

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN SHEPHERD and DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE, CA

*Docket No. 01-1764; Submitted on the Record;
Issued March 13, 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 determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the April 5, 2001 decision denying appellant's request for reconsideration. More than one year has elapsed between the date of the Office's most recent merit decision of May 31, 1996, which denied modification of a December 4, 1995 decision and the filing of appellant's appeal on November 30, 2000. The Board lacks jurisdiction to review the merits of appellant's claim.¹

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Office, through its regulations, 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.² 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).³

The Office properly found in the April 5, 2001 decision that the one-year time limit for filing a request for reconsideration of the Office's May 31, 1996 decision expired on

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

² 20 C.F.R. § 10.607(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

May 31, 1997. Therefore, the request for reconsideration dated November 27, 2000 was untimely.

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.⁴ 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁵

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

In support of his November 27, 2000 request for reconsideration, appellant submitted two personal letters, an undated letter from Dr. Jennifer Osborn, an October 12, 2000 medical narrative from Dr. Stephen A. McCurdy, a Board-certified internist, and copies of various publications regarding work exposure to solvents and jet fuel. The information appellant submitted in support of his request is irrelevant to the issue at hand since it pertains to claims of

⁴ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

⁷ *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *Jesus D. Sanchez*, *supra* note 3.

⁹ *Leona N. Travis*, *supra* note 7.

¹⁰ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 3.

¹² *Gregory Griffin*, *supra* note 4.

chemical exposure with vertigo and balance problems and is not related to his claim of an employment-related bilateral hearing loss or the denial of his schedule award. These claims are not covered under the accepted condition of bilateral sensorineural hearing loss with tinnitus and do not raise a question as to the correctness of any of the Office's decisions. The Board finds that the evidence submitted by appellant does not establish clear evidence of error in the Office's denial of a schedule award.

Appellant did not submit any evidence which raised a substantial question as to the correctness of the Office's May 31, 1996 decision denying appellant's request for modification of a previous decision denying a schedule award for hearing loss.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied it.

The April 5, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 13, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member