

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILLIP J. LEVY and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, CA

*Docket No. 99-1996; Submitted on the Record;
Issued May 15, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration, received by the Office on November 2, 1998 was untimely filed and did not present clear evidence of error.

The Board has duly reviewed the case record and concludes that appellant's request for reconsideration, received by the Office on November 2, 1998 was untimely filed and did not present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).³ 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.⁴ 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).⁵

¹ 5 U.S.C. § 8128(a).

² *Veletta C. Coleman*, 48 ECAB 367 (1997).

³ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.606(b).

⁴ 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ *See Veletta C. Coleman*, *supra* note 2.

The Office properly determined in this case 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.⁶ The Office issued its last merit decision in this case on November 5, 1996 wherein an Office hearing representative affirmed the Office's January 16, 1996 decision, terminating appellant's compensation benefits on the grounds that the evidence of record failed to establish that he had any disability after February 4, 1996 causally related to his accepted December 11, 1967 back strain and aggravation of degenerative disc disease. The Office hearing representative further found that appellant failed to meet his burden of proof to establish that he developed an employment-related psychiatric condition.

In a March 18, 1998 letter to his congressman, which was forwarded to the Office on March 17, 1998, appellant asserted that he had in fact filed a timely request for reconsideration in August 1997. By letter dated April 2, 1998, the Office explained to the congressman that it had no record of any reconsideration requests pertinent to the November 5, 1996 Office decision. On April 22, 1998 appellant responded again through his congressman, asserting that his reconsideration request had been sent certified and registered mail and that a copy of the prior mailing, together with its attached mailing verification, would be forwarded to the Office. This letter was acknowledged by the Office, by return letter dated May 4, 1998. On August 10, 1998 appellant contacted the Office by telephone and insisted that he had filed a timely request for reconsideration in August 1997. By pleading dated October 26, 1997⁷ and received by the Office on November 2, 1998, appellant, through counsel, requested reconsideration of the Office's prior decision. Attached to counsel's request was a copy of a request for reconsideration dated October 10, 1997 and three medical reports which counsel asserted had been submitted with the prior request for reconsideration and were now being resubmitted. By letter to his congressman dated October 23, 1998 and forwarded to the Office on October 27, 1998, appellant submitted an additional copy of the October 10, 1997 reconsideration request, which he asserted was proof that he had filed a timely request.

The Board finds that appellant has not established that he filed a timely request for reconsideration of the Office's November 5, 1996 decision. While appellant asserts that he filed a request for reconsideration in August 1997, a review of the record file reveals no letters from either appellant or his representative, sent either directly or through his congressman, in which appellant requests reconsideration of the November 5, 1996 decision. In addition, although appellant asserted that his prior request for reconsideration was sent registered and certified mail and that proof of mailing would be submitted to the Office, no such proof was ever received. Moreover, the Board notes that in its letters of response dated February 18, June 4 and June 17, 1997, the Office emphasized that appellant should exercise his appeal rights and noted that he was still within the one-year time limitation for requesting reconsideration. The Board also notes that appellant was represented by counsel during the relevant time period. Finally, the Board notes that while one of the three medical reports appellant asserted was submitted with his prior

⁶ *Veletta C. Coleman, supra* note 2; *Larry L. Lilton*, 44 ECAB 243 (1992).

⁷ The Board notes that the stated date of this pleading appears to be a typographical error and assumes the pleading should be dated October 26, 1998.

request for reconsideration was received by the Office prior to appellant's November 2, 1998 reconsideration request, this report, dated March 5, 1997 from Dr. Myron Koch, did not accompany a request for reconsideration, but rather was attached to a May 18, 1997 letter from appellant's congressman, in which the congressman inquired as to the status of appellant's claim and asked what could be done to resolve pending issues. In its June 4, 1997 response, the Office noted that it was appellant's responsibility to exercise his appeal rights and that the medical report would be placed in his file to be reviewed should appellant request reconsideration. As appellant has provided no evidence that he submitted a prior timely request for reconsideration and as appellant's reconsideration request received on November 2, 1998 was outside the one-year time limitation which began the day after November 5, 1996, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.⁸ 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. § 10.606(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. 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.¹⁰

In the present case, appellant did not submit any medical evidence pertaining to his claim for an employment-related psychiatric condition. However, aside from the copies of correspondence with his Senator and Congressman, discussed above, appellant did submit three medical reports documenting the care and treatment of his back condition. In reports dated July 3 and September 25, 1997, Dr. Ralph N. Steiger, a Board-certified orthopedic surgeon,

⁸ *Veletta C. Coleman, supra note 2; Gregory Griffin, 41 ECAB 186 (1989); petition for recon. denied, 41 ECAB 458 (1990).*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

¹⁰ *Veletta C. Coleman, supra note 2.*

diagnosed lumbar sprain with radiculitis in both lower extremities, degenerative disc disease at L3-4 and L5-S1 and bulging discs at L3-4, L4-5 and L5-S1 and concluded that based on the history provided by appellant and the type of work performed, lifting 50 pounds or more, the diagnosed conditions were directly related to appellant's December 11, 1967 injury and his work activities. As Dr. Steiger did not provide any rationalized explanation for his conclusions and further does not address whether appellant is disabled from his diagnosed conditions, his reports are of insufficient probative value to establish that the Office erred in terminating appellant's benefits.¹¹ In a report dated March 5, 1997, Dr. Myron Koch, a Board-certified orthopedic surgeon, who had last examined appellant in 1993, noted his findings on recent examination and compared these finding with those of Dr. Cox, the Office second opinion physician upon whose opinion the Office had relied in terminating benefits. He explained why he disagreed with Dr. Cox's various findings and conclusions and further explained why he felt appellant's accepted back conditions had not resolved. While Dr. Koch provided an explanation in support of his conclusions as to appellant's condition, at best his report could only be interpreted as demonstrating that there are diverse opinions in the case record regarding whether appellant has continuing disabling residuals of his accepted work-related back injuries. However, Dr. Koch's report is not sufficient to establish clear evidence of error as the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or to establish a procedural error, but it 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's November 5, 1996 decision.¹² Furthermore, as Dr. Koch did not examine appellant between 1993 and February 1997, his conclusion, that at the time of his 1997 examination appellant continued to be disabled from residuals of his employment-related back conditions, does not raise a substantial question as to the correctness of the Office decision at the time it terminated appellant's benefits on January 16, 1996.

The Office's January 29, 1999 decision properly determined that appellant had not presented clear evidence of error, as appellant did not submit any medical or factual evidence sufficient to show that the Office erred in its prior decisions.

¹¹ Rationalized medical evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Joe L. Wilkerson*, 47 ECAB 604 (1996); *Alberta S. Williamson*, 47 ECAB 569 (1996).

¹² *Mamie L. Morgan*, 47 ECAB 281 (1996); *Jeanette Butler*, 47 ECAB 128 (1995).

The decision of the Office of Workers' Compensation Programs dated January 29, 1999 is hereby affirmed.

Dated, Washington, DC
May 15, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member