

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETER ZINION and U.S. POSTAL SERVICE,
POST OFFICE, St. Petersburg, FL

*Docket No. 01-3; Submitted on the Record;
Issued May 21, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed pursuant to 20 C.F.R. § 10.607 and failed to present clear evidence of error.

On September 15, 1997 appellant, then a 43-year-old carrier technician was assaulted by a patron of the employing establishment while performing work duties. The Office accepted the claim for depression. Appellant stopped work on September 16, 1997 and did not return. He was placed on the periodic roll in December 1997 and received appropriate compensation.

In a notice of proposed termination dated December 7, 1998, the Office advised appellant that it proposed to terminate his compensation, based on the medical report of the referee examiner, Dr. Kirti Pandya, a Board-certified psychiatrist. Dr. Pandya found that appellant had no continuing condition or disability as a result of the injury of September 15, 1997 and could return to work.¹

By decision dated January 27, 1999, the Office terminated appellant's benefits effective January 26, 1999 on the grounds that the weight of the medical evidence supported the cessation of his injury-related depression. In a letter dated June 23, 2000, appellant requested reconsideration and submitted additional evidence.

¹ In the proposal letter, the Office further noted that a conflict in the medical evidence existed between Drs. Gerard Boutin, appellant's treating psychiatrist and Arthur Forman, the second opinion examiner on the issue of continuing disability. Appellant was referred for an independent examination with Dr. Pandya whose opinion the Office found held the weight of the evidence. Dr. Pandya found that appellant did not suffer from a psychological or psychiatric disorder causally related to factors of his employment and that he was capable of performing his work duties.

By decision dated August 23, 2000, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that appellant's request was untimely filed and failed to establish clear evidence of error.

The Board finds that the Office in its August 23, 2000 decision, properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate 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.² As appellant filed his appeal with the Board on September 21, 2000, the only decision properly before the Board is the August 23, 2000 Office decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ the Office's regulations provide that a claimant's application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law, (2) advances a relevant legal argument not previously considered by the Office, or (3) constitutes relevant and pertinent new evidence not previously considered by the Office." To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.⁴ 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. The application must establish on its face, that such decision was erroneous.⁵

In its August 23, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the January 27, 1999 decision, which stated that, if he requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. As appellant's June 23, 2000 reconsideration request was outside the one-year time limit, which began the day after January 27, 1999, appellant's application for review was untimely.

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 of the case to determine whether the application establishes "clear evidence of error." The Office will reopen a claimant's case for merit review

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193. 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 application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(a).

⁵ 20 C.F.R. § 10.607(b).

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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ 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.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

In the instant case, the Board finds that appellant's June 23, 2000 request for reconsideration failed to establish clear evidence of error. In support of his claim, appellant submitted progress notes from January 1998 through July 1999, along with a medical report dated January 2, 1999 from Dr. Gerard Boutin, his treating psychologist. Dr. Boutin stated in the report that he disagreed with Dr. Forman's opinion, the second opinion examiner and with Dr. Pandya's opinion, the referee examiner who both determined that appellant had no continuing condition related to employment injury and could return to work. He indicated that appellant was suffering from post-traumatic stress disorder and was unable to work because of the distress of the traumatic event and fear of returning to his position as a postal carrier, which directly related to the event. Appellant also submitted a letter dated January 21, 2000 from Dr. Ashok Patel, a Board-certified psychiatrist, who reported that he had evaluated appellant on January 7, 2000, reviewed his records and psychological test results and determined that appellant was suffering from post-traumatic stress disorder, directly related to the trauma and stress of attacks he sustained in the performance of duty. Appellant further submitted a letter

⁶ 20 C.F.R. § 10.607(a).

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ See *Gregory Griffin*, 41 ECAB 458 (1990).

dated February 9, 2000 from Dr. Boutin, in which he concurred with Dr. Patel that appellant continued to suffer from post-traumatic stress disorder, created by the violent assaults on his person while on duty as a postal carrier.

Both Drs. Boutin and Patel indicate in these reports that appellant suffered from symptoms related to post-traumatic stress disorder due to the traumatic work event and could not return to work with the employing establishment. Both physicians had previously diagnosed the medical condition of post-traumatic stress disorder and discussed their belief that the condition was related to the employment injury, however, the condition was not accepted by the Office. As such, this evidence is not immaterial and cumulative of evidence already of record. Furthermore, these reports do not contain sufficient rationale to support that appellant has any continuing disability causally related to the employment injury. Therefore, the reports fail to raise a substantial question concerning the correctness of the Office's August 23, 2000 decision and are, therefore, insufficient to establish clear evidence of error.

Because appellant's untimely reconsideration request failed to present clear evidence of error, the Board finds that the Office's refusal to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

For the foregoing reasons, the August 23, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 21, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member