

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUIGI F. ABBATE and DEPARTMENT OF THE NAVY,
NAVAL TRAINING CENTER, Great Lakes, Ill.

*Docket No. 97-1445; Submitted on the Record;
Issued January 15, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs, in its decisions dated December 18 and June 27, 1996, to reopen appellant's claim for merit review constituted an abuse of discretion.

The Board has reviewed the case record and finds that the Office did not abuse its discretion in denying appellant's September 19 and March 15, 1996 requests for reconsideration of the Office's March 17, 1995 decision.¹

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ 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.⁴ 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.⁵

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.⁶ The

¹ The Board's scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Because appellant filed his notice of appeal on March 19, 1997, the Board has jurisdiction only of the Office's nonmerit decisions dated December 18 and June 27, 1996.

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

³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

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

⁵ *Leon D. Faidley, Jr.*, *supra* note 3 at 111.

⁶ *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.⁷ 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.⁸

Clear evidence of error is intended to represent a difficult standard.⁹ 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.¹⁰

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.¹¹ 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.¹² 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.¹³

In the present case, in support of his March 15, 1996 reconsideration request, appellant's counsel submitted a March 24, 1995 report by Dr. Barry Fischer,¹⁴ and medical testimony from Drs. Fischer, Lee Tisa¹⁵ and Lourdes Zebell¹⁶ at an Equal Employment Opportunity (EEO) hearing.

On June 27, 1996 the Office performed a limited examination of the material presented by appellant to determine its relevancy and the probative value of the new evidence, and it found that the evidence submitted was insufficient to support a review of the case on its merits.

⁷ *Howard A. Williams*, 45 ECAB 853, 857 (1994).

⁸ *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹⁰ *Id.*; see *Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition for recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

¹¹ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² *Bradley L. Mattern*, *supra* note 6 at 817.

¹³ *Gregory Griffin*, *supra* note 10 at 466 (1990).

¹⁴ Dr. Fischer specializes in occupational medicine.

¹⁵ Dr. Tisa is a podiatrist.

¹⁶ Dr. Zebell specializes in occupational medicine.

In a letter dated September 19, 1996, appellant's counsel requested reconsideration of the June 27, 1996 decision and made arguments regarding the evaluation standards used by Dr. Fischer. Appellant also submitted a December 8, 1995 letter from Dr. Terry L. Hanusa.¹⁷

On December 18, 1996 the Office performed a limited review of the material presented by appellant to determine the relevancy and the probative value of the new evidence, and it found that the evidence submitted was insufficient to support a review of the case on its merits. The Office also rejected appellant's arguments regarding reconsidering Dr. Fischer's reports as they had been previously considered, and no error had been made in the consideration of his reports.

The Board notes that the evidence from the EEO hearing and the December 8, 1995 report by Dr. Hanusa submitted by appellant do not relate to the issue of whether appellant was entitled to more than a three percent impairment of his left leg, for which he received a schedule award. The testimony from the EEO hearing in which Drs. Fischer, Zebell and Tisa testified is generally irrelevant to the issue of whether appellant had more than a three percent impairment of his left leg. Dr. Fischer's report was previously reviewed by the Office in support of his claim that he is entitled to a greater than three percent schedule award for his left leg, and therefore is repetitious and duplicative and therefore also provides no basis for reopening appellant's claim for a review on the merits.

As appellant provided insufficient evidence to require reopening of his claim for further examination on its merits, the Office properly denied merit review.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated December 18 and June 27, 1996 are hereby affirmed.

Dated, Washington, D.C.
January 15, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹⁷ Dr. Hanusa specializes in psychiatry.