

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PETER DENNISON and TENNESSEE VALLEY AUTHORITY,  
PICKWICK HYDRO PLANT, Pickwick Dam, TN

*Docket No. 01-2001; Submitted on the Record;  
Issued September 17, 2002*

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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 refused to reopen appellant's claim for reconsideration on the basis that the request was untimely and failed to establish clear evidence of error.

The Board has reviewed the case record and finds that the Office acted within its discretion in refusing to reopen appellant's claim for further review of the merits.

The Office accepted that appellant sustained an injury to his lower back on August 15, 1990 and paid appropriate benefits.

On March 24, 1992 the Office proposed termination of appellant's wage-loss benefits and on April 24, 1992 by decision, terminated appellant's benefits effective May 3, 1992. The Office concluded that appellant had no continuing disability as a result of his work-related injury based upon the March 3, 1992 report, of Dr. George England, appellant's treating physician.<sup>1</sup>

Appellant thereupon filed multiple requests for reconsideration on April 18 and September 19, 1993, June 6 and October 20, 1994 and on February 5 and November 29, 1995.

The Office denied his requests in merit decisions dated April 12 and November 2, 1993, June 4 and December 6, 1994 and on February 1, 1996. The Office denied appellant's February 5, 1995 request, for reconsideration in a nonmerit decision dated March 29, 1995.

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<sup>1</sup> Dr. England's report stated that appellant had no residuals based on his work-related injury. He stated: "Standard conservative therapeutic measures were felt to have been achieved in a satisfactory manner on behalf of patient within a six[-]month interval[.] [G]iven that this is not the case, secondary evaluations were carried forth and one would assume that all baselines would have been reached in the natural course of the medical disorder as of October of 1991." He then noted that appellant had a five percent long-term disability based on his acute lumbar strain. Dr. England did not indicate what part of the body the impairment rating represented.

Appellant then filed a request for reconsideration on November 29, 2000. On July 10, 2001 the Office denied appellant's request for merit review.

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> The only decision on review by the Board in the current appeal is the July 10, 2001 decision of the Office. As appellant filed his appeal on August 20, 2001 the Board does not have jurisdiction over the Office's last merit decision dated February 1, 1996.

The Board finds that the Office properly declined to reopen appellant's claim for reconsideration on the basis that the request was untimely filed and failed to establish clear evidence of error.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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>3</sup> When an application for review is untimely, the Office will undertake a limited review to determine whether the application for review presents clear evidence of error that the Office's final merit decision was in error.<sup>4</sup> Since more than one year elapsed from the February 1, 1996 merit decision, denying modification of its prior decisions to appellant's reconsideration request dated November 29, 2000, the Office properly determined the request for reconsideration was untimely.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For proper exercise of the discretionary authority granted under section 8128(a), when an application for review is not timely filed the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>6</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>7</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>8</sup> 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

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<sup>2</sup> See *Feltus B. Stirling, Jr.*, 49 ECAB 387 (1998); *Oel Noel Lovell*, 42 ECAB 537 (1991).

<sup>3</sup> 20 C.F.R. § 10.607(a) (1992).

<sup>4</sup> 20 C.F.R. § 10.607(b) (1999).

<sup>5</sup> *Id.*

<sup>6</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

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.<sup>9</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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's decision.<sup>10</sup> 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.<sup>11</sup>

The Board notes that the evidence appellant submitted included medical records from Dr. David R. Longmire, a neurologist, from June 28, 2000 to April 30, 2001. Although Dr. Longmire diagnosed lumbar back pain, lumbar disc disease and myofascial pain, he was unable to establish a causal relationship between these conditions and the work-related injury.<sup>12</sup> For example, in a report dated June 28, 2000, Dr. Longmire stated that appellant had full range of motion in all extremities and that recent cervical and lumbar spine magnetic resonance imaging scans were normal. None of these reports established that appellant's current condition was causally related to his initial employment injury of August 15, 1990 and thus appellant's contention on appeal does not substantiate clear evidence of error by the Office in terminating his claim for wage-loss benefits.

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<sup>9</sup> See *Fidel E. Perez*, 48 ECAB 663 (1997).

<sup>10</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>11</sup> *Thankamma Mathews*, 44 ECAB 765 (1993).

<sup>12</sup> *Sylvia Lucas (Richard Lucas)*, 32 ECAB 1582 (1981) (while there must be a proven basis for the pain, pain due to an employment-related condition can be the basis for payment of compensation for disability under the Federal Employees' Compensation Act).

The July 10, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
September 17, 2002

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member