

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUPERT R. ROBINSON and U.S. POSTAL SERVICE,
MAIN POST OFFICE, New Orleans, LA

*Docket No. 00-2686; Submitted on the Record;
Issued July 18, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On April 28, 1998 appellant, then a 50-year-old distribution operations supervisor, filed a traumatic injury claim alleging that on April 16, 1998 he developed an emotional condition after Anthony T. Dupuy, distribution operations manager and appellant's supervisor, made a threatening statement to him. Appellant stopped work on April 24, 1998.

By decision dated June 12, 1998, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty. In a June 29, 1998 letter, appellant requested reconsideration of the Office's decision.

In a July 1, 1998 decision, the Office denied appellant's request for modification based on a merit review of his claim. Appellant requested reconsideration of the Office's decision by letter dated July 22, 1999.

By decision dated February 5, 1999, the Office denied appellant's request for modification based on a merit review of his claim. In a March 23, 2000 letter, appellant requested reconsideration.

In a June 26, 2000 decision, the Office denied appellant's request for a merit review of his claim on the grounds that his request for reconsideration was untimely filed and it did not establish clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that

appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

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.¹ As appellant filed his appeal with the Board on August 23, 2000, the only decision properly before the Board is the Office's June 26, 2000 decision.

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ The Office, through its 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.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶

The last merit decision in this case was issued by the Office on February 5, 1999 wherein the Office denied appellant's request for modification based on a merit review of his claim. Since appellant's March 23, 2000 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁷ Office procedures state 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.⁸

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 20 C.F.R. § 10.607(a).

⁵ See cases cited *supra* note 3.

⁶ *Larry L. Lilton*, 44 ECAB 243 (1992).

⁷ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(d) (May 1996); see also, 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ 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.¹⁵

The issue for purposes of establishing clear evidence of error in this case is whether appellant has submitted evidence establishing that there was an error in the Office's determination that he did not sustain an emotional condition in the performance of duty.

In support of his request for reconsideration, appellant submitted a July 17, 1998 report of Dr. Michael E. Lavigne, Jr., a Board-certified internist, noting that on April 16, 1998 he suffered a stressful situation at work and that he was unable to work. Dr. Lavigne stated that appellant was seen in his office and that indeed he was under severe stress with anxiety. He noted that appellant was referred to Dr. Lionel Guillaume, a Board-certified psychiatrist, for an examination and recommended that appellant stay off work from April 16, 1998 until he was evaluated by Dr. Guillaume. Dr. Lavigne further noted that appellant was considered disabled during this time. Dr. Guillaume's October 7, 1998 duty status report indicated the date of injury as April 16, 1998 and described the injury as appellant being threatened by his immediate supervisor, which caused stress with anxiety. He diagnosed adjustment disorder.

Dr. Lavigne's July 17, 1998 report is repetitive of his June 11, 1998 report, which was previously of record; and Dr. Guillaume's duty status report is duplicative because as it was previously of record. Accordingly, the Board finds that the medical evidence submitted by appellant is insufficient to establish clear evidence of error on the part of the Office.

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *Jesus D. Sanchez*, *supra* note 3.

¹² *Leona N. Travis*, *supra* note 10.

¹³ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁵ *Gregory Griffin*, *supra* note 7.

As appellant has not submitted any evidence raising a substantial question as to the correctness of the Office's February 5, 1999 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 June 26, 2000 is hereby affirmed.

Dated, Washington, DC
July 18, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member