

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HENRY G. CARTER and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Dayton, OH

*Docket No. 00-2004; Submitted on the Record;  
Issued May 29, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error; and (2) whether the Office properly denied his request for an oral hearing on his claim by an Office hearing representative.

On November 12, 1996 appellant, then a 33-year-old custodial worker, injured his lower back while picking up a bucket of water. Appellant filed a claim on the date of injury, which the Office accepted for payment of limited medical expenses. Appellant was placed on restricted duty for a period of months, then returned to work.

Appellant filed a claim for recurrence of disability on April 21, 1998, claiming he had experienced a recurrence of his accepted back condition as of December 15, 1997. Appellant submitted numerous treatment notes and diagnostic reports with his request, but did provide a diagnosis or rationalized medical report causally relating his current condition or disability to the accepted back condition.

By letter dated June 10, 1998, the Office requested factual and medical evidence in support of the claim, including a comprehensive medical report. The Office requested that appellant submit the additional evidence within 30 days. Appellant did not respond to this request within 30 days.

By decision dated July 27, 1998, the Office denied appellant's claim based on a recurrence of his employment-related disability.

By letter to the Office received September 30, 1999, appellant requested an oral hearing.

In a decision dated November 15, 1999, the Office found that appellant's request for an oral hearing was untimely filed. The Office noted that appellant's request was postmarked September 30, 1999, which was more than 30 days after the issuance of the Office's July 27,

1998 decision and that he was, therefore, not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

By letter dated December 10, 1999, appellant requested reconsideration of the September 23, 1996 decision. In support of his request, appellant submitted an August 5, 1998 report from Dr. Wylie A. Slagel, Board-certified in preventive medicine. Dr. Slagel reviewed the history of appellant's back condition, stated findings on examination and concluded:

"The only thing that is unclear to this examiner is the acute mechanism of injury on December 4, 1997. However, the fact still remains that the lifting of the bucket [of] water in November 1996, while twisting and the subsequent events of back problems are more likely than not related."

Appellant also submitted results of diagnostic tests administered in January 1999 and treatment reports from Dr. Slagel dated February, March and April 1999.

By decision dated December 17, 1999, the Office denied reconsideration without a merit review, finding appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error. The Office, therefore, denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> does not entitle an employee to a review of an Office decision as a matter of right.<sup>2</sup> This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, or increase the compensation awarded; or
- (2) awarded compensation previously reused or discontinued."

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>3</sup> 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.<sup>4</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).<sup>5</sup>

The Office properly determined in this case that appellant failed to file a timely application for review. Appellant requested reconsideration on March 23, 1999; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

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.<sup>6</sup> Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.<sup>7</sup>

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>9</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> 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.<sup>12</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative

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<sup>3</sup> 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 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).

<sup>4</sup> 20 C.F.R. § 10.607(b).

<sup>5</sup> *See* cases cited *supra* note 2.

<sup>6</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>8</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> *See Jesus D. Sanchez*, *supra* note 2.

<sup>11</sup> *See Leona N. Travis*, *supra* note 9.

<sup>12</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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's decision.<sup>13</sup> The Board makes an independent determination of whether an appellant 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.<sup>14</sup>

The Board finds that appellant's December 10, 1999 request for reconsideration fails to show clear evidence of error. The Office reviewed Dr. Slagel's August 5, 1998 report, which, while generally relevant to the issue of whether appellant's current condition is causally related to his November 12, 1996 employment injury, is not sufficient to *prima facie* shift the weight of the evidence in favor of appellant. The medical opinion evidence did not present any evidence of error on the part of the Office in appellant's request letter. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The Board finds that the Office properly denied appellant's request for an oral hearing on his claim before an Office hearing representative.

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision.<sup>15</sup> A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.<sup>16</sup> The Office has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>17</sup> In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>18</sup>

In the present case, because appellant's September 30, 1999 request for a hearing was postmarked more than 30 days after the Office's July 27, 1998 decision, he is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that he could pursue his claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing.<sup>19</sup>

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<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 2.

<sup>14</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

<sup>15</sup> 5 U.S.C § 8124(b)(1).

<sup>16</sup> 20 C.F.R. § 10.131(a)(b).

<sup>17</sup> *William E. Seare*, 47 ECAB 663 (1996).

<sup>18</sup> *Id.*

<sup>19</sup> The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g.*, *Jeff Micono*, 39 ECAB 617 (1988).

The December 17 and November 15, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
May 29, 2001

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member