

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSEPH K. FITZPATRICK and DEPARTMENT OF THE AIR FORCE,  
AIR TRAINING COMMAND, San Antonio, Tex.

*Docket No. 96-663; Submitted on the Record;  
Issued March 6, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order<sup>1</sup> on February 24, 1993 in which it affirmed the January 14, 1992 decision of the Office on the grounds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review because appellant's application for review was not timely filed and failed to present clear evidence of error. By merit decision dated January 14, 1992, the Office determined that appellant had not submitted sufficient rationalized medical evidence to establish that he sustained an employment-related brain hemorrhage and mercury poisoning between late 1982 and early 1983. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant must (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of

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<sup>1</sup> Docket No. 92-950.

<sup>2</sup> 5 U.S.C. §§ 8101-8193. 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 U.S.C. § 8128(a).

law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>3</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>4</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>5</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>6</sup>

In its November 30, 1995 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision in appellant's claim was issued on January 14, 1992 and appellant's request for reconsideration was dated October 2, 1995, more than one year after January 14, 1992.

The Office, however, may not deny an application for review solely on the ground that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."<sup>7</sup> Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be

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<sup>3</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>6</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>7</sup> *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). The Office therein states, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

<sup>9</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>10</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>11</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

construed so as to produce a contrary conclusion.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of his application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. In connection with his October 2, 1995 reconsideration request, appellant submitted an extensive statement in which he argued that he was exposed to toxic materials at work and sustained various conditions as a result. Appellant did not, however, submit any new rationalized medical evidence showing that he sustained an employment-related condition and his reconsideration request was not relevant to the main merit issue of the present case, *i.e.*, whether appellant submitted sufficient rationalized medical evidence to establish that he sustained an employment-related brain hemorrhage and mercury poisoning between late 1982 and early 1983. Therefore, the evidence submitted by appellant in support of his reconsideration request does not clearly show that the Office erred in its prior merit decisions.

For these reasons, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

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<sup>12</sup> See *Leona N. Travis*, *supra* note 10.

<sup>13</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>14</sup> *Leon D. Faidley, Jr.*, *supra* note 6.

<sup>15</sup> *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The decision of the Office of Workers' Compensation Programs dated November 30, 1995 is affirmed.

Dated, Washington, D.C.  
March 6, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member