

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TYRUS TUCKER and U.S. POSTAL SERVICE,
DETROIT BULK MAIL CENTER, Allen Park, MI

*Docket No. 00-495; Submitted on the Record;
Issued January 22, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for further consideration of the merits of his claim on the grounds that his request was untimely and failed to show clear evidence of error.

This is the second appeal in this case.¹ By decision dated March 27, 1998, the Board affirmed the Office's July 10, 1995 decision which denied appellant's request for reconsideration of its September 1, 1993 decision² on the grounds that the request was untimely and failed to show clear evidence of error. The facts of this case are set forth in the Board's March 27, 1998 decision and are herein incorporated by reference.

Subsequent to the issuance of the Board's March 27, 1998 decision, appellant, by letter dated June 21, 1998, requested reconsideration before the Office and submitted additional evidence. By decision dated July 15, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to require reopening of the case for further merit review.

By letter dated May 28, 1999, appellant again requested reconsideration and submitted additional evidence. By decision dated August 27, 1999, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error in the Office's last merit decision issued September 1, 1993.

¹ Docket No. 96-305, issued March 27, 1998.

² On April 4, 1987 appellant sustained a temporary aggravation of arthritis of the right knee in the performance of duty. The Office's September 1, 1993 decision denied modification of the Office's July 22, 1993 decision which affirmed the Office's January 22, 1993 decision terminating appellant's compensation benefits on the grounds that he refused an offer of suitable work.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.³ As appellant filed his appeal with the Board on October 26, 1999, the only decision properly before the Board is the Office's August 27, 1999 decision denying appellant's request for reconsideration.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for further consideration of the merits of his claim.

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

³ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

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, 108-09 (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. § 10.607 (1999).

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

erroneous.⁹ In accordance with this holding, 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.¹⁰

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 28, 1999. This was clearly more than one year after the Office's last merit decision dated September 1, 1993 was issued and thus the application for review was not timely filed. In accordance with its implementing regulations 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

⁹ *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

¹⁰ 20 C.F.R. § 10.607(b).

¹¹ *See Dean D. Beets*, 43 ECAB 1153, 1158 (1992).

¹² *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

¹⁵ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁷

In support of his May 28, 1999 request for reconsideration, appellant submitted copies of prescriptions for medication dated April 16, 1998 through April 28, 1999, a referral for physical therapy dated October 22, 1998, an August 25, 1998 memorandum from the office of appellant's physician to the Office requesting payment for treatment, and clinical notes from his physician dated April 16, 1998 through February 28, 1999. This evidence does not address the relevant issue as to whether appellant was capable of performing the job offered to him in 1992. Therefore it does not raise a substantial question as to the correctness of the Office's September 1, 1993 decision that appellant had refused an offer of suitable work.

Appellant also submitted a May 5, 1999 narrative report from Dr. Laran Lerner, a Board-certified physiatrist, who treated appellant for cervical and lumbar strains and other back conditions and also for post-traumatic arthritis of the right knee. This report does not address the issue as to whether appellant was capable of performing the job offered to him in 1992 and therefore it does not raise a substantial question as to the correctness of the Office's September 1, 1993 decision's findings that he refused an offer of suitable work.

The decision of the Office of Workers' Compensation Programs dated August 27, 1999 is affirmed.

Dated, Washington, DC
January 22, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹⁷ *Gregory Griffin, supra* note 5.