

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD L. ARQUETTE and DEPARTMENT OF LABOR,
MINE SAFETY & HEALTH ADMINISTRATION, Golden, CO

*Docket No. 01-1625; Submitted on the Record;
Issued February 21, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

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 Office accepted that, on September 5, 1995, appellant, then a 55-year-old safety inspector, sustained a cervical strain with a compressed C5 nerve root when he struck his head in the performance of duty. The Office authorized cervical fusion of C5-6, which was performed on April 26, 1996. On October 15, 1996 appellant returned to his date-of-injury job, with a lifting restriction of 40 pounds, which was accommodated by the employing establishment. In a decision dated December 26, 1996, the Office found that appellant's position as a modified mine inspector fairly and reasonably represented his wage-earning capacity. On January 29, 1999 appellant filed a claim for a schedule award. In a decision dated September 10, 1999, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence showed no current evidence of radicular residuals effecting any of the members or functions of the body specified by section 8107 of the Federal Employees' Compensation Act.¹ The Office specifically noted that appellant's claim remained open for medical benefits for appellant's employment-related cervical condition. On January 16, 2001 appellant filed another claim for a schedule award, together with a narrative statement in which he requested a reevaluation of his

¹ A schedule award is not payable under the Act for an impairment of the back. *Francesco C. Veneziani*, 48 ECAB 572 (1997); *Denise D. Cason*, 48 ECAB 530 (1997). However, in 1966, amendments to the Act modified the schedule award provisions to provide for an award for impairment to a member of the body covered by the schedule regardless of whether the cause of the disability originated in a scheduled or nonscheduled member. For this reason, a claimant may be entitled to a schedule award for impairment to an extremity where the cause of the impairment originates in the spine. *John Litwinka*, 41 ECAB 956 (1990).

neck injury and related nerve damage, as he felt that his condition had progressively worsened. The Office authorized repeat magnetic resonance imaging and the additional physical therapy which was prescribed by appellant's physician.

By letter received March 21, 2001, appellant requested reconsideration of the Office's September 10, 1999 decision denying his claim for a schedule award. In support of his request, appellant submitted a series of physical therapy treatment notes dating from January 20 through February 23, 2001, a letter from his treating physician, Dr. Brain Weakley, stating that appellant had chronic cervical pain and required physical therapy, together with Dr. Weakley's prescription for the therapy.

By decision dated April 5, 2001, the Office denied appellant's reconsideration request as untimely and found that the evidence submitted presented no clear evidence of error on the part of the Office.

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 When an application for review is untimely, the Office takes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴

The Board finds that, since more than one year had elapsed since the date of issuance of the Office's September 10, 1999 merit decision to the date that appellant's request for reconsideration was filed, March 21, 2001, appellant's request for reconsideration is untimely. Moreover, 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 September 10, 1999 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 no medical evidence establishing that he sustained a ratable impairment to a scheduled member or function of the body specified by the Act.

The physical therapist's reports are not medical evidence as a physical therapist is not a physician under the Act.⁵ The only medical evidence submitted was a prescription for physical therapy from Dr. Wheatley, and a supporting letter from him stating that appellant suffered from chronic cervical pain and required physical therapy. Dr. Wheatley does not discuss whether appellant has any impairment of his extremities due to his accepted cervical condition. As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's September 10, 1999 decision, he has failed to

² 5 U.S.C. § 8128(a).

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

⁴ *Thankamma Matthews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ *Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996).

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 April 5, 2001 is hereby affirmed.⁶

Dated, Washington, DC
February 21, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

⁶ Subsequent to the issuance of the Office's April 5, 2001 decision, appellant submitted additional medical evidence into the record, including the results of an April 6, 2001 magnetic resonance imaging and June 8, 2001 nerve conduction study, and medical reports dated May 14 and June 8, 2001 from a treating physician, Dr. J. Scott Bainbridge. The Board cannot review this evidence on appeal, as the Board's jurisdiction is limited to reviewing the evidence and arguments that were before the Office at the time of its final decision; *see Lloyd E. Griffin, Jr.*, 46 ECAB 979 (1995); *Carroll R. Davis*, 46 ECAB 361 (1994). However, the Board notes that appellant's claim for a cervical injury was accepted by the Office and remains open for medical treatment. If appellant obtains medical evidence which establishes that his condition has worsened such that he develops an impairment of a scheduled member of the body, for example, an upper extremity, he may file another claim for a schedule award, together with the supporting medical evidence. In addition, if appellant's accepted medical condition worsens such that he can no longer perform his regular job, he may file a claim for a recurrence of disability, Form CA-2a, together with supporting medical evidence. In either case, it remains appellant's burden to provide medical evidence explaining how his condition has deteriorated, and how it is related to his accepted employment injury.