

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MOHAMED YUNIS and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, Wash.

*Docket No. 96-1318; Submitted on the Record;
Issued July 17, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration received by the Office on November 30, 1995 was untimely filed and did not demonstrate clear evidence of error.

This is the fourth appeal in this case.¹ In the first appeal,² the Board found that the Office abused its discretion in denying a merit review under 5 U.S.C. § 8128 and remanded the case for a merit review, to be followed by a *de novo* decision. The Office, on July 2, 1990, found that the weight of the medical evidence failed to establish that appellant had any continuing disability causally related to factors of his federal employment after the termination of his compensation benefits. By decision dated January 18, 1991,³ the Board in the second appeal found that the reports of the impartial medical specialists were entitled to special weight, that the Office had met its burden of justifying termination of appellant's compensation effective December 22, 1984 and that the weight of the medical evidence, after the termination of compensation, established that appellant did not have any residual disability or condition causally related to factors of his federal employment.

¹ On November 5, 1974 appellant, then a 40-year-old pipefitter, was lifting an 80-pound back pack bottle of oxygen and acetylene when he developed pain in his groin. The Office accepted appellant's claim for enlarged inguinal rings. On September 30, 1975 appellant carried a pipe up to the flight deck of an aircraft carrier. He developed pain in his back. The Office accepted appellant's claim for lumbosacral sprain. On December 3, 1975 appellant filed a claim for psychological stress and anxiety due to harassment. The Office accepted appellant's claim for psychophysiological disorder involving the gastrointestinal tract. The Office terminated appellant's compensation benefits arising from these claims on November 15, 1984, effective December 22, 1984

² Docket No. 87-1048 (issued September 18, 1987).

³ 42 ECAB 325 (1991).

Following issuance of the Board's second decision, on September 16, 1991 and November 7, 1991 appellant requested reconsideration of his claim by the Office. By decisions dated September 25, 1991 and January 29, 1992, the Office denied modification of its prior order, after merit review, finding that the new evidence submitted was insufficient to warrant modification and that the weight of the medical evidence of record continued to rest with the reports of the impartial medical specialists. Appellant thereafter again requested that the Board review the case. By decision dated December 18, 1992,⁴ the Board found that appellant had not established that he had any physical or psychiatric condition after December 22, 1984 causally related to factors of his federal employment.

On August 11, 1993 appellant again requested that the Office reconsider his case. By decision dated October 21, 1993, the Office denied review of its January 29, 1992 decision, finding that appellant's August 11, 1993 request for reconsideration was untimely filed and did not establish clear evidence of error. In the third appeal,⁵ the Board found that appellant's August 11, 1993 request for reconsideration had been timely filed, however, that the Office had not abused its discretion by denying merit review of the claim. The facts of the case are fully set forth in the Board's June 22, 1995 decision and are hereby incorporated by reference.

On November 30, 1995 appellant again requested that the Office reconsider his case. By decision dated March 1, 1996, the Office found that appellant's November 30, 1995 request for reconsideration was untimely filed and did not establish clear evidence of error. The Office therefore denied appellant's request for reconsideration.

The Board finds that appellant's November 30, 1995 request for reconsideration was untimely filed.

Section 8128(a) of the Federal Employees' Compensation Act⁶ does not entitle a claimant to a review of an Office decision as a matter of right. This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

"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."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁷ As one such limitation, the Office has stated

⁴ Docket No. 92-817 (issued December 18, 1992).

⁵ Docket No. 94-425, (issued June 22, 1995).

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.138(b)(2).

that it 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. The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁸

The one-year time limitation begins to run on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues, including a decision of the Employees' Compensation Appeals Board.⁹ The last merit review in this case was the Board's decision dated December 18, 1992. Appellant did not timely file his request for reconsideration, on November 30, 1995, within one year of the Board's December 18, 1992 merit decision. The Office's denial of appellant's November 30, 1995 reconsideration request as untimely was therefore proper.

In those cases where a request for reconsideration is not timely filed, the Board has held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹⁰ Office procedures state 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ 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.¹⁴ 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.¹⁵ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

⁸ *Jesus D. Sanchez*, 41 ECAB 964(1990); *Leon D. Faidley Jr.*, 41 ECAB 104 (1989).

⁹ *Larry J. Lilton*, 44 ECAB 243 (1992).

¹⁰ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

¹¹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *See Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 8.

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.

In support of his November 30, 1995 request for reconsideration, appellant submitted a November 6, 1995 report from Mary Weenike, a nurse practitioner. This report indicated that appellant was regularly seen for chronic pain, which also contributed to his clinical depression.

Section 8101(2) of the Act¹⁶ defines “physicians” as “surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic physicians within the scope of their practice as defined by State law.” A nurse, is not a physician within the meaning of the Act, and therefore is not qualified to render a medical opinion with respect to the precise nature of a physical impairment and its relationship to the implicated incident¹⁷

Appellant’s November 30, 1995 request for reconsideration did not present the type of evidence necessary to precisely establish on its face that the Office’s termination of his compensation benefits was in error. The Office therefore properly determined that appellant had not established clear evidence of error.

The decision of the Office of Workers’ Compensation Programs, dated March 1, 1996, is hereby affirmed.

Dated, Washington, D.C.
July 17, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

¹⁶ 5 U.S.C. § 8101(2).

¹⁷ *Naomi A. Lilly*, 10 ECAB 560 (1959).