

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD E. THOMPSON and DEPARTMENT OF THE ARMY,
DEFENSE LOGISTICS AGENCY, New Cumberland, PA

*Docket No. 00-941; Submitted on the Record;
Issued October 29, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Board has duly reviewed the case record and finds that the Office properly determined that appellant's request for reconsideration was untimely and did not demonstrate clear evidence of error

The only decision before the Board on this appeal is the Office's October 21, 1999 decision denying appellant's application for a reconsideration of the Office's October 7, 1998 decision.¹ Because more than one year has elapsed between the issuance of the Office's October 7, 1998 merit decision and January 4, 2000, the postmarked date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 7, 1998 decision.²

To obtain a review of a case on its merits under section 8128(a) of the Federal Employees' Compensation Act, a claimant must meet the following requirements:

“(b) The application for reconsideration, including all supporting documents, must --

- (1) Be submitted in writing;
- (2) Set forth arguments and contain evidence that either;

¹ This decision established that appellant was no longer disabled for work due to the effects of his accepted employment injury.

² See 20 C.F.R. § 501.3(d)(2).

- (i) Shows that OWCP erroneously applied or interpreted a specific point of law;
- (ii) Advances a relevant legal argument not previously considered by OWCP; or
- (iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”³

To be entitled to a merit review of an Office decision denying or terminating benefits, a claimant also must file his or her application for review within one year of the date of that decision.⁴ 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 the Act.⁵ 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.⁶

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). One such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. However, the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error.

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 show 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 determination of clear error entails a limited review by the

³ 20 C.F.R. § 10.606(b)(1), (2).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *Mohamed Yunis*, *supra* note 5; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

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

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

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

¹⁰ *Leona N. Travis*, *supra* note 8.

Office of the evidence submitted with the reconsideration request and whether the new evidence demonstrated 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 on 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.¹³

In its October 21, 1999 decision, the Office determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on October 7, 1998 and appellant's request for reconsideration was dated October 13, 1999, which was clearly more than one year later. Therefore, appellant's request for reconsideration of his case on its merits was untimely filed.¹⁴

In support of his reconsideration request, appellant submitted a report from Dr. Jay Cho, a Board-certified physiatrist, who identified appellant's back problems, long-term goals and rehabilitation potential and recommended independent exercise. Dr. Cho noted an intervening injury in January 1993 and exacerbation of appellant's low back symptomatology due to March 1995 motor vehicle accident. He related that appellant had been working a sedentary, full-time position until his office was closed in September 1998. Dr. Cho disagreed with Dr. Baker that appellant's current low back pain was of unknown etiology but agreed that appellant could work in a light-duty job. Inasmuch as Dr. Cho's report concurs with Dr. Baker's opinion that appellant is capable of light-duty work, the Board finds that this evidence is insufficient to establish clear evidence of error on the part of the Office in its October 21, 1999 denial of merit review. Therefore, the Office acted within its discretion in denying further review of appellant's case on its merits under 5 U.S.C. § 8128(b)(2)(iii).

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

¹² *Leon D. Faidley*, *supra* note 5.

¹³ *Gregory Griffin*, 41 ECAB 186 (1989), *aff'd on recon.*, 41 ECAB 458 (1990).

¹⁴ Appellant requested that the one-year time limit be waived for good cause shown, namely that Dr. Cho failed to respond to three requests to submit a narrative medical report. Neither the Act nor its implementing regulation provides for such a waiver.

The October 21, 1999 the decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 29, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member