

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILIP J. DWYER and U.S. POSTAL SERVICE,
POST OFFICE, Austin, TX

*Docket No. 02-1112; Submitted on the Record;
Issued October 9, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, 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 claim for consideration of the merits on November 19, 2001 on the grounds that his request for reconsideration was not timely filed and did not establish clear evidence of error.

On June 23, 1997 appellant, then a 59-year-old modified clerk, filed an occupational disease claim alleging that he developed knee problems, bilateral carpal tunnel syndrome and right tarsal tunnel syndrome.

By decision dated September 16, 1997, the Office denied appellant's claim on the grounds that the medical evidence failed to establish that the claimed conditions were causally related to factors of his employment.

In an undated letter received by the Office on September 22, 1997, appellant requested an oral hearing. The hearing was held on June 16, 1998.

By decision dated August 6, 1998, an Office hearing representative found that none of the medical evidence of record provided an opinion which related appellant's claimed knee condition to the alleged factors of employment and affirmed the September 16, 1997 decision.

In a letter dated February 16, 1999, appellant requested reconsideration and submitted a report from Dr. David Savage, a Board-certified orthopedic surgeon, dated October 1, 1998, which stated:

“While it is impossible to establish causality, I think that it is highly probable that over the course of the many years that [appellant] has worked on his feet, getting in and out of a mail truck, bending, stooping, kneeling to sort mail, that his employment, at the very least, has contributed to his problems with both knees. Furthermore, I think the delivering, sorting and carrying of mail also has

contributed to his tendinitis complaints and degeneration to some degree in his left elbow.”

By decision dated March 2, 1999, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted with the request neither raised substantive legal questions nor included new and relevant evidence to warrant a merit review.

In an undated letter received by the Office on July 3, 2000, appellant requested reconsideration. By decision dated November 19, 2001, the Office denied appellant’s request for reconsideration on the grounds that the request was untimely and failed to present clear evidence of error. The Office conducted a limited review of the case and found that Dr. Savage’s report dated October 1, 1998 was insufficient to overcome the lack of an affirmative medical opinion supporting causal relationship.

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 2, 2002, the only decision over which the Board has jurisdiction on this appeal is the November 19, 2001 decision denying his request for reconsideration.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant’s claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not establish clear evidence of error.

Section 8128(a) of the Federal Employees’ Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.⁵ 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).⁶

¹ See 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 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.”

⁵ 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.

⁶ 20 C.F.R. § 10.607.

Appellant's request for reconsideration was received on July 3, 2000. Since appellant filed his reconsideration request more than one year from the August 6, 1998 merit decision, the Board finds that the Office properly determined that said request was 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.⁷ In accordance with this holding, the Office 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ The Board must make 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.¹⁵

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in the case is a medical one of whether appellant's claimed knee condition was caused by the specified factors of appellant's employment. The record

⁷ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁸ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.3(c) (May 1996); *see also* 20 C.F.R. § 10.607(b).

⁹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² *See Leona N. Travis*, *supra* note 10.

¹³ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

reflects that appellant did not submit any medical evidence in support of his request for reconsideration. Appellant did submit, with a prior request, an October 1, 1998 medical report from Dr. Savage of which the Office referenced in the November 19, 2001 decision and found insufficient to establish clear evidence of error of the denial decision. On appeal, appellant through counsel contends that this report does establish an uncontroverted inference of causal relationship. The Board finds that this is insufficient to establish clear evidence of error. Dr. Savage refers in speculative terms to appellant's knee condition, without providing a clear diagnosis or detailed explanation as to causal relationship with the work factors alleged by appellant. The Board finds that the evidence submitted in this case is insufficient to meet the "clear evidence of error" standard for an untimely reconsideration request.

As appellant has failed to establish clear evidence of error on the part of the Office, the Office properly denied appellant's request for reconsideration.

The November 19, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 9, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member