

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CRAIG A. WEIRAUCH and U.S. POSTAL SERVICE,
POST OFFICE, Saginaw, MI

*Docket No. 01-708; Submitted on the Record;
Issued October 9, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and failed to show clear evidence of error.

The Office accepted that appellant sustained a right shoulder strain while in the performance of duty on January 21, 1992. Appellant returned to work in April 1992 and filed a notice of recurrence of disability as of October 9, 1992. By decision dated June 9, 1993, the Office denied the recurrence claim. By decision dated April 18, 1994, an Office hearing representative affirmed the prior decision. In a decision dated March 24, 1995, the Office denied modification.

In a decision dated February 13, 1996, the Office issued a schedule award for a 19 percent permanent impairment to the right arm. In a decision dated November 7, 1996, the Office denied modification of the schedule award decision.

In a letter dated October 26, 2000, appellant requested reconsideration of his claim. He did not indicate the date of the relevant decision. By letter dated November 20, 2000, appellant requested reconsideration and discussed a recurrence of disability.¹ In a decision dated January 4, 2001, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

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

¹ Appellant had filed an appeal with the Board by letter dated September 20, 2000. By order dated November 20, 2000, the Board dismissed the appeal (Docket No. 01-21) based on a letter dated October 25, 2000 requesting withdrawal of the appeal.

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ 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.⁶ 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).⁷

In this case, the last merit decision on the recurrence claim was March 24, 1995. Appellant's request for reconsideration was made more than one year after the final merit decision and therefore it is untimely.

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.⁸ In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607(a),⁹ 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

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 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 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.

⁶ 20 C.F.R. § 10.607.

⁷ *See Leon D. Faidley, Jr.*, *supra* note 3.

⁸ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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).

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

With his November 20, 2000 request for reconsideration, appellant filed medical reports from Dr. W. Akbar, an orthopedic surgeon, that were previously of record. These reports do not constitute new medical evidence. The Board notes that after the March 24, 1995 Office decision appellant had submitted a brief witness statement from coworker stating that appellant was made to work outside his restrictions, but no further details were provided. The evidence is not sufficient to establish a recurrence of disability based on a change in the nature and extent of the light-duty job.

The Board finds that the factual and medical evidence submitted is not sufficient to show clear evidence of error in this case. Accordingly, the Office properly denied the reconsideration request.

The decision of the Office of Workers' Compensation Programs dated January 4, 2001 is affirmed.

Dated, Washington, DC
October 9, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹⁴ See *Leona N. Travis*, *supra* note 12.

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

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 3.

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