

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERNON RIGGINS and U.S. POSTAL SERVICE,
BULK BUSINESS MAIL CENTER, Langhorne, PA

*Docket No. 00-1015; Submitted on the Record;
Issued November 28, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
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 did not demonstrate clear evidence of error.

On July 31, 1990 appellant, then a 40-year-old mailhandler, filed a claim for an injury to his back sustained on July 31, 1990 when a hand jack broke. The Office accepted that appellant sustained an acute lumbosacral sprain and strain and paid compensation.

By decision dated September 28, 1992, the Office terminated appellant's compensation effective October 17, 1992 on the basis that the weight of the medical evidence established that his disability resulting from his July 31, 1990 employment injury had ceased.

By letter dated December 1, 1992, appellant requested a hearing regarding the termination of his compensation.

By decision dated February 22, 1993, the Office denied appellant's request for a hearing on the grounds that a hearing was not requested within 30 days of the Office's decision, and that the issue was medical in nature and could be resolved by the submission of medical evidence.

By decisions dated March 11, June 1 and August 26, 1993, the Office denied appellant's requests, which were dated March 5, April 16 and June 29, 1993, for modification of its decision terminating his compensation.

On February 18, 1999 appellant, through his attorney, requested reconsideration of the Office's February 22, 1993 decision denying appellant's request for a hearing.¹ Appellant's attorney contended that appellant's December 1, 1992 request for a hearing was timely filed

¹ This request contained a copy of a November 11, 1997 request for reconsideration on this decision, which was addressed to the Board and apparently not forwarded to the Office.

within 30 days, because the Office's September 28, 1992 decision was not accompanied by appeal rights, which were not provided until November 16, 1992.

By decision dated January 24, 2000, the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error.

The Board finds that appellant's request for reconsideration was not timely filed.

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. § 10.607(a) provides that "An application for reconsideration must be sent within one year of the date of the Office's decision for which review is sought." 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 this case, the decision on which appellant requested reconsideration was dated February 22, 1993. Appellant had one year from the date of this decision to request reconsideration and did not do so until, at the earliest, November 11, 1997.³ 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. § 10.607(a).

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.⁴ 20 C.F.R. § 10.607(b) provides: "[the Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."

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

³ For the purpose of this appeal, the Board need not decide whether the request sent to the Board on November 11, 1997 was filed with the Office at that time.

⁴ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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 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

Appellant's request for reconsideration did not present clear evidence of error. The Office's September 28, 1992 decision contained in the case record is accompanied by appeal rights, and the cover letter accompanying the decision states that the enclosures include appeal rights. When appellant called the Office on October 6, 1992 regarding the Office's September 28, 1992 decision, he was advised to exercise the appeal rights attached to the decision. Appellant did not state that he did not receive such appeal rights with his decision, but rather stated that he did not want to follow them.

Against this evidence that appellant received appeal rights with his September 28, 1992 decision, the only evidence that he did not was a November 17, 1992 telephone call from an attorney,¹² stating that the decision was not accompanied by appeal rights. This contention necessarily relied on what appellant provided to the attorney, as the attorney was not authorized at the time the Office issued the September 28, 1992 decision and was not mailed a copy of the September 28, 1992 decision. The former attorney's November 17, 1992 telephone call does not show clear evidence of error in the Office's February 22, 1992 decision.

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

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

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 4.

¹² This is not the same attorney who filed the November 11, 1997 request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated January 24, 2000 is affirmed.

Dated, Washington, DC
November 28, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member