

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY L. SMITH and U.S. POSTAL SERVICE,
BENT TREE STATION, Dallas, Tex.

*Docket No. 97-568; Submitted on the Record;
Issued February 22, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's December 20, 1995 request for reconsideration; and (2) whether the Office properly determined that appellant's July 23, 1996 request for reconsideration was untimely and lacking in clear evidence of error.

The case has been on appeal previously.¹ In a December 19, 1994 decision, the Board noted that appellant had filed a claim for a ganglion on the right wrist which he related to repetitive motion of the wrist. The Board found that appellant had not met his burden of proof in relating the ganglion to the factors of his employment. The Board indicated that only one report, a June 4, 1993 report from a physician with an illegible signature, stated that a ganglion could arise due to aggravated trauma and commented that such cases had been reported in medical literature. The Board found that the report gave only a general statement on the cause of ganglions and did not make any specific reference to appellant's claim that the factors of his employment would have caused a ganglion of his right wrist. The Board concluded that this report had limited probative value and was, therefore, insufficient to establish that appellant's ganglion was causally related to his employment.

In an August 14, 1995 letter, appellant requested reconsideration. In an August 17, 1995 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was either repetitious, cumulative or immaterial and, therefore, was insufficient to warrant review of its prior decisions. In a September 12, 1995 letter, appellant again requested reconsideration. In a September 15, 1995 decision, the Office denied appellant's request on the grounds that the evidence submitted was repetitious and, therefore, insufficient to warrant review of its prior decision. In an October 18, 1995 letter, appellant requested reconsideration. In an October 19, 1995 decision, the Office denied

¹ Docket No. 94-645 (issued December 19, 1994).

appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and, therefore, insufficient to warrant review of its prior decision. In a December 20, 1995 letter, appellant again requested reconsideration. In a December 21, 1995 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was immaterial and, therefore, insufficient to warrant review of its prior decision. In a July 23, 1996 letter, appellant made his fifth request for reconsideration. In an August 14, 1996 decision, the Office denied appellant's request on the grounds that the request was untimely and did not present clear evidence of error in the Office's decisions rejecting his claim.

The jurisdiction of the Board is limited to final decisions of the Office issued within one year prior to the filing of an appeal with the Board.² As appellant's appeal was not filed until November 19, 1996, the Board has jurisdiction only over the Office's decisions of December 21, 1995 and August 14, 1996 decisions.

The Board finds that Office properly denied appellant's December 20, 1995 request for reconsideration.

Under 20 C.F.R. §10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.³ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁴ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁵

In his December 20, 1995 request for reconsideration, appellant stated that his request was based on work factors that established that the claimed injury had occurred, medical treatment had recorded an injury in fact, and the concurrence of his disability retirement with his claim for compensation. Appellant submitted a letter from the employing establishment to Dr. James Kelley, an internist, to review appellant's medical records and advise whether he was disabled from his job with the employing establishment. He signed to show his concurrence with the conclusion that appellant was disabled from his job with the employing establishment. The record already established that appellant had a ganglion of the right wrist and that the ganglion had received medical treatment. Appellant, however, had consistently failed to submit reliable, probative, substantive medical evidence that established, through a detailed, rationalized explanation, that factors of appellant's employment caused the ganglion on his wrist. The fact

² 20 C.F.R. § 501.3.

³ 20 C.F.R. 10.138(b)(2).

⁴ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁵ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

that appellant received disability retirement does not establish his claim. Although, Dr. Kelley indicated appellant was disabled for work, he gave no written report or comment on whether appellant's disability was due to factors of his employment. Therefore, Dr. Kelley's concurrence in appellant's claim for disability retirement was immaterial to whether he was disabled due to factors of his employment.

The Board further finds that the Office properly determined that appellant's request for reconsideration on July 23, 1996 was untimely and did not contain clear evidence of error.

Under section 8128(a) the Federal Employees' Compensation Act,⁶ 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) of the implementing federal regulations⁷ which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."⁸ In *Leon D. Faidley, Jr.*,⁹ the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's Procedure Manual provides:

"The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, and decision by the Employees' Compensation Appeals Board, but does not include prerecoupment hearing/review decisions."¹⁰

The last "decision denying or terminating a benefit," *i.e.*, a merit decision, was the December 19, 1994 decision of the Board. As the Office did not receive the application for review until July 22, 1996, the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.138(b).

⁸ 20 C.F.R. § 10.138(b)(2).

⁹ 41 ECAB 104 (1989).

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

granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ To show clear evidence of error, however, 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 fundamental question as to the correctness of the Office decision.¹⁷ 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.¹⁸

Appellant submitted medical notes with his July 23, 1996 request for reconsideration. Some notes had been submitted previously. In an April 1, 1996 note, a physician with an illegible signature indicated that appellant's ganglion was due to repetitive movement which was aggravated by appellant's work as a janitor. In a July 15, 1996 note from the same physician, it was reported that x-rays showed a spur on the fourth digit of the right hand. The physician stated that appellant's chronic right wrist pain was aggravated by repetitive motion in his job as a custodian with the employing establishment. In a separate July 15, 1996 note, another physician with an illegible signature stated that appellant had a ganglion may have been related to repetitive trauma at work and may have been aggravated by work. These notes do not contain any rationalized physiological explanation on how appellant's repetitive motion would have

¹¹ *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which states: "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."

¹² *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁵ *See Leona N. Travis*, *supra* note 13.

¹⁶ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Leon Faidley, Jr.*, *supra* note 9.

¹⁸ *Gregory Griffin*, *supra* note 11.

caused the ganglion. The evidence submitted by appellant does not contain sufficient probative value to clearly establish that the Office was in error in finding that appellant had not established that his wrist ganglion was causally related to factors of his employment.

The decisions of the Office of Workers' Compensation Programs, dated August 14, 1996 and December 21, 1995, are hereby affirmed.

Dated, Washington, D.C.
February 22, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member