

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SIDNEY NELSON, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Seattle, WA

*Docket No. 02-795; Submitted on the Record;
Issued November 12, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
COLLEEN DUFFY KIKO

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for further review on the merits under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

This case was presented to the Board on a prior occasion. Appellant, a 46-year-old mailhandler, injured his left and right rib cage, lower and upper back and left shoulder on May 28, 1995. The Office accepted the claim for the condition of aggravation of preexisting L1 compression fracture. By decision dated June 13, 1998, the Office terminated appellant's benefits. In a decision dated February 5, 2001, the Board affirmed the Office's June 13, 1998 termination decision.¹

By letter dated July 19, 2001, appellant requested reconsideration of the Office's June 13, 1998 termination decision. He submitted a June 18, 1999 disability slip and a March 21, 2000 report from Dr. Dave T. Stonington, who stated findings on examination, diagnosed chronic low back pain, myofascial strain and degenerative disease and recommended that appellant remain on indefinite medical leave due to his back condition.

By decision dated September 5, 2001, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

In a letter received by the Office on January 8, 2002, appellant requested reconsideration of the December 15, 1999 decision. He submitted treatment notes, summary reports and form reports, which he had submitted by the Office in previous decisions, but did not submit any new medical evidence.

¹ Docket No. 99-680 (issued February 5, 2001).

By decision dated January 9, 2002, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error. The Office, therefore, denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.607, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.²

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.³

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law and he has not advanced a relevant legal argument not previously considered by the Office. Dr. Stonington's March 21, 2000 report did not contain a probative, rationalized medical opinion regarding whether appellant still has work-related residuals from his accepted condition or whether his current condition or disability is causally related to his accepted condition and is, therefore, not relevant and pertinent. Additionally, appellant's July 19, 2001 letter failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits. The Board, therefore, affirms the Office's September 5, 2001 decision.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle an employee to a review of an Office decision as a matter of right.⁵ This section, vesting the Office

² 20 C.F.R. § 10.607(b)(1). *See generally* 5 U.S.C. § 8128(a).

³ *Howard A. Williams*, 45 ECAB 853 (1994).

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ 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 by the Office under 5 U.S.C. § 8128(a).⁸

The Office properly determined in this case, that appellant failed to file a timely application for review. He requested reconsideration on October 3, 2000; thus, appellant’s reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had 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.⁹ Office procedures state that the Office will reopen appellant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the application for review shows “clear evidence of error” on the part of the Office.¹⁰

To establish clear evidence of error, appellant must submit evidence relevant to the issue, which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a

⁶ 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 point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

⁷ 20 C.F.R. § 10.607(b).

⁸ *See* cases cited *supra* note 5.

⁹ *Rex L. Weaver*, 44 ECAB 535 (1993).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹¹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *See Leona N. Travis*, 43 ECAB 227 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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's decision.¹⁶ The Board makes an independent determination of whether appellant 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.¹⁷

The Board finds that appellant's January 8, 2002 request for reconsideration fails to show clear evidence of error. The Office reviewed the evidence submitted by appellant and properly found it insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

¹³ See *Jesus D. Sanchez*, *supra* note 5.

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Leon D. Faidley* *supra* note 5.

¹⁷ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The decisions of the Office of Workers' Compensation Programs dated January 9, 2002 and September 5, 2001 are affirmed.

Dated, Washington, DC
November 12, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member