

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN V. PRYOR and DEPARTMENT OF THE ARMY,
CIVILIAN PERSONNEL, Fort Sam Houston, TX

*Docket No. 03-2082; Submitted on the Record;
Issued November 24, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration, dated September 5, 2002, was untimely filed and did not present clear evidence of error.

This is appellant's fourth appeal before the Board. In the first appeal, the Board, on March 27, 1990, affirmed the Office's June 1, 1988 merit decision and its July 27, 1988 and February 22, 1989 nonmerit decisions which found that appellant failed to meet his burden of proof to establish that his impingement syndrome of both shoulders was causally related to his June 18, 1986 employment injury.¹ The facts and the circumstances of the case are set forth in the prior decision and are hereby incorporated by reference.

In the second appeal, on March 8, 1995, the Board issued an order dismissing appeal on the grounds that there was no final decision of the Office issued subsequent to the Board's March 27, 1990 decision, over which the Board could take jurisdiction.²

On January 8, 2003 appellant "disagree[d] with the decision that the [Employees' Compensation] Appeals Board made of my case. I want a request a hearing on my case I have good cause all medical records was sent in to U.S. Department of Labor. I have good cause for a hearing."³

¹ Docket No. 89-1129 (issued March 27, 1990).

² Docket No. 94-2192 (issued March 8, 1995).

³ Appellant had previously requested and received a review of the written record by an Office hearing representative on June 1, 1988.

However, in the third appeal, on February 27, 2003, the Board issued an order remanding case on the grounds that the case record submitted to the Board was incomplete.⁴ The Board set aside the most recent Office decision dated October 21, 2002, which was a nonmerit decision and which denied merit reconsideration of an Office decision supposedly dated March 13, 1996, and remanded the case for further development. The Office was directed to reconstruct and properly assemble the complete case record and to follow up with the issuance of an appropriate final decision to fully protect appellant's appeal rights.

Following remand, the Office attempted but failed to find the March 13, 1996 decision that appellant referred to in his request for reconsideration which was denied on October 21, 2002. The Office, therefore, found that the most recent Office merit decision that contained full appeal rights, was dated June 1, 1988. The Office found that appellant's request for reconsideration was dated September 5, 2002, which was more than one year after the most recent merit decision, and therefore was untimely made.⁵

By letter dated May 23, 2003, the Office requested that appellant submit a copy of the March 13, 1996 decision to the Office, and it reminded him that it was his responsibility to ensure that requested documentation is submitted. Appellant responded that he did not have a copy of a decision dated March 13, 1996, but that he submitted copies of two decisions dated March 27, 1990 and March 8, 1995.

Nothing further was submitted.⁶

By decision dated July 16, 2003, the Office denied appellant's request for further review of his case on its merits and it found that he had not demonstrated clear evidence of error that the most recent merit decision was incorrect.

The only decision before the Board on this appeal is the Office's July 16, 2003 nonmerit decision.⁷ Since more than one year has elapsed from the date of issuance of the Office's June 1, 1988 merit decision to the date of the filing of appellant's appeal before the Board on August 12, 2003, the Board lacks jurisdiction to review the June 1, 1988 decision. In that decision, the hearing representative found that appellant failed to meet his burden of proof to establish that his impingement syndrome of both shoulders was causally related to his June 18, 1986 employment injury.

The Board finds that the Office properly denied merit review of appellant's case request as the request was untimely and did not present clear evidence of error.

⁴ Docket No. 03-684 (issued February 27, 2003).

⁵ Even if there had been a March 13, 1996 Office merit decision in the case record, appellant's September 5, 2002 request for reconsideration would still be untimely made.

⁶ Following the Office's October 21, 2002 decision but prior to his reconsideration request, appellant submitted about 10 years worth of various medical therapy forms for a variety of conditions ranging from upper and lower extremity joint disease to thoracic problems and gynecomastia, and including unpaid medical bills.

⁷ 20 C.F.R. § 501.3(d)(2). The time limitation for the Board to reconsider its February 27, 2003 order remanding case had run as of March 27, 2003. See 20 C.F.R. § 501.7(a).

Section 8128(a) of the Federal Employees' Compensation Act⁸ does not entitle a claimant to a review of an Office decision as a matter of right.⁹ The Office, through its regulation, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.¹⁰

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 5 U.S.C. § 8128(a).

The Office properly determined in this case that appellant failed to file a timely application for review. As appellant's September 9, 2002 and January 8, 2003 requests for reconsideration were made outside the one-year time limitation, which began the day after the most recent Office merit decision carrying reconsideration rights, June 1, 1988, his request for reconsideration was untimely.¹¹

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.¹² 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. § 10.606(a) if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹³

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 a substantial question as to the correctness of the Office decision. The Board makes an

⁸ 5 U.S.C. § 8128(a).

⁹ *Veletta C. Coleman*, 48 ECAB 367 (1997).

¹⁰ 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹¹ The one-year time limit for filing for reconsideration was up on June 1, 1989. However, since the Board rendered a merit decision in this case on March 27, 1990, appellant's time limit for requesting reconsideration was extended to March 27, 1991.

¹² *Veletta C. Coleman*, *supra* note 9; *Gregory Griffin*, *supra* note 10.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

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 fact of such evidence.¹⁴

The Board further finds that appellant did not present clear evidence of error in the June 1, 1988 merit decision.

In the present case, in support of his untimely request for reconsideration of the June 1, 1988 hearing representative decision, appellant submitted copies of other decisions. Appellant submitted a copy of Docket No. 94-2192, order dismissing appeal issued March 8, 1997, and a copy of Docket No. 89-1129, decision and order issued March 27, 1990. As these decisions were already a part of the record they were duplicative and hence irrelevant, and therefore did not provide any basis for reopening appellant's claim for further review on its merits. Appellant also submitted an information form for his Congressional representative, copies of medical bills and a variety of medical therapy forms discussing epicondylitis, osteoarthritis, left knee problems, gynecomastia and degenerative joint disease among other conditions dating back 10 years. However, impingement of both shoulders was not mentioned.

As this collection of medical bills, statements, reports and sheets does not directly identify any specific medical condition causally related to appellant's June 18, 1986 employment injury, these reports are irrelevant and duplicative of reports already of record, and therefore do not constitute any basis for reopening appellant's claim for further review on its merits.

The Office properly conducted a limited review and determined that none of this evidence established clear evidence of error, such that appellant has not raised a substantial question as to the correctness of the June 1, 1988 merit decision or the subsequent nonmerit decisions.

As appellant's request for reconsideration was untimely filed and contained no clear evidence of error, the Office properly denied further review of this case on its merits.

¹⁴ See *supra* note 9.

The decision of the Office of Workers' Compensation Programs dated July 16, 2003 is hereby affirmed.

Dated, Washington, DC
November 24, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member