

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AUSTIN DANCY and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

*Docket No. 01-1098; Submitted on the Record;
Issued May 20, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

The record indicates that appellant filed claims for traumatic injuries on August 18, 1979 and June 22, 1981, which were accepted for a low back strain. Appellant also filed an occupational claim on November 24, 1987 by decision dated August 30, 1988, the Office denied the claim.

By decision dated April 27, 1990, the Office accepted a dysthymic disorder causally related to the 1979 and 1981 injuries. The Office also found that disability from the accepted psychiatric condition had ceased by March 5, 1990. In a decision dated June 29, 1990, the Office determined that appellant had no disability causally related to an accepted orthopedic condition after April 30, 1985.¹ In a decision dated June 21, 1991, the Office denied modification of the June 29, 1990 decision. By decision dated June 30, 1992, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the June 21, 1991 decision.

By decision dated August 25, 1994, the Office determined that appellant's request for reconsideration of the April 27, 1990 decision was untimely and failed to show clear evidence of error. The Board affirmed the August 25, 1994 Office decision, in a decision dated September 5, 1997.²

¹ The Office stated that it was denying modification of a May 14, 1984 decision; that decision found that appellant had no disability after January 5, 1982. As the June 29, 1990 decision refers to April 30, 1985, it does appear to modify the prior decision.

² Docket No. 95-1195.

By letter dated November 16, 2000, appellant requested reconsideration of his case. He did not identify a specific decision.

In a decision dated December 15, 2000, the Office determined that appellant's request was untimely and failed to show clear evidence of error.

The Board finds that the Office properly determined that appellant's request for reconsideration 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.³ As appellant filed his appeal on February 21, 2001 the only decision over which the Board has jurisdiction on this appeal is the December 15, 2000 decision denying his request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁷ 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.⁸ 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).⁹

As the procedural history of the case reveals, the last decision on the merits in this case was June 21, 1991. Since appellant's request for reconsideration was dated November 16, 2000, 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

³ See 20 C.F.R. § 501.3(d).

⁴ 5 U.S.C. § 8128(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 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."

⁷ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a 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; see 20 C.F.R. § 10.606(b).

⁸ 20 C.F.R. § 10.607(a).

⁹ See *Leon D. Faidley, Jr.*, *supra* note 5.

erroneous.¹⁰ 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.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence that 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

The June 21, 1991 decision denied modification of a June 29, 1990 decision, which had found that appellant was not entitled to disability after April 30, 1985. The Office determined that the weight of the evidence was represented by second opinion referral physician, Dr. Arthur Auerbach, who had opined appellant could perform his regular duties as of April 1985.

The evidence submitted on reconsideration fails to show clear evidence of error in the June 21, 1991 decision. None of the medical evidence submitted is of such probative value that it shifts the weight of the evidence in appellant's favor. Appellant submitted, for example, a March 18, 1999 report from Dr. Elaine Date, who provided a brief history that appellant had back pain radiating to the left leg since an employment injury in 1979. Dr. Date does not provide

¹⁰ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

¹⁴ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁸ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

a complete background or a reasoned medical opinion an employment-related disability after April 1985. None of the medical evidence submitted provides a reasoned medical opinion, based on a complete and accurate background, on the issues presented. The Board finds no evidence sufficient to establish clear evidence of error in this case.

The December 15, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 20, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member