

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARIUS L. DOBSON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, West Los Angeles, CA

Docket No. 02-586; Submitted on the Record;

Issued March 5, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.¹

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On February 13, 1998 appellant, then a 39-year-old motor vehicle operator, filed a notice of traumatic injury and claim for continuation of pay (Form CA-2), stating that on January 9, 1979 he lifted a 65 gallon water bottle, causing him to sprain his left wrist. He also alleges that he acquired a "gangloin" (*sic*) on his left wrist, due to factors of his employment. By decision dated September 30, 1998, the Office denied appellant's claim on the grounds that he had not established fact of injury. In a letter received by the Office on November 20, 2001, appellant requested reconsideration of the Office's September 30, 1998 decision.

In a decision dated January 15, 2002, the Office denied the request for reconsideration as untimely and found that the statements appellant made in support of his request presented no clear evidence of error on the part of the Office. Further, the Office found appellant submitted no new evidence in support of his claim.

¹ In his letter requesting appeal, received by the Board on January 29, 2002, appellant requested that the Board review all decisions made in his case. 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 filings of the appeal. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2). As appellant's request for appeal was filed on January 29, 2002, the only decision before the Board is the January 2, 2002 decision denying appellant's request for reconsideration as untimely filed.

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

The Board finds that since more than one year has elapsed from the date of issuance of the Office's September 30, 1998 merit decision, to the date that appellant's request for reconsideration was filed, November 20, 2001, appellant's request for reconsideration is untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.⁷ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration 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

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁴ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ 20 C.F.R. § 10.607(a) (1999). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

⁷ *Thankama Mathews*, *supra* note 2 at 770.

⁸ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

⁹ *Thankama Mathews*, *supra* note 3 at 770.

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Jesus D. Sanchez*, *supra* note 3 at 968.

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

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 substantive question as to the correctness of the Office 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

As stated above, appellant has failed to submit any evidence in support of his request for reconsideration.

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's September 30, 1998 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

The decision of the Office of Workers' Compensation Programs dated January 15, 2002 is hereby affirmed.

Dated, Washington, DC
March 5, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹³ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁵ *Gregory Griffin*, *supra* note 5.