

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOWARD FAWCETT and DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO & FIREARMS, Washington, DC

*Docket No. 01-55; Submitted on the Record;
Issued August 9, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

By decision dated November 8, 1988, the Office denied appellant's occupational disease claim¹ for hearing loss on the grounds that his claim was not filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.² By an undated letter received by the Office on June 3, 2000, appellant requested reconsideration. By decision dated August 15, 2000, the Office denied appellant's reconsideration request as untimely and found that the statements appellant made in support of his request and the evidence submitted presented no clear evidence of error on the part of the Office.

The only decision before the Board in this appeal is the August 15, 2000 decision in which the Office denied appellant's request for reconsideration as untimely filed and failed to demonstrate clear evidence of error. Since more than one year has elapsed between the date of the Office's most recent merit decision dated November 8, 1988 and the filing of appellant's

¹ On April 20, 1988 appellant, then a 72-year-old firearms expert, retired in July 1974. He indicated that his date of knowledge of the occupational disease was September 20, 1968 and he also indicated it was this same date that he was aware that it was caused by his employment.

² 5 U.S.C. § 8122(a).

appeal on October 2, 2000, 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 Act⁴ the Office's regulations provide that a claimant's application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office." To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish on its face that such decision was erroneous.⁶

In its August 15, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the November 8, 1988 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. As appellant's June 3, 2000 decision was outside the one-year time limit, which began the day after November 8, 1988, appellant's application for review was untimely.

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." 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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

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 motion or application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(a).

⁶ 20 C.F.R. § 10.607(b).

⁷ 20 C.F.R. § 10.607(a).

⁸ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² 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.¹³ 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.¹⁴

In the present case, the Office denied appellant's occupational disease claim on the grounds that his claim was not filed within the applicable time limitation provisions of the Act.¹⁵

The evidence submitted in support of his June 3, 2000 request for reconsideration was a letter from Chris Heart, a retired ATF supervisor. Appellant indicated, "he was adopting it as his response to the letters your agency has sent out." As Mr. Heart was not appellant's immediate supervisor, he could not have actual knowledge of the injury within 48 hours after the occurrence of the injury¹⁶ and therefore this information was not relevant to the issue which was decided by the Office. Appellant additionally asserted that it was his belief that the Office erred in denying his original claim, but did not elaborate further. As his assertion did not provide a positive, precise and explicit assertion that the Office committed an error, it was insufficient to clear evidence of error.¹⁷

The Board further finds that the evidence submitted by appellant in support of such request does not raise a substantial question as to the correctness of the Office's November 8, 1988 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

The Board finds that the evidence submitted on reconsideration did not raise a substantial question as to the correctness of the Office's November 8, 1988 decision and was insufficient to establish clear evidence of error.

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁴ See *Gregory Griffin*, 41 ECAB 458 (1990).

¹⁵ See footnote 2.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, Chapter 2.801.3(b)(1) (March 1993).

¹⁷ See footnote 11.

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's November 8, 1988 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

The decision of the Office of Workers' Compensation Programs dated August 15, 2000 decision is hereby affirmed.

Dated, Washington, DC
August 9, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member