decision denying his request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against

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<sup>1</sup> See 20 C.F.R. § 501.3(d).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

compensation.<sup>4</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>5</sup> 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.<sup>6</sup> 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).<sup>7</sup>

In this case, appellant's letter requesting reconsideration is dated March 31, 1999. The merit decision of the hearing representative is dated August 14, 1997. Since appellant's request for reconsideration was made more than one year after the Office decision, it is untimely.

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.<sup>8</sup> In accordance with this holding 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.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>11</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> 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.<sup>14</sup>

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<sup>4</sup> 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."

<sup>5</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606.

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> *See Leon D. Faidley, Jr.*, *supra* note 3.

<sup>8</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996); *see also* 20 C.F.R. § 10.607(b).

<sup>10</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>13</sup> *See Leona N. Travis*, *supra* note 11.

<sup>14</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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.<sup>15</sup> 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.<sup>16</sup>

In this case, appellant's March 31, 1999 letter reiterates his allegation that appellant was required to work beyond his work restrictions, without providing any new evidence relevant to this allegation. He indicated in his letter that he was submitting additional evidence, but the record does not contain any evidence submitted prior to the May 14, 1999 decision.<sup>17</sup> In the absence of evidence that is of such probative value that it shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of the Office decision, the Board finds that the Office properly denied the request for reconsideration in this case.

The decision of the Office of Workers' Compensation Programs dated May 14, 1999 is affirmed.

Dated, Washington, DC  
October 25, 2000

David S. Gerson  
Member

Priscilla Anne Schwab  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member

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<sup>15</sup> *Leon D. Faidley, Jr., supra* note 3.

<sup>16</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

<sup>17</sup> Appellant did submit additional evidence on appeal; however, the Board's jurisdiction is limited to evidence that was before the Office at the time of its decision. 20 C.F.R. § 501.2(c).