

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES T. ALLEN and TENNESSEE VALLEY AUTHORITY,
Chickamauga Dam, Tenn.

*Docket No. 96-1135; Submitted on the Record;
Issued October 26, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's requests for reconsideration of its May 10, 1993 decision as untimely filed.

This case has previously been before the Board, which adopts the factual findings and legal conclusions in its decision dated February 8, 1991.¹ In summary, appellant, a 31-year-old laborer, filed a notice of traumatic injury on June 4, 1984, claiming that he hurt his back while lifting 150-pound concrete car stops in a parking lot. Appellant stopped work on June 19, 1984 and was terminated on September 1, 1984 due to the end of his temporary appointment. The Office accepted a lumbar strain and paid appropriate compensation.

On August 4, 1989 the Office issued a notice of proposed termination of compensation based on the May 18, 1989 medical report of Dr. Stanley R. Payne, a Board-certified orthopedic surgeon, to whom the Office had referred appellant for a second opinion evaluation. Dr. Payne stated that the temporary aggravation of appellant's preexisting degenerative disc disease ceased some time in 1984 and that appellant had "been malingering and exaggerating his symptoms for many years."

In response to the proposed notice, appellant timely submitted a medical report from Dr. George W. Shelton, a Board-certified orthopedic surgeon who has since retired. On October 24, 1989 the Office terminated appellant's compensation, effective October 19, 1989 on the grounds that the weight of the medical evidence rested with the opinions of Drs. Payne and Bennett W. Caughran, a Board-certified orthopedic surgeon and appellant's treating physician, both of whom found appellant able to return to full-time work with some restrictions.

Following an appeal to the Board and remand, the Office reviewed the case on its merits in decisions dated June 6 and December 18, 1991 and March 22 and May 10, 1993 and denied

¹ Docket No. 90-1376 (issued on February 8, 1991).

modification of its termination decision. Appellant's next two requests for reconsideration were denied on the grounds that the evidence he submitted and arguments he raised were insufficient to warrant review of the prior May 10, 1993 merit decision.

Appellant's August 10, 1994 request for reconsideration and a new medical evaluation was denied on September 13, 1994 on the grounds that appellant's request was not received within one year of the date of the May 10, 1993 decision and did not establish clear error.

On July 14, 1995 appellant again requested reconsideration contending that he remained disabled. The Office denied his reconsideration request on October 5, 1995 on the grounds that it was untimely and did not establish error in the 1989 termination decision.

On January 25, 1996 appellant submitted the October 9, 1995 report of Dr. Augustus H. Frye, Jr. a Board-certified orthopedic surgeon, in support of his request for reconsideration. On February 8, 1996 the Office again denied reconsideration on the grounds that appellant's request was not received within one year of the prior decision and the evidence submitted was not sufficient to establish error in the Office's prior decisions.

The Board finds that the Office did not abuse its discretion in denying appellant's April 27, 1995 request for reconsideration.

The only decisions the Board may review on appeal are the February 8, 1996 and October 5, 1995 decisions of the Office, which denied appellant's requests for reconsideration, because these are the only final Office decisions issued within one year of the filing of appellant's appeal on February 29, 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

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 *Dennis G. Nivense*, 46 ECAB 926, 932 (1995).

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

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 that 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 that, 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

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 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 a merit decision on May 10, 1993 finding that the new medical evidence submitted by appellant in support of his request for reconsideration was insufficient to warrant modification of its prior decision. The Board finds that appellant's latest two requests for reconsideration, dated July 14, 1995 and January 25, 1996, more than two years after the Office's merit decision, were not timely 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 established clear evidence of error, thereby entitling him to a merit review of his claim. As the Office stated in its October 5, 1995 decision, appellant offered no new medical evidence on the issue of whether the temporary aggravation caused by the 1984 work injury had resolved. Rather, appellant merely requested that the Office authorize another orthopedic examination.

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 *Fidel E. Perez*, 48 ECAB ___ (Docket No. 95-2188, issued August 26, 1997).

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

¹³ *Veletta C. Coleman*, 48 ECAB ___ (Docket No. 95-431, issued February 27, 1997).

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

In support of his latest request for reconsideration, appellant submitted the October 9, 1995 report of Dr. Frye, who stated that appellant had sustained “a rather severe injury” of the L4-5 and L5-S1 discs, which had incapacitated him since the original 1984 incident. Dr. Frye disagreed that the initial injury was only a mild sprain and opined that appellant was unable to work and probably would have benefited from surgical intervention earlier in his treatment.

However, Dr. Frye offered no medical rationale explaining how the 1984 work injury resulted in appellant’s current disc problems, except to note that appellant had experienced back pain ever since. Further, even if Dr. Frye’s conclusion were well rationalized, his report is insufficient to meet the clear evidence of error standard required to reopen appellant’s case. At best, Dr. Frye’s report demonstrates that there are diverse opinions in the record regarding the issue of whether appellant’s work-related back injury had resolved.

Such a difference of opinion is insufficient to establish clear evidence of error because the submitted evidence not only must be sufficiently probative to create a conflict in medical opinion or establish a procedural error, but also must be *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 May 10, 1993 decision. Dr. Frye’s report merely states generally that appellant has not recovered from the 1984 work injury and thus does not rise to this standard.¹⁵

Finally, appellant 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,¹⁶ the Board finds that the Office did not abuse its discretion in denying merit review of the case.

¹⁵ 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).

¹⁶ 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).

The February 8, 1996 and October 5, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
October 26, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member