

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTOR R. LANE and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, Ohio

*Docket No. 97-248; Submitted on the Record;
Issued December 4, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

In the instant case, the Office accepted that appellant sustained a right ankle sprain with degenerative occult fracture and spur formation as a result of an October 7, 1986 traumatic injury and authorized an arthroscopy which was performed on May 14, 1987. The Office further accepted that appellant sprained his ankle and aggravated his prior ankle condition as a result of a traumatic injury occurring on October 2, 1990. By decision dated October 16, 1989, the Office issued appellant a schedule award for a 12 percent permanent impairment of his right leg.

By letter dated September 7, 1993, the Office informed appellant that it proposed to terminate his compensation benefits based on the opinion of Dr. John P. Hudak, an orthopedic surgeon, who provided an impartial medical examination.¹ By decision dated October 7, 1993, the Office terminated appellant's entitlement to continuing compensation benefits and further found that he was not entitled to an increased schedule award.

In a letter dated July 1996, appellant requested reconsideration of the Office's October 7, 1993 decision and submitted additional medical evidence. By decision dated

¹ In a report dated April 8, 1993, Dr. Hudak found that appellant had no objective evidence of any residual disability due to either employment injury and could work eight hours per day without restrictions.

August 9, 1996, the Office denied appellant's request for reconsideration after finding that it was untimely and did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's August 9, 1996 decision denying appellant's request for a review on the merits of its October 7, 1993 decision terminating his compensation benefits and denying his claim for an increased schedule award. Because more than one year has elapsed between the issuance of the Office's August 9, 1996 decision and October 3, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 7, 1993 Office decision.²

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ The Office 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.⁴ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.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 manifested 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 as to whether a claimant has submitted clear evidence of error on

² See 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ See *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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

⁸ See *Jesus D. Sanchez*, *supra* note 5.

⁹ See *Leona N. Travis*, *supra* note 7.

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

¹¹ See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹²

The Board finds that, since more than one year has elapsed since the date of issuance of the Office's October 7, 1993 merit decision and July 1996, the date of appellant's request for reconsideration, the Office properly found his request for reconsideration untimely. The Board further finds that the evidence submitted by appellant in support of his request for reconsideration does not raise a substantial question as to the correctness of the Office's October 7, 1993 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

Appellant submitted a report dated June 21, 1994 from Dr. Edward H. Gabelman, a Board-certified orthopedic surgeon and his attending physician. Dr. Gabelman opined that appellant required continuing treatment for his employment-related ankle condition. He noted that he most recently examined appellant on June 3, 1994 and listed normal findings on examination except for some tenderness of the lateral malleolar area. He further found that appellant could work. As Dr. Gabelman does not find that appellant is unable to perform his usual employment due to his accepted employment injuries or that he has an additional permanent impairment of his right leg, his report is insufficient to shift the weight of the evidence in favor of appellant. Additionally, although Dr. Gabelman opined that appellant's current ankle condition is causally related to the accepted employment injury, his finding is conclusory and unsupported by medical rationale.¹³

Appellant further submitted office visit notes from Dr. Gabelman dated May 22, 1996 and November 3, 1994. In the office visit note dated November 3, 1994, Dr. Gabelman treated appellant for right ankle pain and tenderness and opined that he could continue to work restricted duty. Dr. Gabelman, however, does not relate appellant's current condition to his accepted employment injuries or find appellant unable to work, and thus his report does not constitute grounds for reopening appellant's case for merit review.

In the office visit note dated May 22, 1995, Dr. Gabelman found a slight restriction in range of motion of the ankle but did not obtain range of motion measurements or reach any specific impairment determination and thus his report does not raise a substantial question as to the correctness of the prior Office finding that appellant was not entitled to an additional schedule award.

The Board also finds that appellant's reconsideration request, in which he argued that Dr. Byron K. Hoffman, a Board-certified orthopedic surgeon and Office referral physician, erroneously considered only appellant's October 7, 1990 employment injury in finding that he had no residuals from the injury, is insufficient to raise a legal question warranting a merit review. Dr. Hoffman, in response to an Office inquiry, opined that appellant had no objective disability due to either his October 7, 1986 or October 2, 1990 employment injury.

¹² *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

¹³ Medical reports not containing rationale on causal relationship are entitled to little probative value and are generally insufficient to meet appellant's burden of proof. *Lourdes Davila*, 45 ECAB 139 (1993).

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, did not abuse its discretion in denying further review of the case.

The decision of the Office of Workers' Compensation Programs dated August 9, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 4, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member