

**United States Department of Labor
Employees' Compensation Appeals Board**

JAMES ROBINSON, JR., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SUPPLY CENTER, Oakland, CA, Employer**

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**Docket No. 04-87
Issued: March 8, 2004**

Appearances:
James Robinson, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 26, 2003 appellant filed a timely appeal from the September 11, 2003 decision of the Office of Workers' Compensation Programs, which denied a merit review of the termination of his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has nonmerit jurisdiction to review the Office's September 11, 2003 decision.

ISSUE

The issue is whether the Office properly denied appellant's May 20, 2002 request for reconsideration on the grounds that it was untimely and failed to present clear evidence of error.

FACTUAL HISTORY

On the prior appeal,¹ the Board found that the case was not in posture for a decision on whether the Office properly denied appellant's May 20, 2002 request for reconsideration. The Office misidentified the issue for which appellant requested reconsideration: He was not seeking

¹ Docket No. 03-1304 (issued July 7, 2003).

a merit review of the decision denying his claim for an additional schedule award, as the Office had thought; and he was seeking a merit review of the Office's March 4, 1987 decision terminating his compensation benefits, effective March 15, 1987, on the grounds that the medical evidence established that he had no residuals or disability causally related to his January 11, 1980 employment injury. The Board remanded the case for a proper determination of whether appellant was entitled to a merit review of the Office's March 4, 1987 decision.²

In a decision dated September 11, 2003, the Office denied a merit review of its decision to terminate compensation benefits. Noting that the most recent merit decision on the issue was its September 17, 1993 decision denying modification, the Office found appellant's May 20, 2002 request for reconsideration to be untimely. Further, the Office found that appellant's request failed to present clear evidence of error in its decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."³

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁵ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁶ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

² The facts of this case, as set forth in the Board's prior decision, need not be repeated and are hereby incorporated by reference.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607 (1999).

⁵ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ See *Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ 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.¹⁰ 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 a merit review in the face of such evidence.¹¹

ANALYSIS

Appellant's May 20, 2002 request for reconsideration, made almost 10 years after the Office's most recent merit decision on the termination of his compensation benefits dated September 17, 1993, is untimely under 20 C.F.R. § 10.607. The Board further finds that the request for reconsideration, together with appellant's subsequent correspondence, does not establish on its face that the Office's decision to terminate compensation benefits for the accepted condition of carpal tunnel syndrome was erroneous. The Office based its decision on the weight of the medical opinion evidence, more specifically, on examinations and opinions obtained in 1986 from a Board-certified orthopedist and a Board-certified neurosurgeon. The Office found that these physicians were well qualified, that they reviewed the case within the framework of a statement of accepted facts, and that they provided medical rationale to support their conclusions.¹² Whether appellant continued to be disabled for work as a result of his employment-related carpal tunnel syndrome or continued to require medical treatment for the condition of carpal tunnel syndrome, is a medical question reserved for qualified physicians.¹³ Appellant may disagree with the medical evidence. He may believe that the physician who performed the surgical release on May 27, 1998 botched the surgery and caused him to develop causalgia, but as a lay person his opinion carries no evidentiary weight on such issues. Nothing he has submitted to support his request for reconsideration raises a substantial question about the correctness of the Office's decision. The mere fact that he received a schedule award for permanent physical impairment is no proof that he continued to be disabled for work as a result of his accepted carpal tunnel syndrome or that he continued to need medical attention for that

⁷ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ See *Travis*, *supra* note 6.

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹² As early as May 21, 1981 appellant's own physician was reporting normal electrodiagnostic studies and no objective findings on examination.

¹³ See *Ausberto Guzman*, 25 ECAB 362 (1974).

condition. An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.¹⁴

The Office intended the “clear evidence of error” standard to be a difficult standard to meet.¹⁵ Appellant’s May 20, 2002 request for reconsideration does not meet the standard, and for that reason he is not entitled to a merit review of the termination of his compensation benefits.

CONCLUSION

The Board finds that the Office properly denied a merit review of the termination of appellant’s compensation benefits. Appellant’s May 20, 2002 request for reconsideration is untimely, and it fails to present clear evidence of error in the Office’s decision.

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2003 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: March 8, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ See *Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that the claimant had sustained a permanent impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).