

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEITH BERNARD WILLIAMS and GOVERNMENT PRINTING OFFICE,
Washington, DC

*Docket No. 99-2414; Submitted on the Record;
Issued February 9, 2001*

DECISION and ORDER

Before BRADLEY T. KNOTT, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record and finds that appellant's application for review was not timely filed and failed to present clear evidence of error.

On August 8, 1995 appellant, then a 31-year-old police officer, sustained right ankle, right knee and lumbosacral sprains when he descended a flight of stairs and missed a step, twisting his right knee and lower back.

By letter dated July 16, 1997, the Office advised appellant that it proposed to terminate his compensation on the grounds that a June 27, 1996 work capacity evaluation by Dr. Lawrence A. Manning, an orthopedist, stated that he could return to his full-time, date-of-injury position without restrictions.

The Office allowed appellant 30 days within which to respond to its proposed termination and he submitted a narrative statement dated August 10, 1997, in which he described his medical treatment since his August 8, 1995 employment injury. Appellant disputed the findings contained in Dr. Manning's June 27, 1997 work capacity evaluation and requested that he be examined by another physician. By decision dated October 10, 1997, the Office terminated appellant's benefits effective that day.

By letter dated February 25, 1999, appellant requested reconsideration of the Office's October 10, 1997 decision and submitted a brief report dated January 13, 1999, in which Dr. Manning noted appellant's complaints and diagnosed lumbar degenerative disc disease. Previously, appellant submitted disability slips dated April 10, 1998, in which Dr. Manning advised that appellant could not work from March 30 to April 20, 1998.

In an August 28, 1998 report, Dr. Manning noted that while appellant could continue working, “it is anticipated that there will be intermittent days of sick leave required due to the back.” He listed specific days from January to July, 1998 that appellant was off work and advised that the absences were “secondary to his work injury.” Appellant also submitted a treatment note dated October 7, 1998, in which Dr. Manning listed additional absences, noted no changes on examination and diagnosed lumbar disc disease.

By decision dated April 29, 1999, the Office found that appellant’s reconsideration request was untimely and that the evidence submitted to support his request did not establish clear evidence of error.

Section 8128(a) of the Federal Employees’ Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is 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.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted to the Office under 5 U.S.C. § 8128(a).⁵

Appellant’s reconsideration request, dated February 25, 1999, was filed more than one year after the Office’s October 10, 1997 merit decision. The Board, therefore, finds that the Office properly determined that the request was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁶ Office procedures state that the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in the Office’s regulations, if the claimant’s request for reconsideration shows “clear evidence of error” on the part of the Office.⁷

¹ 5 U.S.C. § 8128(a).

² *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

³ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁴ 20 C.F.R. § 10.607(a). The Board has concurred in the Office’s limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ *Thankamma Mathews*, *supra* note 2 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

⁶ *Thankamma Mathews*, *supra* note 2 at 770.

⁷ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by the Office to determine 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.¹²

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant but also raise a substantial question as to the correctness of the Office decision.¹³ The Board must make an independent determination of whether a claimant 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.¹⁴

The evidence submitted by appellant does not establish clear evidence of error because it does not raise a substantial question as to the correctness of the Office's most recent merit decision. Dr. Manning's reports merely note appellant's symptoms and his lumbar degenerative disc disease diagnosis. While he indicated that appellant missed work in 1998 due to his employment injury, that is irrelevant to the issue of whether the Office erred in terminating his compensation effective October 10, 1997. Thus, Dr. Manning's reports were insufficient to establish clear evidence of error.

As appellant failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of appellant's case.¹⁵

⁸ *Thankamma Mathews*, *supra* note 2 at 770.

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Jesus D. Sanchez*, *supra* note 3 at 968.

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁴ *Gregory Griffin*, *supra* note 4 at 458.

¹⁵ The Board notes that appellant submitted evidence to the Board with his appeal. The Board, however, cannot consider this evidence as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board further notes that the record shows that on November 19, 1998, appellant filed a recurrence of disability claim which was accepted by the Office for aggravation of lumbar strain.

The decision of the Office of Workers' Compensation Programs dated April 29, 1999 is hereby affirmed.

Dated, Washington, DC
February 9, 2001

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member