

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL L. BRANDT and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Omaha, NE

*Docket No. 00-2116; Submitted on the Record;
Issued June 7, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the grounds that his application for review was untimely filed and failed to present clear evidence of error.

On June 18, 1997 appellant, then a 45-year-old supervisor of air traffic controllers, filed a notice of traumatic injury stating that he developed a stress condition when his manager proposed to suspend him for 14 days based on false accusations of wrongdoing.

In a decision dated October 7, 1997, the Office denied compensation on the grounds that appellant failed to establish that he sustained an emotional condition while in the performance of duty.

Appellant requested reconsideration on October 16, 1997 and submitted additional evidence.

In a January 26, 1998 decision, the Office denied modification of its prior decision following a merit review.

Appellant filed another request for reconsideration by letter dated April 6, 2000. He submitted a December 27, 1999 notice of hearing before the Equal Employment Opportunity Commission (EEOC), an October 21, 1998 letter of instructions for hearing before the EEOC and a copy of an EEOC decision issued by an administrative judge on March 27, 2000 regarding appellant's allegations of racial and age discrimination.

In a decision dated April 21, 2000, the Office determined that appellant's request for reconsideration was untimely filed and that the evidence submitted by appellant failed to establish 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 May 25, 2000, the April 21, 2000 decision is the only decision properly before the Board.

The Board finds that appellant filed an untimely reconsideration request on April 10, 2000 and failed to demonstrate clear evidence of error.

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 This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ 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.⁶ 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).⁷

In this case, appellant requested for reconsideration of the Office's January 26, 1998 merit decision on April 6, 2000. Because appellant's letter was not filed with the Office within the one-year deadline for requesting reconsideration,⁸ the Office properly determined that appellant's April 6, 2000 reconsideration request was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.⁹ In accordance with Office

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8128(a).

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

⁴ 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."

⁵ 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 new evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b) (1999).

⁶ 20 C.F.R. § 10.607(a) (1999).

⁷ *See Leon D. Faidley, Jr.*, *supra* note 3.

⁸ 20 C.F.R. § 10.607(a) (1999) states that a reconsideration request will be considered timely filed if postmarked by the U.S. Postal Service within the time period allowed. If there is no postmark, the regulation permits the Office to rely on other evidence to establish the mailing date.

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

procedures, 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.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must 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 part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁷

With his untimely reconsideration request, appellant did not submit any new and relevant evidence.¹⁸ As noted by the Office, appellant's request for reopening the record was based solely on his disagreement with the Office's prior decision. He disagreed with how the evidence was evaluated but failed to present any new and pertinent evidence or argument demonstrating clear evidence of error by the Office in denying the claim. Therefore, the Office properly issued a decision on April 21, 2000 finding that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

¹⁰ 20 C.F.R § 10.607(b) (1999); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

¹³ *See Jesus D. Sanchez*, *supra* note 3.

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

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

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁷ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

¹⁸ The EEOC decision confirms that appellant was not subject to age or racial discrimination; therefore, the Office did not err in finding that appellant failed to allege a compensable factor of employment with respect to his emotional claim.

The April 21, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 7, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member