

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TOMMY W. KESTLER and DEPARTMENT OF THE ARMY,
RED RIVER ARMY DEPOT, Texarkana, Tex.

*Docket No. 97-1699; Submitted on the Record;
Issued January 27, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs, by its July 2, 1996 decision, properly denied appellant's request for reconsideration under 5 U.S.C. § 8128; and (2) whether the Office properly determined that appellant's request for reconsideration dated November 15, 1996 was untimely filed and did not demonstrate clear evidence of error.

Appellant suffered a work-related injury on July 29, 1981. The Office accepted the claim for left shoulder trauma and rotator cuff syndrome.¹ Appropriate benefits were authorized and paid, including compensation for a schedule award based on a total of 12 percent permanent impairment of the left shoulder. Originally, appellant was awarded a 10 percent permanent impairment of the left upper extremity. On November 13, 1995 appellant was awarded an additional 2 percent permanent impairment of the left upper extremity, totaling 12 percent.

In a letter to appellant dated January 3, 1996, the Office provided a detailed description of how the schedule award of 12 percent permanent impairment was calculated, as well as the advice that appellant could follow his appeal rights attached to the decision of November 13, 1995, which granted the additional 2 percent permanent impairment, if he disagreed with the percentage awarded. As a courtesy to appellant, the Office attached a copy of the appeal rights to the letter.

In a June 14, 1996 letter, appellant requested reconsideration of the November 13, 1995 schedule award decision. Submitted with the reconsideration request was a May 28, 1996 report from Dr. Jeffrey T. DeHaan, a Board-certified orthopedic surgeon, which discussed appellant's bursitis and shoulder strain. No opinion was offered on the degree of permanent impairment to appellant's shoulders.

¹ The record further reflects that appellant sustained an injury in 1975 which the Office accepted for a right shoulder strain and awarded a five percent schedule award for pain.

By decision dated July 2, 1996, the Office denied reconsideration of appellant's claim on the grounds that the evidence submitted was immaterial and thus insufficient to warrant a review of the prior decision.

On November 15, 1996 appellant requested reconsideration. He made a personal visit to the Office on that date and delivered his request for reconsideration. Accompanying his request for reconsideration was a November 8, 1996 report from Dr. DeHaan which discussed the diagnoses of osteoarthritis of both acromioclavicular joints and chronic rotator cuff syndrome in both joints as being the correct diagnosis for appellant. No opinion was offered on the degree of permanent impairment to appellant's shoulders.

By decision dated January 7, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not demonstrate clear evidence of error. In the accompanying memorandum, the Office noted that the letter of January 3, 1996 was not a formal decision and that the letter clearly stated that appellant could request reconsideration, provided that it was done within one year of the November 13, 1995 decision.

The Board finds that the Office, in its July 2, 1996 decision, properly denied appellant's request for reconsideration under section 8128.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal with the Board.² As appellant filed his appeal with the Board on March 18, 1997, the only decisions before the Board are the Office's July 2, 1996 and January 7, 1997 nonmerit decisions denying appellant's request for reconsideration.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”³

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁴ Evidence

² *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 20 C.F.R. § 10.138(b)(1).

⁴ *See* 20 C.F.R. § 10.138(b)(2).

that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.⁵ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁶

In the present case, the Office issued an additional 2 percent permanent impairment award for appellant's left upper extremity on November 13, 1995, which equated to a total of a 12 percent award for appellant's left upper extremity. Dr. DeHaan's May 28, 1996 report, which was submitted with appellant's request for reconsideration, did not offer an opinion on permanent impairment to appellant's shoulders. As appellant is requesting that the evidence of permanent partial impairment be reconsidered, Dr. DeHaan's report does not address the particular issue involved and, thus, is not sufficient to warrant review of the prior decision.⁷

The Board further finds that the Office properly determined that appellant's request for reconsideration dated November 15, 1996 was untimely filed and did not demonstrate clear evidence of error.

In its January 7, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on November 13, 1995 and appellant's request for reconsideration was dated November 15, 1996 which was more than one year after November 13, 1995.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁸ Office procedures provide 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.⁹

⁵ *Daniel Deparini*, 44 ECAB 657 (1993).

⁶ *Id.*

⁷ *Id.*

⁸ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁹ *Anthony Lucszynski*, 43 ECAB 1129 (1992).

The Office's procedure manual discusses "clear evidence of error" as follows:

"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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."¹⁰

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.¹⁴ 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.¹⁵ 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.¹⁶ The Board makes an independent determination as to 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.¹⁷

The Board has duly reviewed the case record and concludes that appellant has not established clear evidence of error in this case. The issue for purposes of establishing clear evidence of error is whether appellant has submitted evidence establishing that there was an error in the calculation of his schedule award. Although appellant submitted a November 8, 1996 medical report from Dr. DeHaan, Dr. DeHaan again did not offer an opinion on permanent impairment to appellant's shoulders. Thus, Dr. DeHaan's report is not sufficient to raise a

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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 *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁷ *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

substantial question as to the correctness of the Office's merit decision.¹⁸ As appellant's untimely November 15, 1996 request for reconsideration failed to demonstrate clear evidence of error, the Board finds that the Office properly denied appellant's request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated January 7, 1997 and July 2, 1996 are hereby affirmed.

Dated, Washington, D.C.
January 27, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

¹⁸ See *Jesus D. Sanchez*, *supra* note 13.