

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN PENDRAK and DEPARTMENT OF THE ARMY,
TOBYHANNA ARMY DEPOT, Tobyhanna, PA

*Docket No. 01-614; Submitted on the Record;
Issued November 1, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

On June 23, 1994 appellant, then a 54-year-old electronics mechanic leader, filed an occupational disease claim, alleging that he experienced chest pains and depression due to work-related stress. He submitted no factual or medical evidence to identify the specific factors of employment he believed caused or contributed to his medical condition.

By decision dated October 5, 1995, the Office denied appellant's claim on the grounds that he failed to establish that the claimed emotional condition arose in the performance of duty.

In a letter dated February 14, 1996, appellant, through his congressional representative, filed a request for reconsideration. By decision dated May 6, 1996, the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision.

In a letter dated February 26, 1997, appellant again requested reconsideration and submitted new evidence. By decision dated August 6, 1997, the Office modified the prior decision on the grounds that appellant had established one compensable factor of employment. The Office found that the employing establishment erred in delaying the filing of appellant's compensation claim. The Office, however, determined that appellant failed to meet his burden of proof to show that his chest pains or depression were causally related to the accepted employment factor.

In a letter dated January 14, 1998, appellant requested reconsideration. By decision dated March 24, 1998, the Office denied modification of the prior decision on the grounds that

appellant failed to establish a causal relationship between the accepted factor of employment and his medical condition.

In a letter dated March 3, 1999, appellant again requested reconsideration. By decision dated April 20, 1999, the Office denied appellant's request on the grounds that the new evidence submitted was repetitious and immaterial and, therefore, insufficient to warrant review of the claim.

In a letter dated June 1, 1999, appellant again requested reconsideration. By decision dated July 20, 1999, the Office denied appellant's claim on the grounds that the request for reconsideration was not filed within the one-year time limit and failed to present clear evidence of error.

On October 19, 1999 appellant requested reconsideration. By decision dated November 12, 1999, the Office again denied appellant's request on the grounds that the claim was untimely filed and failed to present clear evidence of error.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The only decision before the Board in this appeal is that dated November 12, 1999, in which the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. Since more than one year has elapsed between the date of the Office's March 24, 1998 merit decision and the filing of appellant's appeal on October 23, 2000, the Board lacks jurisdiction to review the merits of his claim.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Act,² the Office's regulations provide that a claimant's application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office." To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office's decision for which review is sought.³ 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.⁴

¹ 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(a).

⁴ 20 C.F.R. § 10.607(b).

Appellant was issued appeal rights with the March 24, 1998 decision, which stated that, if he requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. As appellant's October 19, 1999 reconsideration request was outside the one-year time limit, which began the day after March 24, 1998, appellant's application for review was untimely.

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 of the case to determine whether the application establishes "clear evidence of error." The Office will reopen a claimant's case for merit review notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰

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.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹²

⁵ 20 C.F.R. § 10.607(a).

⁶ See *Dean D. Beets*, 43 ECAB 1153 (1992). The Office regulations promulgated at 20 C.F.R. § 10.138(b) have since been revised and will be utilized in Office decisions issued after January 1, 1999. The new Office regulations will be interpreted with the same applicability as in prior decisions, with regard to time limitations for reconsideration requests and the clear evidence of error standard.

⁷ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁹ See *Leona N. Travis*, *supra* note 7.

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² See *Gregory Griffin*, 41 ECAB 458 (1990).

In support of his October 19, 1999 request for reconsideration, appellant argued that the employing establishment omitted from his record all evaluations, which illustrated his highly successful job performance, leaving only negative evaluations on record. He has raised this argument before the Office in previous requests for reconsideration. Further, this argument is also immaterial to the issue in the case and is thus insufficient to warrant merit review.

Appellant also submitted copies of nursing and physician notes, which generally discuss his hip and back condition and symptoms of stress and anxiety that he attributed to work. These reports are already of record and have been previously determined insufficient to warrant a merit review of the case.

The critical issue in the case at the time the Office issued its March 24, 1998 decision, was whether appellant had established that his chest condition and depression were causally related to a compensable factor of employment, the employing establishment's delay in submitting appellant's compensation documentation. The Office found in its March 24, 1998 decision that the medical evidence of record failed to establish a causal relationship between the claimed conditions and the accepted factor of employment. The evidence submitted with appellant's October 19, 1999 request for reconsideration does not establish clear evidence of error in the Office's March 24, 1998 decision.

Therefore, as appellant has not raised a substantial question as to the correctness of the merit decision or presented evidence which on its face shows that the Office made an error, appellant has failed to establish clear evidence of error in the Office's March 24, 1998 decision.

The decision of the Office of Workers' Compensation Programs dated November 12, 1999 is hereby affirmed.

Dated, Washington, DC
November 1, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member