

**United States Department of Labor
Employees' Compensation Appeals Board**

KEITH E. GUTHRIE, Appellant

and

**DEPARTMENT OF THE ARMY,
HEADQUARTERS, Fort Dix, NJ, Employer**

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**Docket No. 03-854
Issued: April 13, 2004**

Appearances:
Keith E. Guthrie, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On February 19, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 14, 2002, which denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated March 6, 2000 and the filing of this appeal on February 19, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for a merit review on the grounds that the request was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

The Office found that on October 31, 1996 appellant, then a 47-year-old pest control driver, was involved in a two-vehicle accident during, which a woman ran a stop sign and hit the

driver's side of appellant's truck. The Office accepted that appellant sustained a concussion and low back sprain. At that time appellant was in treatment for Vietnam service-related post-traumatic stress disorder.

Appellant continued in treatment for low back strain with Dr. Jeffrey Oppenheim, who continued to support that he was disabled as a result of his work injuries.

The Office referred appellant for a second opinion examination to Dr. Stanley Askin, a Board-certified orthopedic surgeon. By report dated October 6, 1997, Dr. Askin found that there were no objective findings on clinical examination that would corroborate appellant's ongoing disability or impairment on the basis of low back sprain. He found no objective evidence of any remaining injury-related disability from the musculoskeletal perspective and he opined that appellant could return to work in any capacity for a full eight-hour day.

Thereafter the Office referred appellant to Dr. Michael Partnow, a Board-certified neurologist, for a second opinion examination. By report dated November 6, 1997, Dr. Partnow noted that he performed a neurologic work-up and opined that appellant was fully recovered from his work injury with regard to his diagnosed concussion. He indicated that appellant could perform his job as a pest controller without limitations.

By letter dated January 7, 1998, the Office advised appellant that it proposed to terminate his compensation benefits on the grounds that the weight of the medical evidence of record established that he had no continuing disability as a result of the October 31, 1996 work injury.

Appellant disagreed with the proposed action and submitted medical records, treatment notes and diagnostic testing results, which supported that he continued to be disabled.

By decision dated February 10, 1998, the Office terminated appellant's compensation benefits effective that date on the grounds that his employment-related disability had ceased. Although appellant's treating physician, Dr. Oppenheim, continued to support injury-related disability, he did not provide medical rationale to support this opinion, whereas Drs. Askins and Partnow both provided well-rationalized medical reports based upon a proper factual and medical background, which were, therefore, entitled to great probative weight. Dr. Askins found that orthopedically appellant had recovered from his back injury and Dr. Partnow found that neurologically appellant had recovered from his concussion.

Appellant disagreed with this action and requested an oral hearing before an Office hearing representative, which was held on October 29, 1998, at which he testified that he continued to suffer from the effects of the injury. Submitted at the hearing were medical progress notes dating from 1997 and before. Subsequent medical reports from Drs. Schwartzman, Oppenheim, Scardigli, Panda and Israelite were insufficient to demonstrate continuing disability as none of them were rationalized or provided a specific opinion on causal relation.

As appellant did not provide rationalized probative medical evidence sufficient to create a conflict on the issue of whether or not he had continuing disability, the weight of the medical evidence of record remained with Drs. Askins and Partnow.

By decision dated February 11, 1999, the hearing representative affirmed the February 10, 1998 Office decision, finding that the additional medical evidence was not sufficient to warrant further development of the claim.

Appellant disagreed with this decision and by letter dated November 11, 1999, he requested reconsideration of the February 11, 1999 decision. In support he submitted duplicative medical reports dating from April 1996 through December 4, 1997 and three new reports, one of which was a pharmacy report and the other two were lacking any discussion on causal relation.

By decision dated March 6, 2000, the Office denied modification of the February 11, 1999 decision on the grounds that the evidence submitted in support was insufficient to warrant modification.

In August 2002 appellant contacted his congressional representative, who was advised by the Office on September 9, 2002 that orthopedic and neurologic second opinion examinations of appellant provided no objective findings or rationale to support continuing disability. By letter dated September 16, 2002, appellant complained how his case had been mishandled and how Dr. Askin had discriminated against him. On October 24, 2002 appellant sent by facsimile to the Director of the Office through his congressional representative's office, two September 16, 2002 statements regarding errors on the part of the Office in completing various forms alleging harassment, discrimination and fraud. Appellant claimed that his original diagnosis was not ever correct, that he had neck and back trauma and a concussion, that he was improperly denied a second opinion and that the medical reports resulting were discriminating and prejudicial.

By decision dated November 14, 2002, the Office advised appellant that his reconsideration request was not timely filed and did not present clear evidence of error. It denied reopening of appellant's case for a further review on its merits.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error.

To establish clear evidence of error, a claimant has to submit evidence relevant to the issue, which was decided by the Office.¹ The evidence has to be positive, precise and explicit and must

¹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

be manifest on its face that the Office committed an error.² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁴ This determination of clear evidence of error entails a limited review by the Office of the evidence submitted with the reconsideration request to determine whether the new evidence demonstrated clear evidence of error on the part of the Office.⁵ 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.⁶ The Board makes an independent determination as to 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 face of such evidence.⁷

ANALYSIS

In its November 14, 2002 decision, the Office determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on March 6, 2000 commencing the one-year time limitation period, and appellant's requests for reconsideration of that decision were dated September 16, 2002 and were sent by facsimile on October 24, 2002, which were clearly more than one year after March 6, 2000. Therefore, appellant's requests for reconsideration of his case on its merits were untimely filed.

In support of appellant's section 8128(a) merit reconsideration request, he submitted his own evaluation and interpretation of medical reports previously submitted to the record. No new actual medical evidence was submitted. Appellant argued that multiple medical errors were made on many reports, that the deck was stacked against him, that Dr. Askin's report was discriminating and prejudicial, that Social Security viewed his case differently, that the employing establishment acted with pure harassment, discrimination and fraud and that the Office did not bother to check their own forms to really see his diagnoses. None of appellant's allegations or arguments were persuasive or relevant to the issue of the case, which was the termination of appellant's compensation effective February 10, 1998.

The Board has frequently explained that findings of other administrative agencies are not determinative with regard to proceedings under the Federal Employees' Compensation Act,

² See *Leona N. Travis*, 43 ECAB 227 (1991).

³ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ See *Leona N. Travis*, *supra* note 2.

⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

which is administrated by the Office and the Board.⁸ The standards for disability are very different under the Social Security Act regulation, from those under the Federal Employees' Compensation Act. Therefore, the Board must find that the holdings and conclusions of the Social Security Administration are not binding on the Office or the Board and are, therefore, moot in this case.

The Office conducted a limited review of these arguments and determined that they did not demonstrate clear evidence of error in the March 6, 2000 decision. The Board finds that the arguments do not establish clear evidence of error in the March 6, 2000 decision, as they merely criticize the employing establishment's actions, the physicians' opinions and the Office's determinations. This evidence, therefore, is not sufficient to demonstrate that appellant had continuing disability for work on or after February 10, 1998. No clear evidence of error on the part of the Office was identified and, therefore, the Office properly found that this evidence was not relevant to the issue of the March 6, 2000 decision.

CONCLUSION

The Board finds that the Office properly declined to reopen appellant's claim for merit review on November 14, 2002. The Board further finds that appellant has failed to submit evidence establishing clear evidence of error on the part of the Office in his reconsideration requests dated September 16 and October 24, 2002. Inasmuch as appellant's reconsideration requests were untimely filed and failed to establish clear evidence of error, the Office properly denied further merit review on November 14, 2002.

⁸ See *George A. Johnson*, 43 ECAB 712 (1992).

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 13, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member