

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALVIN JOSEPH and U.S. POSTAL SERVICE,
POST OFFICE, Amarillo, TX

*Docket No. 01-868; Submitted on the Record;
Issued November 28, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is 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.

This is the second appeal in the present case. Prior to the first appeal, appellant filed an occupational disease claim on September 6, 1995 alleging that factors of his employment caused degenerative disease in his knees and a bow leg condition. By decision dated March 12, 1996, the Office denied appellant's claim on the grounds that the evidence failed to establish fact of injury. Following a request for reconsideration, the Office in a decision dated January 9, 1997 modified the March 12, 1996 decision, finding that appellant had established the alleged work conditions, however, failed to establish that his physical conditions were causally related to his employment.

Appellant again timely requested reconsideration and by decision dated February 11, 1997, the Office denied appellant's request for review on the grounds that the evidence was duplicative and insufficient to warrant merit review. In the prior appeal, the Board issued a decision dated February 19, 1999, which affirmed the January 9 and February 11, 1997 Office decisions.¹

Appellant's Congressional representative forwarded a letter from appellant to the Office.

In a letter addressed to appellant dated July 17, 2000, the Office reviewed the procedural history of his case and advised that although his appeal rights had expired he could submit evidence to establish clear error to the Office for further consideration.

¹ Docket No. 97-1424, issued February 19, 1999.

On July 29, 2000 appellant requested reconsideration before the Office and submitted additional evidence.

By decision dated January 11, 2001, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and appellant failed to present clear evidence that the Office's most recent merit decision was erroneous.

The Board has reviewed the record and finds that the Office properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.² As appellant filed his appeal on January 22, 2001, the only decision over which the Board has jurisdiction on this appeal is the January 11, 2001 decision denying his request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ 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.⁷ 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).⁸

In this case, appellant's letter requesting reconsideration is dated July 29, 2001. The most recent merit decision is dated February 19, 1999. Since appellant's request for reconsideration was made more than one year after the Board's prior decision, it is untimely.

² See 20 C.F.R. § 501.3(d).

³ 5 U.S.C. § 8128(a).

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 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."

⁶ 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 evidence not previously considered by the Office; see 20 C.F.R. § 10.606.

⁷ 20 C.F.R. § 10.607(a).

⁸ See *Leon D. Faidley, Jr.*, *supra* note 3.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.⁹ In accordance with this holding 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, which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be 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

Appellant argued with his July 29, 2000 reconsideration request that the Office should have relied upon the medical opinion of Dr. Andrew Booker, an attending physician, that his diagnosed injury was job related. Appellant submitted a new medical report from Dr. Booker dated May 3, 2000, which reported that appellant had been on permanent work restrictions related to a separate foot condition since 1993. He also noted that appellant had undergone resection of an anterior horn tear of the medial meniscus and on January 4, 2000 he underwent a second arthroscopic surgery. Dr. Booker stated that appellant had degenerative changes in his

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

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

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

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

¹³ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁴ *See Leona N. Travis*, *supra* note 11.

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

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁷ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

knee and that he did not dispute opinions of his previous physicians that his degenerative arthritis was related to employment. He then stated that appellant's progressive medial compartment degenerative arthritis was clearly aggravated by his position with the employing establishment. Appellant also submitted a copy of his February 2, 2000 recurrence of disability claim form and stated in his request that he had not yet received a decision on the claim.

The Office found Dr. Booker's report to be of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant or to raise a substantial question as to the correctness of the Office's January 9, 1997 decision. In order to establish clear evidence of error in this case, appellant should have provided evidence showing that the January 9, 1997 decision was erroneous, based on evidence on file at the time of the decision. Dr. Booker's report failed to provide a rationalized medical opinion regarding a causal relationship between appellant's diagnosed condition and the factors of employment to which he attributed his condition. As this evidence does not raise a substantial question as to the correctness of the prior January 9, 1997 Office decision or *prima facie* shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

The Office, therefore, did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 11, 2001 is hereby affirmed.

Dated, Washington, DC
November 28, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member