

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EMMITT TAYLOR and DEPARTMENT OF THE AIR FORCE,
McCONNELL AIR FORCE BASE, KS

*Docket No. 01-2218; Submitted on the Record;
Issued September 17, 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.

This is the sixth appeal in the case. In the most recent appeal, the Board affirmed a March 13, 1998 Office decision, finding that appellant's request for reconsideration was insufficient to warrant a merit review of the claim.¹ The Board also affirmed an April 24, 1998 Office decision, denying appellant's request for a hearing. The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

In a letter dated February 20, 2001, appellant requested reconsideration of his claim. By decision dated May 25, 2001, the Office determined that the 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.

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

¹ Docket No. 98-1830 (issued July 6, 2000).

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."

discretionary authority under 5 U.S.C. § 8128(a).⁵ 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.⁶ 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).⁷

In this case, the last decision on the merits of the claim was the Board's August 31, 1987 decision, affirming a December 18, 1986 Office decision that the position of telephone solicitor represented appellant's capacity to earn wages prior to November 29, 1985.⁸ Appellant's February 20, 2001 request for reconsideration was clearly filed more than one year after the August 31, 1987 decision and is therefore, 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.⁹ 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.¹⁰

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

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(b).

⁶ 20 C.F.R. § 10.607(a).

⁷ *See Leon D. Faidley, Jr., supra* note 3.

⁸ Docket No. 87-811.

⁹ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

¹³ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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 decision.¹⁶ 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.¹⁷

The record contains medical evidence submitted after the Office's March 13, 1998, including reports dated February 21, March 5 and November 1, 2000 from Dr. Richard Piazza, an osteopath, a May 10, 2000 report from Dr. Lee Dorsey, an orthopedic surgeon and a July 14, 2000 report from Dr. Kris Lewonowski, an orthopedic surgeon. None of the medical evidence, however, provides a reasoned opinion on the relevant merit issue in the case. Appellant has argued that for the periods February 5, 1976 to July 25, 1977, and May 28, 1980 to November 29, 1985, the position of telephone solicitor did not represent his wage-earning capacity. The medical evidence submitted does not address this issue. Dr. Piazza, for example, opines that appellant had a cervical and shoulder injury causally related to the 1972 employment injury, without discussing appellant's ability to perform the selected position during the relevant time periods.

The Board finds that the evidence is not 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 decisions. The evidence does not establish clear evidence of error and therefore, the Office properly denied appellant's February 20, 2001 request for reconsideration.

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

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁷ *Gregory Griffin*, 41 ECAB 458 (1990).

The decision of the Office of Workers' Compensation Programs dated May 25, 2001 is affirmed.

Dated, Washington, DC
September 17, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member