

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN J. POXON and DEPARTMENT OF THE NAVY,
MIRAMAR NAVAL AIR STATION, San Diego, CA

*Docket No. 99-1186; Submitted on the Record;
Issued August 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and appellant failed to present clear evidence of error.

On September 14, 1994 appellant, then a 60-year-old flight documentation clerk, sustained a back injury in the performance of duty. While the Office initially denied the claim based on appellant's failure to establish fact of injury, an Office hearing representative subsequently reversed the initial denial and accepted the claim for lumbar strain. After further development of the medical evidence, the Office issued a decision on June 27, 1996 wherein the Office found that as of May 23, 1996, appellant no longer suffered from residuals causally related to his September 14, 1994 employment injury. Appellant sought reconsideration, however, by merit decision dated March 28, 1997, the Office denied modification. Thereafter, appellant requested a second hearing on two separate occasions. In each instance the Office denied appellant's request based on the fact that he had previously received a hearing. In its most recent hearing denial dated February 4, 1998, the Office further explained that the issue of whether appellant continued to suffer residuals of his accepted employment injury could equally well be addressed on reconsideration.

In a letter dated October 29, 1998, appellant again requested reconsideration. Additionally, appellant submitted an operative report for back surgery performed on November 19, 1997 and a February 3, 1998 letter from Dr. James E. McSweeny, a Board-certified orthopedic surgeon.

By decision dated January 11, 1999, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and he failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's October 29, 1998 request for reconsideration.

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 payment of compensation.³ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ The application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵ Appellant failed to meet this particular requirement in that the Office's most recent decision was issued on March 28, 1997 and appellant filed his request for reconsideration more than a year and a half later on October 29, 1998.

In those instances where a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.⁶ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷

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 it must be apparent 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 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

¹ 5 U.S.C. § 8128(a).

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

³ 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 on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ 20 C.F.R. § 10.607(a).

⁶ 20 C.F.R. § 10.607(b).

⁷ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

¹⁰ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ *See Leona N. Travis*, *supra* note 9.

favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹²

In the instant case, appellant failed to demonstrate clear evidence of error. The issue is whether appellant continues to suffer from residuals of his September 14, 1994 employment injury, which the Office accepted for lumbar strain. As previously noted, the Office determined that as of May 23, 1996, appellant no longer suffered from residuals of his accepted injury. The record indicates that appellant suffered from preexisting degenerative disc disease of the lumbar spine as well as preexisting spinal stenosis. Additionally, the record indicates that following his September 14, 1994 injury, appellant sustained two work-related back injuries, both of which were similarly accepted for lumbar strain.

None of the information submitted following the Office's March 28, 1997 merit decision is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant. The operative report regarding appellant's November 19, 1997 back surgery merely outlines the procedure performed and does not address whether the surgery was a consequence of appellant's September 14, 1994 accepted injury. Furthermore, Dr. McSweeney, who performed the procedure, noted in his February 3, 1998 letter that appellant's current condition and the need for surgery in November 1997 was a direct consequence of an employment injury which occurred on October 11, 1996. Inasmuch as the evidence submitted on reconsideration does not specifically relate appellant's current condition to his accepted employment injury of September 14, 1994, appellant has failed to present any rationalized medical evidence that he continues to suffer residuals of his accepted employment injury. As previously noted, the clear evidence of error standard is a difficult standard to meet. In view of the foregoing evidence, the Office properly concluded that appellant failed to present clear evidence of error on the part of the Office in denying compensation. Consequently, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

The January 11, 1999 decision of the Office of Workers' Compensation Programs is, hereby, affirmed.

Dated, Washington, D.C.
August 16, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member