

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS BOEHM and U.S. POSTAL SERVICE, BUFFALO
MANAGEMENT SECTION CENTER, Buffalo, NY

*Docket No. 01-799; Submitted on the Record;
Issued October 29, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on October 20, 2000 on the grounds that his request for reconsideration was not timely filed and did not establish clear evidence of error.

This case has previously been before the Board on appeal. In a decision dated July 7, 1997, the Board found that appellant had not established that he had continuing disability causally related to his December 22, 1993 employment injury on or after December 26, 1993.¹ Appellant disagreed with the Board's decision and filed a petition for reconsideration before the Board. The Board denied this petition by decision dated October 22, 1997.

Following the Board's July 7, 1997 decision and October 22, 1997 decision denying his petition for reconsideration, appellant continued to assert that the Board's decisions were incorrect both legally and factually. Appellant requested reconsideration from the Office by letter dated June 2, 2000. By decision dated October 20, 2000, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that appellant's request for reconsideration was not timely filed and did not contain clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits.

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

¹ Docket No. 97-260.

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

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. One such limitation is that the Office 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.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁶

Appellant requested reconsideration on June 2, 2000. Since appellant filed his reconsideration request more than one year from the Board's July 7, 1997 merit decision, the Board finds that the Office properly determined that said request was untimely.

In those cases where requests for reconsideration are not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁷ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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

⁴ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁵ 20 C.F.R. § 10.607. The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

⁷ *Thankamma Mathews*, *supra* note 3 at 770.

⁸ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

⁹ *Thankamma Mathews*, *supra* note 3 at 770.

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Jesus D. Sanchez*, *supra* note 4 at 968.

¹² *Leona N. Travis*, *supra* note 10.

¹³ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

and raise a substantial question as to the correctness of the Office's decision.¹⁴ The Board must make 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.¹⁵

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in the case is a medical one of whether appellant's December 22, 1993 employment injury resulted in disability for work after December 26, 1993. Appellant did not submit any medical evidence in support of his request for reconsideration.

Appellant argued that the Board's decisions violated his legal and constitutional rights by failing to accord his physician proper respect and failing to detail the specific errors of fact and law listed in appellant's initial petition for reconsideration. The Board addressed these allegations in the initial decision denying the petition for reconsideration. Appellant's continuing disagreement with the Board's decisions did not constitute evidence that would require the Office to reopen his claim for consideration of the merits.

Appellant also alleged that the Board erred in failing to respond to his October 28 and December 1, 1997 petitions for reconsideration. The Board notes that its jurisdiction for reviewing a petition for reconsideration is limited to those petitions filed within 30 days of the date of the decision unless some other time is specified in the decision.¹⁶ As the July 7, 1997 decision did not contain any specified time for petition, appellant's right to petition for reconsideration was limited to 30 days from the date of the decision or August 7, 1997. The additional petitions were not timely and there is no provision in the regulations governing the Board's procedures to allow the Board to respond to consecutive petitions for reconsideration by appellant.

As appellant has failed to establish clear evidence of error on the part of the Office, the Office properly denied appellant's request for reconsideration.

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁵ *Gregory Griffin*, *supra* note 5.

¹⁶ 20 C.F.R. § 501.7.

The October 20, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 29, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member