

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL R. BOYKO and DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY, Fort Lewis, WA

*Docket No. 98-2477; Submitted on the Record;
Issued April 21, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

By decision dated December 16, 1996, the Office denied appellant's occupational disease claim for retracted tendons on the toes of his left foot, which he claimed resulted from standing on tiptoes on scaffolds and ladders in his capacity as a fire sprinkler technician, on the grounds that the submitted factual and medical evidence failed to establish that there was sufficient medical evidence to support the fact that appellant suffered an injury as reported. Subsequent to the issuance of the Office's December 16, 1996 decision, appellant submitted additional factual and medical evidence. By letter dated April 13, 1998, received by the Office on April 15, 1998, appellant requested reconsideration. By decision dated June 8, 1998, the Office denied appellant's reconsideration request as untimely and found that the statements appellant made in support of his request and the evidence submitted presented no clear evidence of error on the part of the Office.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹ 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.² When an application for review is untimely, the Office undertakes a limited review to

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.138(b)(2); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

determine whether the application presents clear evidence that the Office's final merit decision was in error.³

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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.⁷ 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).⁸

The Board finds that, since more than one year has elapsed from the date of issuance of the Office's December 16, 1996 merit decision, to the date that appellant's request for reconsideration was filed, April 15, 1998, appellant's request for reconsideration is untimely.

The Board further finds that the evidence submitted by appellant in support of such request does not raise a substantial question as to the correctness of the Office's December 16, 1996 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In this regard, appellant submitted a medical report from Dr. Robert W. Leyen, an orthopedist, with the Group Health Medical Center in Tacoma, Washington, dated November 19, 1996. The Board notes that this report was previously of record and had been considered by the Office in the issuance of its December 16, 1996 decision. Since this evidence was repetitious and duplicative of that already contained in the case record, it is not a basis for reopening the claim.⁹ Appellant also submitted a May 4, 1998 report from Dr. Michael S. McManus, Board-certified in preventative medicine, who diagnosed chronic synovitis and tendonitis in the left second toe and opined that appellant's condition was work related. However, Dr. McManus' report is of little probative value as he provided no medical rationale explaining the reasons for his conclusion.¹⁰ The Board finds that the evidence submitted on reconsideration did not raise a substantial question as to the correctness of the Office's December 16, 1996 decision and was insufficient to establish clear evidence of error.

³ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ 5 U.S.C. § 8128(a).

⁵ *Thankamma Mathews*, *supra* note 3.

⁶ *Id.* at 768; *see also Jesus D. Sanchez*, *supra* note 3.

⁷ 20 C.F.R. § 10.138(b)(2) or 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, *supra* note 2.

⁸ *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

⁹ *See Merlind K. Cannon*, 46 ECAB 581 (1995); *Eugene F. Butler*, 36 ECAB 393 (1984).

¹⁰ *See George Randolph Taylor*, 6 ECAB 986, 988 (1954).

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's December 16, 1996 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

The decision of the Office of Workers' Compensation Programs dated June 8, 1998 is hereby affirmed.¹¹

Dated, Washington, D.C.
April 21, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member

¹¹ The record contains several medical reports received after the Office's June 8, 1998 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c).