

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY IRBY, JR. and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Homestead, Fla.

*Docket No. 96-2038; Submitted on the Record;
Issued March 4, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's November 4, 1993 request for reconsideration did not present clear evidence of error.

This case has previously been on appeal before the Board. In a decision and order dated November 20, 1995, the Board found that appellant's November 4, 1993 request for reconsideration was not timely filled within one year of the Office's April 22, 1992 decision. The Board further found that the case was not in posture for a decision on the issue of whether appellant's untimely request for reconsideration presented clear evidence of error. The Board noted that the Office, in its January 19, 1994 decision, did not review evidence from appellant's other claim, consisting of reports from his attending physicians prepared in July and September 1993, that appellant requested that the Office review in his November 4, 1993 request for reconsideration. The Board stated, "As this evidence was as much a part of appellant's request for reconsideration as it would be if appellant had made copies of it and submitted it with the request, the case will be remanded to the Office for review of the evidence referred to by appellant in his November 4, 1993 letter to determine whether it shows clear evidence of error."¹

On remand, the Office, in a decision dated January 18, 1996, reviewed the July and September 1993 reports from Dr. Franklin A. Foote, a psychologist, and Dr. Bernard Savariego, a Board-certified psychiatrist. The Office found that these reports did not establish clear evidence of error.

The Board finds that appellant's November 4, 1993 request for reconsideration did not present clear evidence of error in the Office's April 22, 1992 decision.

¹ Docket No. 94-1054.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“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, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that “the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision.” 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).²

In the present case, the Board determined on the prior appeal that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows “clear evidence of error” on the part of the Office.³ Office procedures state 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.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁵ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ *See Leona N. Travis*, 43 ECAB 227 (1991).

establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ 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.¹⁰ 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.¹¹

In a report dated July 27, 1993, Dr. Savariego stated that appellant's "condition was precipitated and aggravated by patient's perceived mistreatment at work." In this report Dr. Savariego listed, as appellant's history, "He complained of being unfairly treated by supervisors and of being picked on and not getting appropriate recognition because of prejudice by supervisor." In a report dated September 15, 1993, Dr. Foote stated that appellant's condition "appeared to be due to stress induced by what he perceived to be inappropriate supervisory practices at his place of employment." In a report dated September 20, 1993, Dr. Savariego noted that appellant "felt unfairly treated because of racial prejudice."¹²

These reports do not present clear evidence of error in the Office's April 22, 1992 decision for several reasons. They are speculative on causal relation, and an award of compensation cannot be based on conjecture or speculation.¹³ These reports also rely on appellant's perception of mistreatment or prejudice, and the Board has held that mere perceptions of harassment or discrimination are not compensable under the Act. There must be evidence that the harassment or discrimination did in fact occur.¹⁴ The April 22, 1992 decision of the Office was based in part on a finding that the evidence did not demonstrate that the employing establishment erred or acted abusively. Until appellant demonstrates that the discrimination or mistreatment he perceived in fact occurred, medical reports relying on a history of such mistreatment or discrimination will be of little probative value. The medical reports

⁷ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ See *Leona N. Travis*, *supra* note 6.

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Leon D. Faidley, Jr.*, *supra* note 2.

¹¹ *Gregory Griffin*, *supra* note 3.

¹² The discussion of these reports of a recurrent major depression in July 1993 cannot show clear evidence of error in the Office's April 22, 1992 decision, as this decision dealt only with appellant's major depressive episode from July to September 1991.

¹³ *William Nimitz, Jr.*, 30 ECAB 567 (1979).

¹⁴ *Jack Hopkins, Jr.*, 42 ECAB 818 (1991).

appellant submitted with his November 4, 1993 request for reconsideration do not present clear evidence of error in the Office's April 22, 1992 decision.

The decision of the Office of Workers' Compensation Programs dated January 18, 1996 is affirmed.

Dated, Washington, D.C.
March 4, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member