

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEONEL BARREIRO and U.S. POSTAL SERVICE,
POST OFFICE, San Antonio, TX

*Docket No. 00-555; Submitted on the Record;
Issued September 14, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

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.

The only Office decision before the Board on this appeal is the September 22, 1999 decision denying appellant's request for reconsideration. Since more than one year has elapsed between the date of the Office's most recent merit decision on July 31, 1997, denying appellant's schedule award claim, and the filing of appellant's appeal on November 12, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.¹

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.² 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).³

The Office properly found, by its September 22, 1999 decision, that the one-year time limit for filing a request for reconsideration of the Office's July 31, 1997 decision expired on

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

² 20 C.F.R. § 10.607(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

July 31, 1998, and that the request for reconsideration received on September 13, 1999 was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held however 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.⁴ Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰

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.¹¹ 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.¹²

Appellant did not submit any new evidence in support of his September 13, 1999 request for reconsideration. Appellant only stated in his letter that the assistant of his treating physician, Dr. Joe G. Gonzales, Board-certified in physical medicine and rehabilitation, had "made a lot of mistakes and was fired for those mistakes." Appellant stated: "he gave me a rating of 0 and Dr. Gonzales said I have a rating of 14 percent disability." These statements by appellant,

⁴ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁶ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *Jesus D. Sanchez*, *supra* note 3.

⁹ *Leona N. Travis*, *supra* note 7.

¹⁰ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 3.

¹² *Gregory Griffin*, *supra* note 4.

without any accompanying evidence, do not raise a substantial question as to the correctness of the Office's July 31, 1997 decision denying appellant's claim for a schedule award.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied it.

The September 22, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member