

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OLIVER HENRY and DEPARTMENT OF THE INTERIOR, NATIONAL
PARK SERVICE, NATIONAL CAPITOL REGION, Washington, DC

*Docket No. 98-2359; Submitted on the Record;
Issued September 11, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Worker's Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On August 2, 1994 appellant, then a painter supervisor, filed a traumatic injury claim (Form CA-1) assigned number A25-454086 alleging that on July 31, 1994 he injured his back while picking up a small amount of paint in a bucket.¹

By letter dated January 9, 1994, the Office accepted appellant's claim for left lower back strain.

In a notice of proposed termination of compensation dated April 17, 1996, the Office advised appellant that it proposed to terminate his compensation based on the January 17, 1996 medical report of Dr. John B. Cohen, a Board-certified orthopedic surgeon and second opinion physician, finding that appellant was no longer disabled due to his accepted employment injuries and that appellant could return to work in his position as a painter supervisor.

¹ Prior to the instant claim, appellant filed a Form CA-1 on August 25, 1993 assigned number A25-432693 alleging that on August 8, 1993 he injured his neck and upper back while painting the ceiling in the White House oval office. The Office accepted appellant's claim for cervical strain. The Office consolidated appellant's claim assigned number A25-454086 and claim assigned number A25-432693 into a master case file assigned number A25-432693 because the latter was the oldest case in its office.

By decision dated May 20, 1996, the Office terminated appellant's compensation effective that date based on Dr. Cohen's medical opinion. The Office found that appellant's disability was due to his preexisting degenerative disc disease. In a May 20, 1997 letter, appellant, through his counsel, requested reconsideration of the Office's decision.

By decision dated June 9, 1997, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that it neither raised substantive legal questions nor included new and relevant evidence. On May 12, 1998 appellant, through his counsel, requested reconsideration of the Office's decision accompanied by medical and factual evidence.

By decision dated June 26, 1998, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that appellant's request was untimely filed and failed to establish 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 Inasmuch as appellant filed his appeal with the Board on July 23, 1998, the only decision properly before the Board is the Office's June 26, 1998 decision denying appellant's request for a review of the merits of its May 20, 1996 decision.

Under section 8128(a) of the Federal Employees' Compensation Act³ the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).⁵

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶ The Office issued its last merit decision in this case on May 20, 1996 wherein it terminated appellant's compensation on the grounds that appellant no longer had any disability causally related to his August 8, 1993 and July 31, 1994 employment injuries. Inasmuch as appellant's May 12, 1998 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(a); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ *Larry L. Lilton*, 44 ECAB 243 (1992).

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁷ 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹²

In the instant case, the Board finds that appellant's May 12, 1998 request for reconsideration failed to establish clear evidence of error. In support of his claim, appellant submitted the October 3, 1986 x-ray report of Dr. C.F. Murphy, a radiologist, indicating a straightened cervical spine, degenerative change throughout most of the cervical spine with spurring and narrowing of several disc spaces, anterior encroachment on the C4-5 neurocanal on the right and anterior encroachment on the C4 through C6 neurocanals on the left. Dr. Murphy's report also indicated an unremarkable right shoulder. Appellant also submitted the October 6, 1986 treatment notes of a physician whose signature is illegible revealing the medical treatment he received for his neck pain. Further, appellant submitted medical treatment notes covering the period October 17 through November 13, 1986 regarding his right upper extremity and neck. The August 30, 1993 magnetic resonance imaging (MRI) scan results of Dr. Charles E. Hunter, a Board-certified radiologist, submitted by appellant revealed a posterior spur from C3-4 to C7-T1 with associated spinal stenosis and that the most severe level was at C4-5 with associated cord compression and bilateral nerve root compression. A September 2, 1993 hospital medical report of Dr. Charles J. Azzam, a Board-certified neurosurgeon, provided a history of appellant's August 8, 1993 employment injury and medical treatment and his findings on objective and neurological examination. He diagnosed cervical radiculitis on the basis of cervical spondylosis with evidence of cervical canal stenosis as demonstrated by the cervical MRI scan. A September 8, 1993 discharge summary report of Dr. Stephen M. Seabron, an internist, indicated

⁷ *Gregory Griffin, supra* note 4.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (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); *Thankamma Mathews*, 44 ECBA 765 (1993); *Jesus D. Sanchez, supra* note 5.

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *Jesus D. Sanchez, supra* note 5.

¹² *Leona N. Travis, supra* note 10.

final diagnoses of acute cervical radiculopathy, cervical spinal stenosis, degenerative joint disease, degenerative disc disease and hypercholesterolemia. The medical evidence submitted by appellant failed to address a causal relationship between his current disability and his accepted employment injuries. Therefore, appellant has failed to establish clear evidence of error.

Appellant submitted a September 23, 1993 medical report of Dr. Frederick W. Gooding, a Board-certified physiatrist, providing a history of appellant's right arm pain and his findings on physical and objective examination. He diagnosed chronic severe cervical spondylosis and spinal cord compression secondary to multiple level cervical discitis. Dr. Gooding ruled out cervical radiculopathy. He opined that appellant had preexisting cervical spondylosis, but that his physical activities "could have" promoted an inflammation at the facet joints, as well as, additional pressure on the cervical discs causing inflammation at both areas which in turn would cause compromise of the nerve roots, as well as, the spinal cord. Dr. Gooding's opinion is not sufficient to establish clear evidence of error by the Office in terminating appellant's compensation benefits.

Appellant also submitted Dr. Gooding's September 9, 1997 deposition which reviewed a history of appellant's July 31, 1994 employment injury and diagnosed cervical radiculopathy, cervical discitis and chronic myofascial pain syndrome. He deposed that he reviewed appellant's medical records, including Dr. Cohen's medical report and he provided an opinion of how appellant's conditions were caused by his August 8, 1993 and July 31, 1994 employment injuries. Although Dr. Gooding's report may be sufficient to establish a conflict in the medical opinion evidence with the opinion of Dr. Cohen, such evidence does not constitute clear evidence of error.¹³

Inasmuch as none of the evidence submitted by appellant in support of his untimely request for reconsideration raise a substantial question as to the correctness of the prior May 20, 1996 Office decision or *prima facie* shifts the weight of the evidence in favor of appellant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

¹³ See *Fidel E. Perez*, 48 ECAB 663 (1997) (finding that the medical evidence submitted in support of appellant's untimely request for reconsideration, while sufficient to create a conflict in medical opinion, did not rise to the level of clear evidence of error).

The June 26, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 11, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member