

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOWARD E. BREWER and DEPARTMENT OF THE AIR FORCE,
FAIRCHILD AIR FORCE BASE, Spokane, Wash.

*Docket No. 96-2089; Submitted on the Record;
Issued November 10, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's May 24, 1996 request for reconsideration of its decision dated November 8, 1994.

Appellant's notice of traumatic injury, filed on May 16, 1961, was accepted by the Office for an acute lumbosacral strain and a protruded intervertebral disc at L5-S1. Subsequently, following a recurrence of disability, appellant had spinal fusion surgery in 1964, then retired on September 28, 1972, and elected disability benefits.

On October 12, 1978 following two years of schooling, the Office reduced appellant's compensation based on its determination that he had the wage-earning capacity of an accounting clerk. Appellant requested reconsideration, which was denied on July 28, 1980.

On December 2, 1993 the Office responded to a congressional inquiry on appellant's behalf. On December 13, 1993 appellant filed a notice of recurrence of disability, claiming that his degenerative arthritis, which resulted in right knee replacement in January 1983 with follow-up surgery in April 1993, left knee replacement in May 1988, and cervical foraminotomy at C3 through C6 in April 1991, was caused by his initial 1961 work injury.

On November 8, 1994 the Office denied appellant's claim on the grounds that the medical evidence failed to establish a causal relationship between the 1961 back injury and appellant's current conditions. The Office noted that the July 7, 1993 report from Dr. Robert C. Brewster, a Board-certified orthopedic surgeon, provided no opinion on the issue of causal relationship.

On November 14, 1994 appellant requested an oral hearing. On April 6, 1995 the Office denied appellant's request on the grounds that he was not entitled as a matter of right to such a

hearing because his work injury occurred prior to July 4, 1966.¹ On July 10, 1995 the Office responded to a congressional inquiry, noting that appellant could request reconsideration by submitting a rationalized medical opinion in support of the issue of causal relationship.

On July 19, 1995 appellant wrote to the Office of Personnel Management (OPM), requesting instructions on filing “discrimination charges” and listing a series of complaints. On November 30, 1995 OPM dismissed appellant’s claim on the grounds of lack of jurisdiction. On December 28, 1995 the Office responded to a congressional inquiry, explaining that appellant had one year from the date of November 8, 1994 denial of his recurrence of disability claim to request reconsideration but did not do so. On February 8, 1996 appellant wrote to the Office, stating that his medical evaluation should be completed soon and that he was experiencing more pain from his injuries now that he had in the past 40 years.

Appellant submitted the February 20, 1996 report of Dr. William M. Shanks, a Board-certified orthopedic surgeon who diagnosed spinal stenosis and stated that appellant was totally disabled because he was not able to sit long enough to do sedentary-type work. On March 12, 1996 the Office asked Dr. Shanks to provide a reasoned medical opinion on whether appellant’s current condition was due to the 1961 injury.

On April 10, 1996 Dr. Shanks stated that appellant’s degenerative arthritis and disc disease at L-2 through L-4 were due to stress on those levels associated with a previous fusion operation from L-4 to the sacrum in 1964. Dr. Shanks added that the arthritic changes were progressive but “somewhat related” to the prior surgery. Dr. Shanks concluded that appellant’s stenosis was related to the 1961 injury because it developed above the spinal fusion.

On April 22, 1996 the Office informed appellant that Dr. Shanks’ opinion was insufficient to show that appellant’s present condition was medically related to the initial injury. The Office explained that because more than one year had elapsed since the November 1994 decision, appellant had the burden of proof to show clear evidence of error on the part of the Office in denying his claim for a recurrence of disability. The Office added that appellant, should submit a request for reconsideration accompanied by probative medical evidence.

On April 29, 1996 Dr. Shanks stated that appellant’s spinal fusion and herniated disc surgery in 1964 stemmed from the 1961 injury and that while appellant later developed arthritic changes, his spinal stenosis was “probably more related” to the previous fusion than to general arthritis because stenosis is one of the long-term complications associated with a spinal fusion.

On May 24, 1996 appellant requested reconsideration. On June 11, 1996 the Office denied his request as untimely filed and found the evidence accompanying his request insufficient to meet his burden of proof in establishing clear evidence of error.

¹ See *Ella M. Garner*, 36 ECAB 238, 241 (1984) (noting that prior to the 1966 amendments a claimant had no right to a hearing under the Act); 5 U.S.C. § 8124.

The Board finds that the Office properly denied appellant's December 12, 1995 request for reconsideration on the grounds that it was untimely filed and she presented no clear evidence of error.

The only decision the Board may review on appeal is the June 11, 1996 decision of the Office, which denied appellant's request for reconsideration, because this is the only final Office decision issued within one year of the filing of appellant's appeal on June 21, 1996.²

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ Rather, the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.⁵ The Board has held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.⁷ The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.⁸ Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.⁹

Clear evidence of error is intended to represent a difficult standard.¹⁰ The claimant must present evidence which on its face shows that the Office made an error, for example, proof of a miscalculation in a schedule award. Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.¹¹

² *Joseph L. Cabral*, 44 ECAB 152, 154 (1992); see 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8128(a).

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

⁵ 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

⁶ *Leon D. Faidley, Jr.*, *supra* note 4 at 111.

⁷ *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

⁸ *Howard A. Williams*, 45 ECAB 853, 857 (1994).

⁹ *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹¹ *Id.*; see *Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding

To establish clear evidence of error, a claimant must submit positive, precise, and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.¹² The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹³ 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.¹⁴

In this case, the Office issued its decision denying appellant's claim for a recurrence of disability on November 8, 1994 and properly informed appellant of his options to request reconsideration within one year or appeal the decision to the Board. While appellant wrote several letters to the Board and his congressional representatives during the intervening 18 months, he did not request reconsideration until May 24, 1996, well beyond the one-year deadline. Therefore, his request was untimely filed.

Given the untimely filing, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of the untimely reconsideration request established clear evidence of error, thereby entitling him to a merit review of his claim. The two medical reports from Dr. Shanks indicated that appellant's current condition of spinal stenosis developed because of the 1964 herniated disc and spinal fusion operation he underwent. However, Dr. Shanks provided no opinion on the relevant issue of whether appellant's claimed recurrence of disability in 1993 due to degenerative arthritis was causally related to the 1961 work injury.

Further, even if Dr. Shanks' conclusion -- appellant's arthritic changes were "somewhat related" to the 1964 surgery -- were well rationalized, his reports are insufficient to meet the clear evidence of error standard required to reopen appellant's case. At best, Dr. Shanks' reports demonstrate his belief that there is some causal relationship between the initial injury with its resultant spinal fusion and appellant's current diagnosed conditions. However, such an opinion is insufficient to establish clear evidence of error because the submitted evidence must be not only sufficiently probative to create a conflict in medical opinion or establish a procedural error, but also *prima facie* probative enough to shift the weight of the evidence in favor of appellant and raise a substantial question regarding the correctness of the Office's November 8, 1994 decision.¹⁵ Dr. Shanks' reports, while favorable to appellant's assertions, do not meet the requisite standard.¹⁶

that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹³ *Bradley L. Mattern*, *supra* note 7 at 817.

¹⁴ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹⁵ See *Frances H. Kinney*, 47 ECAB ____ (Docket No. 94-2401, issued June 12, 1996) (finding that various

Finally, while appellant has alleged many “errors or misstatements of fact” in his file, none of these are relevant to the issue of causal relationship in his claim for recurrence of disability, and he does not allege any misapplication of the law or procedural error by the Office in processing his claim. Inasmuch as appellant’s request for reconsideration was indisputably untimely and he failed to submit evidence substantiating clear evidence of error,¹⁷ the Board finds that the Office did not abuse its discretion in denying merit review of the case.

The June 11, 1996 decision of the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, D.C.
November 10, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

medical reports submitted in support of appellant’s untimely request for reconsideration failed to raise any substantial question of error).

¹⁶ See *John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992)(same).

¹⁷ Compare *Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) with *Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office’s failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).