

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD RODRIGUEZ and DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, TX

*Docket No. 97-1921; Submitted on the Record;
Issued August 24, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant made an untimely request for reconsideration on January 2, 1997 and if so, whether he presented clear evidence of error.

Following its August 17, 1995 decision affirming the denial of appellant's claim of recurrence on the grounds that he failed to supply sufficient medical evidence to establish a recurrence of disability on or after May 21, 1991 causally related to one or both of his accepted employment injuries, the Office of Workers' Compensation Programs received appellant's request for discovery dated August 14, 1996. Appellant made clear in this request that he was not requesting reconsideration because he was not currently in possession of a complete, precise and certified record of the compensation file. Also on August 14, 1996 appellant sent to the Office additional documents relating to his request for discovery.

In a letter postmarked January 2, 1997, appellant requested information from the Office under the Freedom of Information Act. In this request appellant indicated that he was not satisfied with the Office's August 17, 1995 decision: "Request for Reconsideration ... would be in fundamental error in the August 17, 1995 decision of the hearing representative and that evidence in the claim file would show that the hearing representative error[ed]: [appellant then lists a number of asserted errors in that decision.]"

The Office treated appellant's January 2, 1997 request for information as a request for reconsideration and on February 14, 1997 issued a decision denying a merit review of appellant's claim on the grounds that the request for reconsideration was untimely and failed to show clear evidence of error.

On appeal, appellant states that he served the Office with a request for discovery on or about August 14, 1996 but that the Office never responded. He states that on or about January 2, 1997 he wrote to the Office under the Privacy Act requesting information concerning his request

for discovery. “The claimant never made a request for Reconsideration,” appellant explains, “only for information under the Privacy Act.”

The Board finds that the Office reasonably regarded appellant’s January 2, 1997 request as a request for reconsideration and properly denied that request.

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.”¹

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 for review is filed within one year of the date of that decision. Office procedures state, however, that the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows “clear evidence of error” on the part of the Office.²

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.³ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁴ Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ 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.⁷ To show clear evidence of error, the evidence submitted must not only be of sufficient probative

¹ 5 U.S.C. § 8128(a).

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

³ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁴ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁵ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ See *Travis*, *supra* note 4.

⁷ *Nelson T. Thompson*, 43 ECAB 919 (1992).

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.⁸ 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 a merit review in the face of such evidence.⁹

Appellant made his January 2, 1997 request more than one year following the Office's August 17, 1995 decision affirming the denial of his claim of recurrence. The Office therefore properly found that appellant's request was untimely. The Board has reviewed appellant's untimely request and the asserted errors listed therein and finds that they do not establish clear evidence of error in the Office's August 17, 1995 decision. The issue is a medical one, as the Office explained in its August 17, 1995 decision and appellant failed to support his untimely request with medical opinion evidence of sufficient probative value to *prima facie* shift the weight of the evidence in his favor and raise a substantial question as to the correctness of the Office's decision. For this reason, the Board finds that appellant's untimely request failed to present clear evidence of error and that the Office committed no abuse of discretion in denying that request.

The February 14, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
August 24, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *Gregory Griffin*, 41 ECAB 458, 466 (1990).