

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARRY JONES and U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, San Francisco, CA

*Docket No. 01-1259; Submitted on the Record;
Issued January 9, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's March 2, 2000 request for reconsideration; and (2) whether the Office properly determined that appellant's February 23, 2001 request for reconsideration was untimely and failed to show clear evidence of error.

On May 16, 1997 appellant filed a claim alleging that he sustained an emotional condition on May 14, 1997, causally related to his supervisors actions. By decision dated July 8, 1997, the Office denied the claim, finding that appellant had not established compensable work factors as contributing to an emotional condition. In a decision dated October 20, 1999, an Office hearing representative affirmed the prior decision.

In a letter dated March 2, 2000, appellant requested reconsideration. By decision dated April 5, 2000, the Office determined that the request for reconsideration was insufficient to warrant merit review of the claim. In a letter dated February 23, 2001, appellant again requested reconsideration. By decision dated March 8, 2001, the Office determined that the request was untimely and failed to show clear evidence of error.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.¹ As appellant filed his appeal on April 4, 2001, the only decisions over which the Board has jurisdiction on this appeal are the February 8, 2001 and April 5, 2000 decisions denying his requests for reconsideration.

The Board finds that the Office properly denied appellant's March 2, 2000 request for reconsideration.

¹ See 20 C.F.R. § 501.3(d).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provides that a claimant may obtain review of the merits of the 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.³ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁴

In this case, appellant submitted a December 30, 1997 report from Dr. Bert Levenson, a psychiatrist, in support of his request for reconsideration. This report had previously been submitted and was considered by the hearing representative in the October 20, 1999 decision. It is not new and relevant evidence, and is thus insufficient to require the Office to reopen the claim for merit review. Appellant did not meet any of the requirements of section 10.606(b)(2), and therefore the Office properly refused to reopen the case for merit review.

The Board further finds that the Office properly determined that appellant's February 23, 2001 reconsideration request was untimely and failed to show clear evidence of error.

Section 8128(a) of the Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁷ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁸ 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.⁹ 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).¹⁰

The appeal rights accompanying the October 20, 1999 decision indicated that appellant had one year to request reconsideration. The April 5, 2000 decision is not a merit review and

² 5 U.S.C. § 8128(a) (providing that "[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").

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.608(b); *see also* *Norman W. Hanson*, 45 ECAB 430 (1994).

⁵ 5 U.S.C. § 8128(a).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ 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."

⁸ *See* 20 C.F.R. § 10.606.

⁹ 20 C.F.R. § 10.607.

¹⁰ *See Leon D. Faidley, Jr., supra* note 6.

does not extend the time period for a timely reconsideration request. Since the February 23, 2001 reconsideration request was more than one year after the October 20, 1999 decision, 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.¹¹ 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 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.¹²

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹³ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹

With his reconsideration request appellant submitted additional medical evidence. Some of the medical evidence had been submitted prior to the hearing representative's decision and other new reports discuss appellant's left shoulder condition. In order to establish a claim for an emotional condition, appellant must first substantiate a compensable work factor, and then submit medical evidence on causal relationship between the compensable work factors and a

¹¹ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹³ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁶ *See Leona N. Travis*, *supra* note 14.

¹⁷ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁸ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁹ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

diagnosed condition.²⁰ The Office did not accept that a compensable work factor had been substantiated, and the evidence submitted on reconsideration does not show error in this regard. Appellant submitted a September 30, 1996 letter indicating that a discrimination complaint had been received by the Equal Employment Opportunity Commission, but this does not establish that discrimination occurred.

Appellant has not submitted evidence establishing clear evidence of error in the denial of his claim. Accordingly, the Office properly denied the February 23, 2001 reconsideration request.

The decisions of the Office of Workers' Compensation Programs dated March 8, 2001 and April 5, 2000 are affirmed.

Dated, Washington, DC
January 9, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

²⁰ See, e.g., *James D. Zurcher*, 48 ECAB 274 (1997).