

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLIE J. PATTERSON and TENNESSEE VALLEY AUTHORITY,
DIVISION OF CHEMICAL OPERATIONS, Chattanooga, TN

*Docket No. 01-1526; Submitted on the Record;
Issued February 1, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

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 that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed his appeal with the Board on May 7, 2001, the only decision before the Board is the Office's March 7, 2001 decision, denying appellant's request for reconsideration.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.³ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

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 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.⁵

This case is on appeal to the Board for the second time.⁶ On the first appeal, the Board reviewed the Office's December 3, 1996 and April 23, 1997 decisions, by which the Office denied appellant's request for modification of the Office's prior decisions affirming its termination of appellant's compensation benefits effective May 3, 1992. In the December 3, 1996 and April 23, 1997 decisions, the Office found that the medical evidence appellant submitted did not establish a causal relationship between appellant's back condition and the March 16, 1982 employment injury. The Board affirmed, finding that the medical evidence appellant submitted was insufficient to counter the opinion of the referral physician, Dr. Perry L. Savage, a Board-certified orthopedic surgeon, that appellant was no longer disabled due to the accepted work conditions of contusion of the left hip, low back strain and chronic lumbar back syndrome. The Board therefore affirmed the Office's December 3, 1996 and April 23, 1997 decisions.

By letter dated October 9, 2000, appellant requested reconsideration and submitted the deposition of his treating physician, Dr. Robert Q. Craddock, a Board-certified neurological surgeon, dated May 21, 1998. In his deposition, Dr. Craddock stated that he first treated appellant in February 1983, that over the years, he performed two myelograms and a computerized axial tomography scan on appellant as well as gave him nerve blocks and prescribed physical therapy. He opined that appellant had a bulging disc at L4-5. Dr. Craddock stated that he eventually placed permanent restrictions on appellant to avoid strenuous work. He described the drugs he prescribed appellant and stated that they made him drowsy and could impair his ability to work. Dr. Craddock also prescribed morphine injections. He stated that appellant had degenerative disc disease but did not have ankylosing spondylitis. Dr. Craddock stated that there were times appellant could have performed sedentary work and that appellant's complaints of pain were fairly constant and consistent with his objective findings.

⁵ See *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁶ Docket No. 97-2163 (issued July 7, 1999). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

By decision dated March 7, 2001, the Office denied appellant's request for reconsideration because it was not timely filed and failed to present clear evidence of error.

As the last merit decision in this case was the Board's July 7, 1999 decision, appellant's October 9, 2000 request for reconsideration was untimely filed.

In this case, Dr. Craddock's deposition testimony describing his treatment of appellant and the nature of appellant's condition based on diagnostic tests and appellant's subjective complaints contains no rationalized medical opinion explaining how appellant's current back condition is work related. Dr. Craddock's opinion is therefore not relevant to the issue in this case, *i.e.*, whether appellant's work-related disability ceased.⁷ The Office acted within its discretion in denying appellant's request for reconsideration and appellant failed to show clear evidence of error.

The Office of Workers' Compensation Programs' March 7, 2001 decision is hereby affirmed.

Dated, Washington, DC
February 1, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ See *Donald Johnson*, 44 ECAB 540, 548, 551 (1993).