

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BRIAN K. RANSOM and U.S. POSTAL SERVICE,  
POST OFFICE, Baltimore, MD

*Docket No. 98-465; Submitted on the Record;  
Issued February 1, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
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 with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's September 9, 1997 decision denying appellant's request for a review on the merits of its May 26, 1995 decision.<sup>1</sup> Because more than one year has elapsed between the receipt of the Office's May 26, 1995

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<sup>1</sup> On May 31 and December 15, 1995 the office of Congressman Benjamin L. Cardin asked the Office to report on the status of appellant's claim. On December 19, 1995 the Office advised the congressman's office that it had issued a decision on May 26, 1995 and enclosed a copy of that decision. Appellant on February 8, 1997 contacted Senator Barbara A. Mikulski's office and stated, "Congressman Cardin forwarded all information to claimant. Based on that information to Claimant had been sent to a P.O. Box rather than to his home address [sic]." The senator's office then asked the Office to update the status of appellant's claim. The Office received Senator Milkulski's letter on March 19, 1997 and responded on March 26, 1997 with a copy of the May 26, 1995 decision enclosed. Appellant thereupon filed the May 27, 1997 request for reconsideration with the Office stating that he had "actually received the correspondence approximately two weeks from today's date." The Board finds that since appellant had notified the Office that Congressman Cardin's office forwarded all information to him, and that appellant acknowledged that "[I]nformation to Claimant had been sent to a P.O. Box rather than his home address," that appellant received a copy of the May 26, 1995 decision not more than a year after issuance on May 26, 1995. The Board further notes that appellant's allegation that he had "just received a copy two weeks" prior to his May 27, 1997 letter is not credible.

decision received no later than May 26, 1996 and November 21, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the May 26, 1995 decision.<sup>2</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</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 law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or his application for review within one year of the date of that decision.<sup>5</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>6</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>7</sup>

In its September 9, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on May 26, 1995 and appellant's request for reconsideration was dated May 27, 1997, which was more than one year after May 26, 1995.

Therefore, appellant's request for reconsideration of his case on its merits was untimely filed.

The Office, however, may not deny an application for review solely on the grounds 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>8</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>9</sup>

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<sup>2</sup> 20 C.F.R. § 501.3(d)(2).

<sup>3</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. §§ 10.138(b)(1), (2).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>7</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>11</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>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</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>14</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>15</sup> The Board makes an independent determination as to 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>16</sup>

In the present case, with his request for reconsideration appellant submitted an April 24, 1997 medical report from a doctor from the Department of Veterans Affairs (VA), which states that appellant's chronic back pain was secondary to a 1982 motor vehicle accident. Appellant also submitted a June 30, 1995 medical report from Dr. John D. Griswold, appellant's treating physician and a specialist in emergency medicine, which states that appellant's work-related injury prevents him from fulfilling his duties as a letter carrier. The Board finds that the evidence submitted by appellant in support of his request does not raise a substantial question as to the correctness of the Office's May 26, 1995 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The VA doctor attributed appellant's condition to a 1982 accident. The Board finds that this report is irrelevant to appellant's claim. The Board further finds that Dr. Griswold did not explain how the factors of employment aggravated or caused appellant's permanent disability. Dr. Griswold's report is therefore not sufficiently rationalized to establish appellant's claim.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

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<sup>10</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>13</sup> See *Leona N. Travis*, *supra* note 11.

<sup>14</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>15</sup> *Leon D. Faidley, Jr.*, *supra* note 7.

<sup>16</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

The Office, therefore, 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. As appellant has not, by the submission of medical evidence, raised a substantial question as to the correctness of the Office's September 9, 1997 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.

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 9, 1997 is hereby affirmed.

Dated, Washington, D.C.

February 1, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member