

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE C. SMALLS and DEPARTMENT OF THE ARMY, OAHU
CONSOLIDATED FAMILY HOUSING OFFICE, Fort Shafter, HI

*Docket No. 00-2779; Submitted on the Record;
Issued October 3, 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 abused 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.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for merit review on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

In a prior appeal,¹ the Board affirmed the December 1, 1994 decision of the Office on the grounds that the Office acted its discretion in refusing to reopen appellant's case because his application for review was not timely filed and failed to present clear evidence of error.² The Board determined that the evidence submitted by appellant did not clearly show that the Office had erred in denying appellant's claim that he sustained an employment-related emotional

¹ Docket No. 95-1566.

² In October 1991 appellant, then a 30-year-old forklift operator, filed a claim alleging that he sustained an emotional condition due to various incidents and conditions at work. By decision dated June 12, 1992, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors. By decision dated May 28, 1993, an Office hearing representative affirmed the Office's June 12, 1992 decision. By decision dated April 12, 1994, the Office denied appellant's timely request for merit review. By decision dated December 1, 1994, the Office denied appellant's reconsideration request on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

condition.³ The facts and circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.⁴

On June 16, 1998 appellant again requested reconsideration of his claim. By decision dated October 6, 1998, the Office denied appellant's claim on the grounds that his application for review was not timely filed and failed to present clear evidence of error. Appellant filed an appeal with the Board, which remanded the case to the Office for reconstruction and proper assemblage of the case record to be followed by issuance of an appropriate decision to protect appellant's appeal rights.⁵ On July 3, 2000 the Office reissued its October 6, 1998 decision.

The only decision before the Board on this appeal is the Office's July 3, 2000 decision denying appellant's request for a review on the merits of its May 28, 1993 decision. Because more than one year has elapsed between the issuance of the Office's May 28, 1993 decision and September 13, 2000, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the May 28, 1993 decision.⁶

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁷ a claimant must also file his or her application for review within one year of the date of the decision for which review is sought.⁸ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁹

In its July 3, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on May 28, 1993 and appellant's request for reconsideration was dated June 16, 1998, more than one year after May 28, 1993.

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

³ On November 28, 1997 the Board issued an order granting Director's petition for correction and denying appellant's petition for reconsideration. The Board corrected errors in the procedural history of the case, which had been identified by the Director of the Office, but denied the Director's petition for reconsideration of its April 15, 1997 decision.

⁴ The Office has accepted that appellant sustained an employment-related aggravation of his bilateral pes planus. The record contains documents regarding this injury, but it is not the subject of the present appeal. In November 1994, appellant had filed an appeal with the Board. The Board dismissed the appeal by order dated December 12, 1994 (Docket No. 94-987) after appellant elected to file a reconsideration request with the Office.

⁵ Docket No. 99-560 (May 31, 2000). On May 19, 1999 the Board had served the Director of the Office with a copy of an application for review which had been filed by appellant.

⁶ See 20 C.F.R. § 501.3(d)(2).

⁷ 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 on application." 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”¹⁰ Office procedures provide that 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.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸

¹⁰ *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ 20 C.F.R. § 10.607(b); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). The Office therein states:

“The term ‘clear evidence of error’ is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which if submitted prior to the Office’s denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case....”

¹² *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹³ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁴ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁵ *See Leona N. Travis*, *supra* note 15.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 11.

¹⁸ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

In accordance with its internal guidelines and with Board precedent, the Office properly conducted a limited review to determine whether appellant's reconsideration showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his request. The Office stated that the evidence submitted by appellant did not clearly show that the Office's prior decision was in error.

In support of his reconsideration request, appellant submitted statements which contained arguments regarding his belief that he had sustained an emotional condition due to certain employment factors. However, these statements were essentially similar to statements which appellant had previously submitted to the Office and they do not clearly show that the Office committed error in its prior decisions.¹⁹

Appellant also submitted numerous documents which he indicated provided support for his arguments.²⁰ A number of these documents had been previously submitted and considered by the Office and therefore would not show that the Office erred in its prior decisions.

Appellant also submitted numerous administrative and personnel records which were not relevant to his claim that he sustained an employment-related emotional condition.²¹ He submitted several medical reports but these also are not relevant because appellant's claim was denied on the basis that he had not established any compensable employment factors. Therefore, the documents submitted by appellant do not clearly show that the Office committed error in its prior decisions and the Office properly denied his request for a merit review.

¹⁹ Appellant had claimed that he sustained an emotional condition due to various employment factors, including harassment by supervisors, wrongful working beyond his restrictions, and improper denial of leave.

²⁰ A number of these documents had been previously submitted, but some of them appeared to be new to the case file.

²¹ For example, appellant submitted documents concerning his entitlement to retirement compensation, a matter unrelated to the issue currently before the Board. Appellant also submitted a number of letters of commendation, but did not explain the relevance of these documents.

The July 3, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 3, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member