

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMY L. HOLYFIELD and U.S. POSTAL SERVICE,
BETHABARA STATION, Winston-Salem, NC

*Docket No. 01-1760; Submitted on the Record;
Issued March 27, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

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

On January 10, 1996 appellant, then a 43-year-old letter carrier, sustained a lumbosacral strain in the performance of duty when he slipped on ice and fell.

Compensation benefits were paid to appellant until by decision dated February 5, 1999, the Office terminated his compensation benefits on the grounds that the weight of the medical evidence established that he had no continuing disability causally related to his January 10, 1996 employment injury.

By decision dated and finalized October 28, 1999, an Office hearing representative affirmed the Office's February 5, 1999 decision.

By letter dated January 31, 2001, received by the Office on February 6, 2001, appellant requested reconsideration and submitted additional evidence.¹

In a report dated September 10, 1999, Dr. Paul G. Martin provided a history of appellant's back problems and the results of a neurological examination. He stated that appellant had chronic back pain due to his preexisting back condition of spondylolysis and his 1996 employment injury and might require further surgery.

In a report dated December 6, 2000, Dr. Edward G. Hill provided a history of appellant's condition and opined that appellant was totally disabled due to his 1996 employment injury.

¹ Appellant also submitted evidence previously considered by the Office.

By decision dated March 26, 2001, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that his request was untimely and failed to show clear evidence of error.

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.² As appellant filed his appeal with the Board on June 22, 2001, the only decision properly before the Board is the Office's March 26, 2001 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's February 5, 1999 decision terminating appellant's compensation benefits or the October 28, 1999 decision affirming the February 5, 1999 decision.³

Section 8128 of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). As one such limitation, the Office will not review a decision denying or terminating compensation benefits unless the application for review is filed within one year of the date of that decision.⁷ 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).⁸

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure a review of an Office decision upon presentation of new evidence that the decision was erroneous.⁹ In accordance with this holding, the Office will consider an untimely application for

² 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 5 U.S.C. § 8128(a).

⁵ *Gregory Griffin*, 41 ECAB, 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, *supra* note 3.

⁶ *Leon D. Faidley*, *supra* note 3. Compare 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request is made prior to a request for reconsideration.

⁷ 20 C.F.R. § 10.607.

⁸ See *Gregory Griffin*, *supra* note 5.

⁹ See *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision.¹⁰

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

In this case, appellant filed his request for reconsideration by letter dated January 31, 2001 and received by the Office on February 6, 2001. This was clearly more than one year after the Office's October 28, 1999 merit decision was issued and thus the application for review was not timely filed. In accordance with its implementing regulations and Board precedent, the Office properly found that the request for reconsideration was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error which would warrant reopening his case for merit review under 5 U.S.C. § 8128(a), notwithstanding the untimeliness of his application.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application for review was sufficient to show clear evidence of error

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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.¹⁶

In support of his request for reconsideration, appellant argued that a November 13, 1998 report by an Office referral physician, which found that appellant's work-related disability had ceased, was based on the physician's incorrect statement that an injury sustained by appellant in

¹⁰ 20 C.F.R. § 10.607(b).

¹¹ See *Dean D. Beets*, 43 ECAB 1153, 1158 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁶ *Gregory Griffin*, *supra* note 5.

1995 was not an accepted employment injury. However, this argument was previously addressed in the Office's October 28, 1999 decision. Therefore, this argument does not show clear evidence of error in the October 28, 1999 decision.

Appellant also submitted additional medical evidence in support of his request for reconsideration.

In a report dated September 10, 1999, Dr. Martin provided a history of appellant's back problems and the results of a neurological examination. He stated that appellant had chronic back pain due to his preexisting back condition of spondylolysis and his 1996 employment injury and might require further surgery. In a report dated December 6, 2000, Dr. Hill provided a history of appellant's condition and opined that appellant was totally disabled due to his 1996 employment injury. However, as noted above, it is not sufficient to merely show that the evidence could be construed so as to produce a contrary conclusion. Later medical evidence independently supporting causal relationship such as that submitted with appellant's January 31, 2001 request for reconsideration, has no bearing on the probative value of the medical evidence that was before the Office at the time of its October 28, 1999 decision.¹⁷ Consequently, the evidence submitted in support of appellant's untimely request for reconsideration in no way shows that the Office's October 28, 1999 decision was erroneous. Thus the evidence submitted by appellant did not raise a substantial question as to the correctness of the Office's October 28, 1999 decision and the Office properly denied appellant's untimely request for reconsideration.

¹⁷ *Dean D. Beets, supra* note 11.

The decision of the Office of Workers' Compensation Programs dated March 26, 2001 is affirmed.

Dated, Washington, DC
March 27, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member