

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HOYT SHELTON and DEPARTMENT OF THE ARMY,  
McALESTER ARMY AMMUNITION PLANT, McAlester, Okla.

*Docket No. 97-2364; Submitted on the Record;  
Issued May 24, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issues are: (1) whether the Office of Worker's Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's February 24, 1997 request for reconsideration was untimely filed and failed to present clear evidence of error; and (2) whether the Office met its burden of proof in terminating appellant's compensation benefits effective April 8, 1995 on the grounds that appellant no longer had any residuals of his September 18, 1991 employment injury.

On October 8, 1991 appellant, who was in the temporary position of equipment operator, filed a traumatic injury claim (Form CA-1) alleging that while he was driving on September 18, 1991 he injured his upper back and neck when he was struck from behind by another car. Appellant returned to light-duty work on January 13, 1992.

The Office accepted appellant's claim for thoracic strain and cervical strain.

On April 29, 1992 appellant filed a claim for compensation on account of continuing disability (Form CA-8) for the period May 18 through 31, 1992. On May 28, 1992 appellant filed a Form CA-8 for the period June 1 through 14, 1992.

On May 19, 1992 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of disability of his September 18, 1991 employment injury. Appellant stopped work on May 4, 1992.

In a November 5, 1992 letter, the employing establishment requested that the Office determine whether appellant was entitled to loss of wage-earning capacity because the temporary position he was in at the time of his September 18, 1991 employment injury had expired and he was returned to his former position at a lower pay rate.

By decision dated February 3, 1993, the Office found the evidence of record insufficient to establish that appellant had a loss of wage-earning capacity due to his September 18, 1991 employment injury because the expiration of his temporary appointment effective September 20, 1992 was due to an administrative action. By decision of the same date, the Office found the

evidence of record insufficient to establish that appellant was totally disabled during the period May 4 through June 14, 1992.

In a February 25, 1993 letter, appellant requested an oral hearing before an Office representative. By decision dated December 2, 1993, the hearing representative affirmed the Office's February 3, 1993 decisions.

Appellant, through his counsel, requested reconsideration of the Office's decision. By decision dated May 4, 1995, the Office denied appellant's request for modification based on a merit review of the claim.

In a notice of proposed termination of compensation dated May 4, 1995, the Office advised appellant that it proposed to terminate his compensation because the medical evidence of record established that he no longer had any residuals of his September 18, 1991 employment injury. By decision dated September 22, 1995, the Office terminated appellant's compensation effective April 8, 1995.

On May 6, 1996 appellant, through his counsel, requested reconsideration of the Office's decision. By decision dated June 12, 1996, the Office denied appellant's request for modification based on a merit review of the claim.

On February 24, 1997 appellant, through his representative, requested reconsideration of the Office's May 4, 1995 and June 12, 1996 decisions. By decision dated April 15, 1997, the Office denied appellant's request for reconsideration of its May 4, 1995 decision on the grounds that it was untimely filed and that it did not establish clear evidence of error. By decision of the same date, the Office denied appellant's request for modification of its June 12, 1996 decision based on a merit review of the claim.<sup>1</sup>

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's February 24, 1997 request for reconsideration was untimely filed and failed to present clear evidence of error.

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.<sup>2</sup> Inasmuch as appellant filed his appeal with the Board on July 15, 1997, the only decisions properly before the Board are the Office's April 15, 1997 decisions denying appellant's request for a review of the merits of its May 4, 1995 decision which denied appellant's request for modification of the hearing representative's December 2, 1993 decision and its decision denying appellant's request for modification of its June 12, 1996 decision which affirmed its September 22, 1995 decision terminating appellant's compensation benefits effective April 8, 1995.

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<sup>1</sup> The Board notes that subsequent to the Office's April 15, 1997 decision, the Office received additional medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; *see* 20 C.F.R. § 501.2(c)(1).

<sup>2</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>6</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. 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.<sup>7</sup> 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 section 8128(a).<sup>8</sup>

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>9</sup> The Office issued its last merit decision on appellant's claim for loss wages during the period May 4 through June 14, 1992 on May 4, 1995. Inasmuch as appellant's February 24, 1997 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

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.<sup>10</sup> 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>11</sup>

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 20 C.F.R. § 101.38(b)(1)-(2); *Thankamma Mathews*, 44 ECAB 788 (1993).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>7</sup> 20 C.F.R. § 10.138(b)(2); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>8</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>9</sup> *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>10</sup> *Gregory Griffin*, *supra* note 7.

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>12</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>13</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup>

In the present case, appellant failed to submit any evidence establishing that he was totally disabled during the period May 4 through June 14, 1992 with his February 24, 1997 request for reconsideration. Inasmuch as appellant has failed to submit any evidence that manifests on its face that the Office committed error in the May 4, 1995 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The Board further finds that the Office met its burden of proof in terminating appellant's compensation benefits effective April 8, 1995 on the grounds that appellant no longer had any residuals of his September 18, 1991 employment injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>16</sup>

In a June 26, 1994 medical report, Dr. Richard L. Pentecost, a Board-certified orthopedic surgeon and appellant's treating physician, indicated a history of appellant's September 18, 1991 employment injury and medical treatment, his findings on physical examination and a review of medical records. Dr. Pentecost stated that he advised appellant to obtain a second opinion by a neurosurgeon such as Dr. James A. Rodgers because he most likely needed an anterior cervical discectomy and fusion. He further stated that appellant needed help based on an abnormal electromyogram (EMG), discogram and persisting pain, and an amputated left arm. Dr. Pentecost concluded that if appellant had the appropriate surgery, then he would be able to return to full-duty status.

By letter dated January 18, 1995, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. Donald L. Landstrom, a

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20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office); *Thankamma Mathews*, *supra* note 4; *Jesus D. Sanchez*, *supra* note 8.

<sup>12</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>13</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>14</sup> *Jesus D. Sanchez*, *supra* note 8.

<sup>15</sup> *Leona N. Travis*, *supra* note 13.

<sup>16</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

Board-certified neurosurgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Landstrom of the referral.

Dr. Landstrom submitted a March 5, 1995 medical report revealing a history of the September 18, 1991 employment injury and appellant's medical treatment. Dr. Landstrom's report also revealed his findings on physical and objective examination. He opined that there was no objective evidence that appellant had sustained right cervical radiculopathy of the right upper extremity due to the September 18, 1991 employment injury. He, however, noted that appellant had not undergone magnetic resonance imaging (MRI) scan of his cervical spine to his knowledge since August 1992 and that since that study showed equivocal findings, he recommended that it be repeated.

In a supplemental medical report dated April 8, 1995, Dr. Landstrom indicated that the results of a March 23, 1995 MRI scan revealed mild spondylosis greatest at the C6-7 level with no evidence of cervical disc herniation. He stated that this gave him no reason to alter the opinions in his March 5, 1995 medical report. Dr. Landstrom opined that there was no objective evidence of right cervical radiuclopathy, right-sided carpal tunnel syndrome or any other neurological impairment based upon neurological and objective examination due to the September 18, 1991 employment injury. He further opined that surgery was not necessary and that there was no neurological reason why appellant could not perform his job as an engineering equipment operator. The Board finds that Dr. Landstrom provided a rationalized opinion based on a complete medical and factual background in establishing that appellant no longer had any continued disability caused by his September 18, 1991 employment injury.

In support of his claim for continuing disability, appellant submitted Dr. Pentecost's February 28, 1995 letter advising the employing establishment that he was unable to perform the duties of a laborer. He opined that appellant had cervical disc syndrome and spinal stenosis at C5-6 due to his September 18, 1991 employment injury. Dr. Pentecost's opinion is insufficient to establish continued disability inasmuch as it failed to provide any medical rationale explaining how or why appellant's totally disabling conditions were caused by the September 1991 employment injury.

In addition, appellant submitted Dr. Pentecost's medical treatment notes dated August 29, 1995 and March 4, 1996 regarding the treatment of appellant's back and diabetes conditions. These treatment notes failed to address whether these conditions were totally disabling as a result of appellant's September 18, 1991 employment injury.

Appellant also submitted the February 23, 1996 medical report of Dr. C. Eric Eckman, a Board-certified radiologist, indicating that appellant had a degenerated disc at C6-7 with bilateral foraminal protrusions and osteophytes based on a computed tomography (CT) examination of his cervical spine at the C6-7 intervertebral disc. This medical report is insufficient to establish continued disability because it failed to address whether these conditions were totally disabling as a result of appellant's September 18, 1991 employment injury.

Further, appellant submitted Dr. Pentecost's March 25, 1996 medical report. In this report he opined that appellant had a cervical disc at C6-7 with spinal stenosis of C5-6 as a result of his September 18, 1991 employment injury. Dr. Pentecost failed to provide any medical rationale explaining how or why appellant's condition was caused by the September 1991 employment injury.

Appellant also submitted a medical report of Dr. Emily D. Friedman, a Board-certified neurosurgeon. This report, however, is of limited probative value because it is illegible.<sup>17</sup>

Inasmuch as Dr. Landstrom's medical opinion constitutes the weight of the medical opinion evidence in this case, the Board finds that the Office met its burden of proof in terminating appellant's compensation effective April 8, 1995.

The April 15, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.  
May 24, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member

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<sup>17</sup> *Robert B. Rozelle*, 44 ECAB 616 (1993); *Harold L. Spear*, 32 ECAB 909 (1981).