

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

HAROLD FUNDERBURK, Appellant

and

**SOLDIERS' & AIRMEN'S HOME,
Washington, DC, Employer**

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**Docket No. 04-1074
Issued: July 8, 2005**

Appearances:

Ardelia L. Davis, Esq., for the appellant

Thomas G. Giblin, Esq., for the Director

Oral Argument May 25, 2005

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 15, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 8, 2003 nonmerit decision denying his reconsideration request. The record does not contain any other decision that was issued within the year prior to the March 15, 2004 filing of the present appeal. Therefore, the Board has jurisdiction over the December 8, 2003 nonmerit decision but does not have jurisdiction over the merits of this case.¹

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The record also contains a March 15, 1996 decision of the Board. In the absence of further review by the Office on the issue addressed by the decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant did not seek reconsideration of the Board's decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on March 15, 1999 in which it affirmed the Office's termination of appellant's compensation effective August 22, 1993 on the grounds that he refused an offer of suitable work.² The Board found that the Office properly determined that the medical evidence, including the opinion of Dr. David Dorin, a Board-certified orthopedic surgeon and Office referral physician, showed that the modified electrical worker position offered by the employing establishment was suitable.³ The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

In an undated letter received by the Office on October 3, 2003 appellant requested reconsideration of his claim. He argued that Dr. Dorin did not conduct an adequate medical examination in 1993 and that the reports of his attending physicians showed that he could not perform the modified electrical worker position offered by the employing establishment.⁴

Appellant submitted numerous brief medical treatment notes, dated between 1996 and 2003, which were produced by Hampton J. Jackson, an attending Board-certified orthopedic surgeon, who described the symptoms reported by appellant in his neck, back, and upper and lower extremities and recommended treatment. He generally indicated that appellant was totally disabled from work. In a report dated May 14, 1996, Dr. Jackson detailed the results of an examination which was more comprehensive than those he usually performed. He noted that appellant had neck, back and right knee degenerative changes, left carpal tunnel syndrome, and a decompensated left shoulder and opined that he was totally disabled.

Appellant also submitted several reports from 1996 in which Dr. Rida N. Azer, an attending Board-certified orthopedic surgeon, discussed his neck, back, and left shoulder conditions and a January 5, 2001 report in which Dr. Kevin E. McGovern, a Board-certified orthopedic surgeon and Office referral physician, evaluated his back and left shoulder conditions. Appellant submitted physical therapy reports from 1996 onwards and medical reports which had

² Docket No. 95-533 (issued March 15, 1999). The Board affirmed the Office's March 21 and July 20, 1994 decisions. The Board also found that the Office properly denied appellant's request for surgery for his left carpal tunnel syndrome.

³ The Office accepted that on May 15, 1990 appellant, then a 45-year-old electrician, sustained employment-related lumbosacral, left shoulder and thoracic strains. It also authorized an arthroscopy of the left shoulder which was performed on October 19, 1991. In April 2003 the employing establishment offered appellant the modified electrical worker position and in May 2003 the Office determined that the job was suitable.

⁴ The letter was addressed to appellant's congressional representative but the Office interpreted it as a request for reconsideration.

already been received and considered by the Office. He submitted numerous administrative and other nonmedical documents, including prior decisions of the Office, communications with congressional representatives, the Office's responses to these representatives, and periodical articles of general application.

By decision dated December 8, 2003, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. 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."⁷ Office regulations and procedure provide 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by the Office of how the

⁵ 20 C.F.R. § 10.607(a).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

⁹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² *See Leona N. Travis*, *supra* note 10.

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.¹³ 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.¹⁴

ANALYSIS

In its December 8, 2003 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on October 3, 2003, more than one year after the last merit decision of record, *i.e.*, the Board's March 15, 1996 decision.¹⁵ Therefore, he must demonstrate clear evidence of error on the part of the Office in its prior decisions.

The Board finds that appellant has not demonstrated clear evidence of error on the part of the Office in issuing its prior decisions. In his October 3, 2003 reconsideration request, appellant argued that Dr. Dorin, a Board-certified orthopedic surgeon and Office referral physician, did not conduct an adequate medical examination in 1993 and that therefore his opinion could not serve as the basis for the Office's May 1993 determination that the modified electrical worker position offered by the employing establishment was suitable. He also argued that the reports of his attending physicians showed that the job was not suitable. However, the question of whether the Office properly determined that the modified electrical worker position was suitable is medical in nature and appellant's mere argument that the medical evidence was insufficient would not be relevant to this issue.¹⁶ Similarly, appellant's submission of numerous administrative and other nonmedical documents would not be relevant to this medical matter.

Appellant submitted numerous notes, dated between 1996 and 2003, in which Dr. Jackson, an attending Board-certified orthopedic surgeon, described his symptoms and recommended treatment. However, although these documents would constitute medical evidence, they are not relevant in that they provide no opinion on appellant's medical condition around mid 1993, *i.e.*, the time that the Office determined that the modified electrical worker position offered by the employing establishment was suitable. Appellant also submitted several reports from 1996 of Dr. Azer, an attending Board-certified orthopedic surgeon, and a 2001 report of Dr. McGovern, a

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (January 2004).

¹⁶ Moreover, it should be noted that the Board, in its March 15, 1996 decision, already affirmed the Office's termination of appellant's compensation effective August 22, 1993 on the grounds that he refused an offer of suitable work. As noted above, in the absence of further review by the Office on the issue addressed by a Board decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. See *supra* note 1.

Board-certified orthopedic surgeon and Office referral physician, but these reports also are not relevant in that they provide no opinion on appellant's medical condition around mid 1993.¹⁷

None of the evidence or argument submitted by appellant raises a substantial question concerning the correctness of the Office's prior decisions and appellant's untimely reconsideration request is insufficient to establish clear evidence of error.¹⁸

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 8, 2003 decision is affirmed.

Issued: July 8, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁷ Appellant submitted physical therapy reports from 1996 but such reports would not be relevant as they do not constitute medical evidence. *See Jane A. White*, 34 ECAB 515, 518-19 (1983). He submitted medical reports which had already been received and considered by the Office, but he did not explain how these reports would show that the Office erred in its prior decisions.

¹⁸ The Office also determined that appellant was not entitled to left shoulder surgery. Appellant did not submit any evidence or argument regarding this matter and therefore did not show that the Office committed error with respect to it.