

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT AYRES and U.S. POSTAL SERVICE,
POST OFFICE, Somerdale, NJ

*Docket No. 02-209; Submitted on the Record;
Issued August 2, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for a review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely and failed to present clear evidence of error.

This case has previously been before the Board on appeal. The Board's decision of February 9, 1995 affirmed an Office hearing representative's November 9, 1992 decision, finalized on November 12, 1992, finding that appellant failed to establish that he sustained an emotional condition due to his accepted employment injuries and factors of his federal employment.¹ The Board's decision of January 24, 2000 affirmed the Office's May 9, July 21 and December 24, 1997 decisions denying appellant's requests for reconsideration. The facts of the case are accurately set forth in the Board's decision.² On July 28, 2000, the Board denied appellant's February 8, 2000 petition for reconsideration on the grounds that appellant failed to establish any error of fact or law warranting further consideration.³

Appellant requested that the Office reconsider his claim by letter dated February 6, 2001.

¹ Docket No. 93-1010 (issued February 9, 1995). Before the Office and the Board, appellant contended that his emotional condition was aggravated by his accepted employment-related back injury, the requirement that he work with pain and the harassment he experienced as a result of his accepted employment injuries.

² Docket No. 98-1382 (issued January 24, 2000).

³ Docket No. 98-1382 (issued February 8, 2000).

By decision dated August 20, 2001, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and it failed to establish clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁴ As appellant filed his appeal with the Board on September 26, 2001 the only decision properly before the Board is the Office's August 20, 2001 decision denying appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ 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.⁷ 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).⁸

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁹

As the last merit decision in this case was issued by the Board on February 9, 1995, which affirmed the Office hearing representative's November 12, 1992 decision finding that appellant failed to establish that he sustained an emotional condition in the performance of duty, appellant's February 6, 2001 request for reconsideration was made outside the one-year time limitation. Thus, the Board finds that appellant's request for reconsideration was untimely filed.

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.¹⁰ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year

⁴ 20 C.F.R. §§ 501.2(c) 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

⁵ 5 U.S.C. § 8128(a).

⁶ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ See cases cited *supra* note 6.

⁹ *Larry L. Litton*, 44 ECAB 243 (1992).

¹⁰ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

filings 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 be manifested 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

Appellant did not submit any new evidence in support of his February 6, 2001 request for reconsideration. He only stated, in his letter, that he had provided ample factual evidence establishing that his back injury was the result of an injury he sustained while working for the employing establishment. Appellant further stated that he had provided adequate medical evidence establishing that he was in fact injured and that he received treatment for his injuries. These statements by him, without any accompanying evidence, do not raise a substantial question as to the correctness of the Office's decisions finding that appellant failed to establish that he sustained an emotional condition due to factors of his federal employment.

For these reasons, the Office did not abuse 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.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(d)(May 1996); see also 20 C.F.R. § 10.607(b).

¹² *Dean D. Beets*, 43 ECAB 1153 (1992).

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

¹⁴ *Jesus D. Sanchez*, *supra* note 6.

¹⁵ *Leona N. Travis*, *supra* note 13.

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

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁸ *Gregory Griffin*, *supra* note 10.

The August 20, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 2, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member