

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS M. LONG and DEPARTMENT OF THE ARMY,
MEDICAL SUPPLY DEPARTMENT, Fort Hood, N.Y.

*Docket No. 97-5; Submitted on the Record;
Issued November 3, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly rejected appellant's request for reconsideration.

Appellant sustained dorsal and lumbosacral sprains on March 28, 1986 while in the performance of his federal employment and was placed on the periodic rolls to receive compensation for temporary total disability.

On October 13, 1992 Dr. Gerald Q. Greenfield, appellant's treating physician and a Board-certified orthopedic surgeon, stated that his objective findings were a central disc herniation at the T11-12 level, as well as at the L5/S1 level, based on a March 27, 1992 magnetic resonance imaging. He noted decreased sensation in the left S1 dermatome and, by x-ray, bilateral par defects at the L5 level. He indicated that these findings were most likely due to appellant's July 13, 1983 and March 28, 1986 injuries. Dr. Greenfield stated that appellant had not yet recovered from these injuries and that his disability was seven percent for each of the disc herniation levels and eight percent for the spondylolysis level. Dr. Greenfield also completed a work restriction form indicating that appellant could intermittently sit for eight hours per day, that he could intermittently walk and stand for six hours per day, that he could intermittently squat and kneel for three hours per day, that he could intermittently climb for one hour per day and that he could not bend or twist. He stated that appellant could lift 10 to 20 pounds and that he could perform simple grasping without any hand restrictions. He found that appellant could not push or pull, but that he could perform fine manipulation, reach and work above his shoulder, use his feet to operate foot controls and perform repetitive movement and operate a car or truck. Dr. Greenfield limited appellant to working six hours per day and he indicated that appellant needed more surgery.

The Office subsequently referred appellant to Dr. Jerjis J. Denno, a Board-certified orthopedic surgeon. On November 18, 1992 Dr. Denno diagnosed spondylosis at L5, a herniated nucleus pulposus at L5-S1 and at T11-12 centrally and an old anterior wedge fracture at T12 and L1 with some mild anterior kyphosis. He concurred with Dr. Greenfield's recommendation of

surgery of an anterior interbody fusion and a combination of the postlateral fusion and plates along with a Gill procedure.

On April 27, 1993 the Office issued a "Notice of Proposed Reduction of Compensation." The Office indicated that the medical evidence established that appellant was partially disabled and had the capacity to earn wages as a telephone solicitor at the rate of \$186.00 per week. In an accompanying memorandum, the Office indicated that it relied on Dr. Greenfield's October 13, 1992 work restriction form and the rehabilitation counselor's report that the position of telephone solicitor met Dr. Greenfield's restrictions and was reasonably available. Appellant was given 30 days to respond.

By decision dated May 27, 1993, the Office reduced appellant's compensation effective May 30, 1993 finding that he was only partially disabled and that the position of telephone solicitor fairly and reasonably represents his wage-earning capacity. In an accompanying memorandum, the Office authorized an anterior interbody fusion and a combination of the posterolateral fusion and plates along with the Gill procedure and the EB1 bone stimulator. The Office further stated that at such time the surgery was performed, the reduction of compensation would be interrupted and would continue until such time when appellant was again capable of performing work of a sedentary nature.

Appellant subsequently requested reconsideration. In support, appellant submitted letters from Dr. Greenfield dated July 9 and 14, 1993 indicating that appellant was disabled, pending surgery. Appellant also resubmitted Dr. Greenfield's April 22 and October 13, 1992 reports.

By decision dated August 10, 1993, the Office denied modification of the May 27, 1993 decision. In an accompanying memorandum, the Office noted that none of the new evidence addressed whether appellant was capable of performing the duties of a telephone solicitor at the time the Office's decision was issued.

On January 28, 1994 appellant again requested reconsideration. In support, appellant submitted progress reports from Dr. Greenfield dated August 25 and September 9, 1993, noting appellant's current condition and requests for approval of surgery.

By decision dated March 1, 1994, the Office reviewed the case on its merits and denied modification. In an accompanying memorandum, the Office noted that the additional medical reports failed to address whether appellant was unable to do the work of a telephone solicitor on June 1, 1993 or explained how appellant's condition worsened after that date.

Appellant again requested reconsideration. In support, he submitted an August 17, 1994 report from Dr. Greenfield. Dr. Greenfield indicated that he treated appellant for an injury sustained in March 1996. He diagnosed spondylolysis L5 bilaterally and a disc herniation at the L5/S1 level. He also diagnosed a disc herniation at the T11-12 level which was asymptomatic. He stated that he was awaiting surgical intervention and that appellant needed a disc excision, a postlateral fusion and a fusion interbody with stabilization at the L5/S1 level. He stated that appellant could not sit for a prolonged period exceeding one hour. He stated that after surgery that the rehabilitation period would be about 6 to 12 months. He stated that afterwards appellant would be limited to lifting less than 25 pounds and be precluded from prolonged sitting or standing without changing positions. Appellant also submitted progress notes from

Dr. Greenfield indicating that appellant would have difficulty returning to a heaving lifting job and that he would be able to lift up to 25 pounds.

By decision dated November 22, 1994, the Office reviewed the merits of the decision and denied modification. In an accompanying memorandum, the Office stated that, the new medical evidence failed to support a worsening of appellant's condition. The Office noted that, although Dr. Greenfield recommended surgery, appellant refused the procedure. Moreover, the Office indicated that Dr. Greenfield's conclusion that appellant could not sit for more than one hour was not supported by medical rationale.

On January 2, 1995 appellant again requested reconsideration. In support, appellant submitted a December 12, 1994 report from Dr. Greenfield. Dr. Greenfield repeated his previous diagnoses and recommended that appellant be barred from a heavy equipment job. He noted that magnetic resonance imaging showed a disc herniation at the T11-12 and L5/S1 levels. He stated that both of these would be impaired by a sitting position and by doing heavy work. He again recommended surgery.

By decision dated January 17, 1995, the Office reviewed the merits of the case and denied modification. In an accompanying memorandum, the Office reviewed Dr. Greenfield's December 12, 1994 report and noted that appellant refused his advice of surgery. The Office found that the additional medical report failed to provide substantial probative evidence that there has been a material change in appellant's injury-related condition.

Appellant again requested reconsideration. In support, appellant submitted a March 28, 1995 report from Dr. Greenfield, indicating that appellant should have surgery. Dr. Greenfield also repeated his previous diagnoses and stated that appellant could resume a light-duty job. Appellant also resubmitted previous reports of record from Dr. Greenfield.

By decision dated May 3, 1995, the Office denied reconsideration finding the evidence submitted in its support was immaterial and insufficient to warrant review of the previous decision. In an accompanying memorandum, the Office noted that Dr. Greenfield's March 28, 1994 report was not relevant to the issue of appellant's wage-earning capacity.

On June 27, 1995 appellant again requested reconsideration. In support, appellant submitted a June 6, 1995 letter from Dr. Greenfield. Dr. Greenfield repeated his previous diagnoses and again recommended surgery.

By decision dated August 29, 1995, the Office denied reconsideration because the evidence submitted in its support was cumulative and insufficient to warrant review of the previous decision. In an accompanying memorandum, the Office noted that Dr. Greenfield's report was cumulative of his prior opinions stating that appellant needed surgery.

On May 13, 1996 appellant again requested reconsideration.¹ In support, appellant submitted a July 8, 1996 report from Dr. Greenfield. In this report, Dr. Greenfield repeated his prior diagnoses and again stated that appellant needed surgery. He also stated that he did not

¹ Although appellant's reconsideration letter was dated May 13, 1995, the Office indicated that the letter was sent on May 13, 1996.

recommend a return to heavy manual labor and that appellant was capable of doing sedentary work.

By decision dated August 12, 1996, the Office denied appellant's request for reconsideration pursuant to 20 C.F.R. § 10.138(b)(2) because it was not filed within one year of its January 17, 1995 merit decision. The Office further found that pursuant to 20 C.F.R. § 10.138(a) appellant failed to demonstrate clear evidence of error. In an accompanying memorandum, the Office stated that Dr. Greenfield's July 8, 1996 report was essentially the same as his previous reports and, therefore, failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decision issued within one year prior to the filing of the appeal.² As appellant filed his appeal on September 10, 1996, the only decision properly before the Board is the Office's August 12, 1996 decision, denying appellant's request for reconsideration.

The Board has duly considered the case record and concludes that the Office properly refused to reopen appellant's claim for further reconsideration of the merits in its August 12, 1996 decision under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b) and that the application failed to present clear evidence of error.

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 and states in relevant part:

“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 previously 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).³

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ *Mamie L. Morgan*, 47 ECAB ____ (Docket No. 94-610, issued January 22, 1996).

On May 13, 1996 appellant requested reconsideration. The most recent decision on the merits prior to appellant's request was the Office's January 17, 1995 decision.⁴ The one-year limitation period, therefore, began to run on January 18, 1995 and appellant's May 13, 1996 request for reconsideration was untimely.⁵

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.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 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.⁷

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

⁴ In a statement of appeals rights accompanying the January 17, 1995 decision, the Office informed appellant of the following:

"RECONSIDERATION: If you have additional evidence which you believe is pertinent, you may request, in writing, that the Office reconsider this decision. Such a request must be made *within one year of the date of the decision*, clearly state the grounds upon which reconsideration is being requested and be accompanied by relevant evidence not previously submitted, such as medical reports or affidavits, or a legal argument not previously made." (Emphasis added.)

⁵ *Larry J. Lilton*, 44 ECAB 243 (1992). With regard to when the one-year limitation period begins to run, the Office's Procedure Manual provides:

"This one-year [limitation] period for requesting reconsideration begins on the date of the original [Office] decision...."

⁶ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁷ 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, proof of a 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 a review of the case...."

a substantial question as to the correctness of the Office's decision. 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.⁸

The Board finds that the evidence submitted in support of appellant's untimely May 13, 1996 request for reconsideration fails to establish clear evidence of error. The only new evidence submitted by appellant in support of reconsideration was the July 8, 1996 report of Dr. Greenfield, appellant's treating physician and a Board-certified orthopedic surgeon. Dr. Greenfield, however, found that appellant was capable of doing sedentary work. Consequently, this opinion fails to support appellant's request for reconsideration on the basis that he remains totally disabled. Moreover, Dr. Greenfield's report is substantially similar to his previously submitted opinions stating that appellant should have surgery and avoid heavy labor. His opinion is, therefore, also cumulative.

Accordingly, the evidence submitted in support of appellant's untimely request for reconsideration does not raise a substantial question as to the correctness of the Office's decision rejecting appellant's claim. As appellant's untimely request for reconsideration failed to demonstrate clear evidence of error, the Board finds that the Office properly denied appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated August 12, 1996 is affirmed.

Dated, Washington, D.C.
November 3, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁸ *Thankamma Mathews*, 44 ECAB 765 (1993).