

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of ISMAIL MEGHANI and U.S. POSTAL SERVICE,  
NEW YORK MANAGEMENT SECTION CENTER, New York, NY

*Docket No. 98-2160; Submitted on the Record;  
Issued February 7, 2000*

---

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the refusal of the Office to reopen appellant's claim for further consideration on the basis that appellant's application for review was not timely filed and failed to demonstrate clear evidence of error did not constitute an abuse of discretion.

On December 4, 1992 appellant, then a 41-year-old mail processor, sustained an injury when he struck his head on a metal bar in the course of his employment. The Office accepted appellant's claim for a contusion and post-concussion syndrome. Appellant stopped work on the date of the injury and returned to light duty, four hours a day, on January 20, 1993. On May 7, 1993 appellant filed a claim for occupational disease alleging that he developed pain and numbness in his feet, due to his December 4, 1992 employment-related head injury. This claim was assigned OWCP No. A2-553469. In a decision dated November 26, 1993, the Office denied appellant's claim for occupational disease on the grounds that the record contained no evidence of a new employment-related injury or condition. The Office noted that appellant's head injury claim, claim No. A2-655761, had been denied and was currently under appeal and that the facts of the May 7, 1993 claim support that appellant's condition was due to a recurrence of this previously denied claim. The Office advised appellant to file a claim for a recurrence of disability. On June 30, 1993 appellant, filed a claim for recurrence of disability, alleging that on May 18, 1993 he could no longer work due to chronic headaches, numbness of both feet, numbness and pain in his left arm, back and neck pains and nausea, vomiting and motion sickness. He alleged that these conditions were causally related to his original December 4, 1992 injury. Appellant stopped work and has not returned.

In a decision dated July 16, 1993, the Office denied appellant's claim for a recurrence of disability. The Office noted that the record contained evidence that appellant had several prior injuries to his head, neck and back, which he did not disclose to the employing establishment when he applied for employment. The Office further found that appellant failed to submit any rationalized medical opinion evidence in support of his claim. Appellant subsequently submitted several letters disagreeing with the Office's decision, together with additional medical evidence. In a merit decision dated October 12, 1994, the Office found the evidence submitted in support of appellant's request for reconsideration to be insufficient to warrant modification of the prior decision.<sup>1</sup>

By letter postmarked April 18, 1998, appellant requested reconsideration of the Office's prior decision, referencing both claim numbers in his letter. In support of his request, appellant submitted a narrative statement, letters from the workers' compensation divisions of the state of Florida and the state of New Jersey, copies of prior letters from the Office, a letter from the Office dated January 6, 1998 acknowledging that by court order, a guardian had been appointed for the management of appellant's property and an April 15, 1998 letter medical report from Dr. Michael Leung, a psychiatrist with the Upper Manhattan Mental Health Center.

By decision dated June 11, 1998, the Office denied appellant's reconsideration request on the grounds that pursuant to 20 C.F.R. § 10.138(b)(2) it had not been filed within one year of the October 12, 1994 decision by the Office and did not show clear evidence of error pursuant to 20 C.F.R. § 10.138(a). The instant appeal follows.

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 filing of the appeal.<sup>2</sup> As appellant filed his appeal with the Board on July 1, 1998, the only decision properly before the Board is the Office's June 11, 1998 decision denying appellant's request for a review of the merits of the Office's October 12, 1994 decision.<sup>3</sup>

---

<sup>1</sup> The Office noted that appellant had requested reconsideration of claim number A2-663469, his May 7, 1993 occupational disease claim. The Office noted that the May 7, 1993 occupational disease claim had been denied by the Office in a decision dated November 16, 1993, on the grounds that the evidence failed to support a new occupational injury. The Office found that the evidence submitted with appellant's current request for reconsideration was insufficient to warrant modification as it did not include a rationalized medical opinion, which establishes that appellant sustained or developed a new occupational injury or disease, but rather clearly indicates that the treated conditions are for a recurrence of appellant's December 4, 1992 employment injury. The Office noted that the recurrence claim, No. A2-655761, was denied in a decision dated November 26, 1993 and was currently under appeal. The record does contain an Order Dismissing Appeal from the Employees Compensation Appeals Board, finding that while appellant did file a notice of appeal on July 29, 1993, subsequent communication from appellant established that he wished to pursue reconsideration before the Office instead. Consequently, the Board dismissed the appeal and remanded the case for further consideration by the Office. The Board's decision does not indicate the OWCP claim number that this decision pertained to.

<sup>2</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

<sup>3</sup> The Office's October 12, 1994 decision was the last merit decision in this case.

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 states:

“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).<sup>4</sup>

In the present case, as more than one year elapsed from the Office's most recent merit decision dated October 12, 1994 and appellant's request for reconsideration dated April 18, 1998, the Office properly determined 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.<sup>5</sup> 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.<sup>6</sup>

---

<sup>4</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991), 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, a proof of 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 review of the case....”

<sup>6</sup> *Id.*

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>8</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>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</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>11</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>12</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 on the face of such evidence.<sup>13</sup>

The Board further finds that the evidence submitted by appellant in support of such request does not raise a substantial question as to the correctness of the Office's October 12, 1994 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The letters from the states of Florida and New Jersey, as well as the copies of prior letters from the Office, have no relevance to appellant's current claim. The April 15, 1998 letter from Dr. Leung, states:

“After requesting Tylenol on May 6, 1993 to alleviate symptoms on duty which was denied to him and led to subsequent dismissal which [appellant] wants to appeal: March 27, 1998 fact-finding decision with enclosure to substantiate his claim. Please see enclosures. Client prescribed Serzone 100 milligrams H.S. by psychiatrist Dr. Leung. As a result of accident A2-655761-CA-1 client has impaired memory for remote as well as recent events.”

While Dr. Leung states that appellant suffers from residuals of his December 4, 1992 head injury, claim No. A2-566761, his opinion is of little probative value as he does not indicate any awareness of the history of appellant's current condition, including his prior head injuries. Finally, with respect to the letter from the Office acknowledging that a guardian has been

---

<sup>7</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>8</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>9</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>10</sup> See *Leona N. Travis*, *supra* note 8.

<sup>11</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>12</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>13</sup> *Gregory Griffin*, 41 ECAB 186 (1989).

appointed for the management of appellant's property, as there is no other evidence in the record pertaining to this guardianship, it is unclear under what circumstances a guardian was appointed and how, if at all, it pertains to appellant's current claim. The evidence is thus insufficient to establish clear evidence of error and the Office did not abuse its discretion in failing to reopen appellant's claim.<sup>14</sup>

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's October 12, 1994 decision, he has failed to establish clear evidence of error. Therefore, 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 June 11, 1998 is hereby affirmed.<sup>15</sup>

Dated, Washington, D.C.  
February 7, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member

---

<sup>14</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>15</sup> The Board notes that the appeal in this case, was filed by Ira Salzman, who indicated that he represented the New York Foundation for Senior Citizens Guardian Services, Inc., ("NYF") and stated that by Order of Supreme Court, New York County, New York, NYF was appointed the guardian of appellant. Mr. Salzman submitted a copy of the November 12, 1997 Order and Judgment Appointing Guardian of the Property, but did not explain the circumstances of the appointment and did not raise any arguments with respect to appellant's competence.