

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS J. McKIEVER and U.S. POSTAL SERVICE,
POST OFFICE, Melville, NY

*Docket No. 01-1235; Submitted on the Record;
Issued April 22, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

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 October 23, 1989 appellant, then a 39-year-old express mail clerk, filed a traumatic injury claim alleging that his left knee swelling was due to being struck by a post-con. The Office accepted the claim for left thigh and knee phlebitis and authorized surgery.

In January 1998, appellant filed an occupational disease claim alleging that on September 15, 1997 he realized his preexisting condition of phlebitis was aggravated by his employment duties.¹

In a report dated September 8, 1998, Dr. Peter J. Sordi, a treating Board-certified surgeon, concluded that appellant's current varicose vein problem was not employment related.

By decision dated October 14, 1998, the Office denied appellant's claim on the basis that fact of injury had not been established. The Office found the medical evidence insufficient to establish that his phlebitis was aggravated by prolonged standing or any other employment duties.

¹ This was assigned claim number A02-742257.

In a letter dated September 27, 2000, appellant's counsel requested reconsideration.² In support of his claim, appellant submitted various medical and factual documentation regarding his various claims.

In a January 23, 2001 decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and it did not establish clear evidence of error.

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

Section 8128(a) of the Federal Employees' Compensation Act does not grant a claimant the right to a merit review of her case.³ Rather, this section vests the Office with discretionary authority to review prior decisions:

“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 awarded; or
- (2) award compensation previously refused or discontinued.”⁴

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). Section 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office's decision, for which review is sought. This section further provides that 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.⁵

Because appellant's request for reconsideration of the October 14, 1998 decision was not made until September 27, 2000, more than one year after the date of the decision, the Office properly found appellant's request to be untimely. The issue, therefore, is whether the reconsideration request demonstrates clear evidence of error.

² Appellant's counsel submitted his August 6, 1999 recurrence claim which alleged that his disability beginning prior to September 8, 1997 was related to his accepted October 23, 1989 employment injury, the first page of an occupational disease claim dated August 3, 1999 regarding his shoulder pain and an occupational disease claim dated August 30, 1999 alleging his hernia was employment related. Appellant also submitted an August 23, 1998 letter to the Office requesting his hernia claim be changed to an on-the-job injury claim.

³ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607 (1999).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁶ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁷ Evidence that 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 on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.¹²

The issue for purposes of establishing clear evidence of error in this case is whether appellant has submitted evidence establishing that there was an error in the Office's determination, *i.e.*, that his phlebitis was caused or aggravated by his employment duties.

In support of his request for reconsideration, appellant submitted copies of his claim forms, an October 3, 1997 right inguinal hernia repair report, a September 15, 2000 report by Dr. Eric A. Putterman regarding his left shoulder and knee problems, letters from appellant dated March 11, 1998, June 11, August 28, and September 12 and 20, 1999, a July 27, 1998 criminal complaint, medical restriction forms, a copy of his August 6, 1999 recurrence claim which alleged that his disability beginning prior to September 8, 1997 was related to his accepted October 23, 1989 employment injury, the first page of an occupational disease claim dated August 3, 1999 regarding his shoulder pain and an occupational disease claim dated August 30, 1999 alleging his hernia was employment related. The issue in the case is whether appellant established that his phlebitis was caused or aggravated by employment duties. Appellant submitted no such evidence, and without it the record does not show that the Office's October 13, 1998 decision denying his claim was erroneous. Therefore, the Board will affirm the Office's January 23, 2001 decision denying appellant's request for reconsideration.

⁶ See *Dean D. Beets*, 43 ECAB 1153 (1992).

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

¹¹ *Linda K. Cela*, 52 ECAB ____ (Docket No. 00-1084, issued March 7, 2001); *Leon D. Faidley, Jr.*, *supra* note 3.

¹² *Steven J. Gundersen*, 53 ECAB ____ (Docket No. 00-625, issued December 5, 2001); *Gregory Griffin*, *supra* note 3.

The January 23, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed

Dated, Washington, DC
April 22, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member