

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID L. ROSS and DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE, OK

*Docket No. 01-999; Submitted on the Record;
Issued January 11, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by denying appellant's request for a merit review.

On November 19, 1996 appellant, then a 50-year-old aircraft mechanic, filed a notice of occupational disease alleging that he sustained bilateral carpal tunnel syndrome due to work factors of repetitive hand and wrist movement, including keyboarding. He was on restricted duty with prescribed wrist splints at the time he filed his claim.¹

In support of his claim, appellant submitted employing establishment health unit chart notes dated May 10, 1993 to March 24, 1997. In November 18, 1996 and January 14, 1997 notes, Dr. Alberto Angles, an occupational health physician, diagnosed "possible carpal tunnel syndrome."

By decision dated June 16, 1997, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that the medical evidence did not contain objective findings or a definitive diagnosis of carpal tunnel syndrome or related condition.

Appellant disagreed with this decision and in an October 4, 2000 letter requested reconsideration. He submitted new evidence: a November 18, 1996 report from Dr. Angles diagnosing possible bilateral carpal tunnel syndrome; January 10, September 6 and 10, 2000 reports from Dr. Ronal Hale, an attending Board-certified orthopedic surgeon, diagnosing bilateral carpal tunnel syndrome, with ulnar neuropathy and cubital tunnel syndrome related to

¹ In a letter dated April 14, 1997, the Office advised appellant of the type of additional medical and factual evidence needed to establish his claim. The Office specifically requested that appellant's physician submit a detailed statement of objective findings, including the presence of Tinel's and Phalen's signs and an explanation of how and why appellant's work factors would cause bilateral carpal tunnel syndrome.

“repetitive accumulative trauma” at work; a February 4, 2000 electromyographic study (EMG) report showing “[s]evere bilateral median nerve entrapment at the wrist.”

By decision dated November 29, 2000, the Office denied reconsideration on the grounds that it was untimely filed. The Office found that appellant’s October 4, 2000 letter was dated more than one year following the June 16, 1997 decision and was therefore not filed within the one-year time limitation for requesting reconsideration. The Office then conducted a limited review of the evidence accompanying appellant’s October 4, 2000 request and determined that it did not demonstrate clear evidence of error.

The Board finds that the Office properly denied appellant’s request for a merit review.

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. As appellant filed his appeal with the Board on March 5, 2001, the Board has jurisdiction only over the November 29, 2000 decision denying his request for a merit review. The Board does not have jurisdiction over the June 16, 1997 decision denying his claim based on fact of injury.²

Section 8128(a) of the Act³ does not entitle a claimant to review of an Office decision as a matter of right.⁴ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ As one such limitation, the Office has stated that it 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.⁶ The Board has found that the

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b)(2).

⁶ 20 C.F.R. § 10.607(a).

imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

The Board finds that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on June 16, 1997. As appellant's October 4, 2000 reconsideration request was outside the one-year time limit which began the day after June 16, 1997, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.⁸ 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.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 by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁶

⁷ See cases cited *supra* note 4.

⁸ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁹ Federal (FECA) Procedure Manual, Part 2 -- *Claims*, Reconsiderations, Chapter 2.1602.3(d) (May 1996).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 4.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁶ *Gregory Griffin*, *supra* note 8.

The Board finds that appellant's October 4, 2000 letter requesting reconsideration and the accompanying medical reports, failed to show clear evidence of error. His letter and the medical reports do not establish that the Office's June 16, 1997 decision was clearly in error or raise a substantial question as to the correctness of that decision.

The critical issue in the case at the time the Office issued its June 16, 1997 decision was whether appellant sustained bilateral carpal tunnel syndrome or a related neuropathy in the performance of duty. The medical reports accompanying appellant's October 4, 2000 request for reconsideration diagnose bilateral carpal tunnel syndrome, ulnar neuropathy and cubital tunnel syndrome. Dr. Hale, an attending orthopedic surgeon, remarked that the diagnosed conditions were caused by "repetitive accumulative trauma" at work, but did not specify any individual work factors or otherwise explain his conclusory support for causal relationship. Thus, the Board finds that the new medical reports are insufficiently rationalized to effect a *prima facie* shift of the weight of the evidence in appellant's favor. Therefore, the Office's November 29, 2000 decision finding that appellant's October 4, 2000 request for reconsideration was untimely and did not establish clear evidence of error was correct under the law and facts of this case.

The decision of the Office of Workers' Compensation Programs dated November 29, 2000 is hereby affirmed.

Dated, Washington, DC
January 11, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member