

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE J. HAMILTON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Omaha, NE

*Docket No. 00-1468; Submitted on the Record;
Issued June 5, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review on the grounds that his application was untimely filed and failed to present clear evidence of error.

On October 29, 1996 appellant, then a 38-year-old housekeeping aide, filed an occupational disease claim alleging that he sustained stress and depression causally related to factors of his federal employment. He stopped work on May 30, 1996.

By decision dated June 23, 1997, the Office denied appellant's claim for an emotional condition on the grounds that he had not established an injury in the performance of duty.

In a letter received by the Office on July 24, 1997, appellant requested a hearing before an Office hearing representative. Appellant's representative subsequently requested that the Office render a decision on the written record. By decision dated June 16, 1998 and finalized June 18, 1998, a hearing representative affirmed the Office's July 24, 1997 decision. The hearing representative found that appellant had not established any compensable factors of employment.

In a letter dated January 11, 2000, appellant, through his representative, requested reconsideration. His representative argued that appellant's lack of legal competence due to his condition caused the delay in requesting reconsideration.

By decision dated January 19, 2000, the Office found that appellant's request for reconsideration was untimely and did not establish clear evidence of error.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for merit review.

The only decision before the Board on this appeal is the Office's January 19, 2000 decision denying appellant's request for a review on the merits of its June 18, 1998 decision denying his claim that he sustained an emotional condition in the performance of duty. Because more than one year has elapsed between the issuance of the Office's June 18, 1998 decision and March 16, 2000, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the June 18, 1998 Office decision.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; or (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

In its January 19, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on June 18, 1998 and appellant requested reconsideration by letter dated January 11, 2000, which was more than one year after June 18, 1998.

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."⁷ 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.⁸

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.607(a).

⁵ 20 C.F.R. § 10.607(b); *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁸ *Anthony Lucszynski*, 43 ECAB 1129 (1992).

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 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.¹⁵

In this case, the evidence submitted by appellant does not establish clear evidence of error because it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Office denied appellant's claim for an employment-related emotional condition on the grounds that the work incidents and situations which he felt caused his condition were either not established as factual or did not arise in the performance of duty.

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹⁶ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that

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

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

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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

¹⁴ See *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

¹⁶ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹⁷

In support of his untimely request for reconsideration, appellant submitted a report dated November 19, 1997 from Dr. Janet McGivern, a Board-certified psychiatrist, who diagnosed post-traumatic stress disorder and major depression caused by discrimination by the employing establishment. Dr. McGivern's report, however, is not relevant to the issue in this case, which is whether appellant has submitted sufficient factual evidence to establish a compensable factor of employment. The Office need not address the medical evidence if appellant has not established any compensable factors of employment.¹⁸ Therefore, the Office properly found Dr. McGivern's report insufficient to establish clear evidence of error.

In his request for reconsideration, appellant's representative argued that appellant was unable to request reconsideration timely due to his emotional condition. However, the Office has the discretionary authority under section 8128(a) to impose a one-year time limitation as promulgated at 20 C.F.R. § 10.607. The Board has previously recognized that the regulations do not provide that a late filing may be excused for extenuating circumstances, including incompetency.¹⁹

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the 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 in denying further review of the case.

¹⁷ *Id.*

¹⁸ *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

¹⁹ *Donald Jones-Booker*, 47 ECAB 785 (1996).

The decision of the Office of Workers' Compensation Programs dated January 19, 2000 is hereby affirmed.

Dated, Washington, DC
June 5, 2001

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member