

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FRANK W. WHITE and TENNESSEE VALLEY AUTHORITY,  
SEQUOYAH NUCLEAR PLANT, Chattanooga, TN

*Docket No. 01-296; Submitted on the Record;  
Issued July 18, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for 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 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. In its August 5, 1992 decision, the Board affirmed the Office's October 11, 1991 decision that appellant no longer had any disability after June 16, 1983 causally related to his September 25, 1972 employment injury. The facts of the case are set forth in the Board's decision.<sup>1</sup>

Subsequently, appellant filed several requests for reconsideration, which were denied by the Office.

In the most recent decision dated August 11, 1998, 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. In an April 12, 2000 letter, appellant requested reconsideration of the Office's decision. In a May 18, 2000 letter, appellant, through his counsel, requested reconsideration of the Board's decision.

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<sup>1</sup> Docket No. 92-194 (issued August 5, 1992).

By decision dated August 8, 2000, the Office again denied appellant's requests for reconsideration on the grounds that they were untimely filed and they 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.<sup>2</sup> As appellant filed his appeal with the Board on October 20, 2000 the only decision properly before the Board is the Office's August 8, 2000 decision denying appellant's requests for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> 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.<sup>5</sup> 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).<sup>6</sup>

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.<sup>7</sup>

As the last merit decision in this case was issued by the Board on August 5, 1992, which affirmed the Office's October 11, 1991 decision finding that appellant no longer had any disability after June 16, 1983 causally related to his September 25, 1972 employment injury, appellant's April 12 and May 18, 2000 requests for reconsideration were made outside the one-year time limitation. Thus, the Board finds that appellant's requests for reconsideration were 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 a clear evidence of error pursuant to the untimely request.<sup>8</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year

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

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> See cases cited *supra* note 4.

<sup>7</sup> *Larry L. Litton*, 44 ECAB 243 (1992).

<sup>8</sup> *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>11</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

The issue for purposes of establishing clear evidence of error in this case is whether appellant submitted evidence establishing that there was an error in the Office's determination that he no longer had any disability after June 16, 1983 causally related to his September 25, 1972 employment injury.

In support of his April 12 and May 18, 2000 requests for reconsideration, appellant submitted numerous duplicate copies of evidence already contained in the record and previously reviewed by the Office. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>17</sup>

Appellant also submitted an April 21, 2000 attending physician's report of Dr. Sushil Bagri, a Board-certified neurologist, noting that he sustained an injury in 1972 while working for

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(d)(May 1996); *see also* 20 C.F.R. § 10.607(b).

<sup>10</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> *Jesus D. Sanchez*, *supra* note 4.

<sup>13</sup> *Leona N. Travis*, *supra* note 11.

<sup>14</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>15</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>16</sup> *Gregory Griffin*, *supra* note 8.

<sup>17</sup> *Linda I. Sprague*, 48 ECAB 386 (1997).

the employing establishment and a diagnosis of major depressive disorder. Dr. Bagri indicated that appellant's condition was caused by the employment activity by placing a checkmark in the box marked "yes." He further indicated that appellant was totally disabled from 1972 to date. Dr. Bagri failed to provide any medical rationale explaining how or why appellant's disability was caused by his September 25, 1972 employment injury. Therefore, his report does not raise a substantial question as to the correctness of the Board's August 5, 1992 decision that appellant no longer had any employment-related disability after June 16, 1983 and does not establish clear evidence of error regarding the termination of appellant's compensation.

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.

The August 8, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
July 18, 2002

Alec J. Koromilas  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member