

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WARREN BURLESON and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Little Rock, Ark.

*Docket No. 97-691; Submitted on the Record;
Issued March 15, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in declining to reopen appellant's claim for merit review on the grounds that his request for reconsideration was untimely filed and presented no clear evidence of error.

On November 1, 1994 appellant filed a notice of recurrence of disability, claiming that he was unable to do his light-duty job because of pain, stress, and loss of motion in his neck and right arm/hand. On November 30, 1994 the Office requested that appellant submit evidence showing that his light-duty assignment had changed or that his employment-related condition had worsened.

On June 12, 1995 the Office denied the claim on the grounds that the evidence failed to establish a causal relationship between appellant's cervical condition after October 20, 1994 and the accepted 1986 work injuries.¹ On June 11, 1996 appellant's attorney requested reconsideration, noting that he was in the process of obtaining additional medical evidence to support appellant's claim and that the Office had informed him in a June 6, 1996 telephone call that a letter requesting reconsideration would be sufficient to preserve appellant's appeal rights.

On June 12, 1996 the Office denied appellant's request on the grounds that his letter neither raised substantive legal argument nor included new and relevant evidence and was therefore insufficient to warrant review of its prior decision. The Office noted that appellant's only right of appeal was to the Board.

¹ Appellant, then a 46-year-old x-ray technician, filed a notice of traumatic injury on April 30, 1986, claiming that he hurt his neck while lifting a patient. The claim was accepted for aggravation of a cervical condition. Appellant returned to work as a receptionist but was unable to do this job. He filed several notices of recurrence of disability and then underwent rehabilitation and retraining. He was working as a clerk at the employing establishment when he filed the 1994 recurrence of disability. On May 5, 1995 appellant was terminated for cause.

Appellant's attorney again requested reconsideration, pointing out that the Office had apparently misinformed him regarding the necessity of furnishing supportive medical evidence with the reconsideration request. The Office denied reconsideration on November 25, 1996 on the grounds that the medical evidence submitted by appellant was insufficient to establish clear evidence of error.

The Board finds that the Office properly declined to reopen appellant's claim for merit review.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 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 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

² 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). Inasmuch as appellant filed his notice of appeal on December 6, 1996, the only decisions before the Board are those dated June 12 and November 26, 1996.

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).

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 denied appellant's June 11, 1996 request for reconsideration of the June 12, 1995 decision on the grounds that his attorney's letter neither raised substantive legal questions nor included new and relevant evidence and therefore was insufficient to require the Office to review its prior decision. Appellant's attorney indicated that he was misinformed about the requirements of requesting reconsideration, but the statement of appeal rights that accompanied the June 12, 1995 decision indicated clearly that the reconsideration request must be made within one year "and be accompanied by relevant evidence not previously submitted ... or legal argument not previously made." Further, the Office reminded appellant of his appeal rights in its June 15, 1995 response to his May 23, 1995 request to reinstate his benefits because he had been separated from the employing establishment that month.

Appellant's next request for reconsideration was made on October 23, 1996, more than one year after the June 12, 1995 decision. In denying this request on November 25, 1996 as untimely filed, the Office reviewed appellant's letter and found that he failed to provide any legal argument or medical evidence to support procedural or evidentiary error on the part of the Office.

The Board finds that the medical evidence submitted in support of appellant's untimely request for reconsideration is insufficient to establish clear evidence of error. Except for a June 27, 1996 letter from Dr. Wilbur M. Giles, a neurosurgeon, and a July 12, 1996 letter from Dr. Thomas M. Hart, Board-certified in anesthesiology, the medical reports consist of copies of documents dating to appellant's initial injury in 1986 through 1995, all of which were previously

¹¹ *Id.*; cf. *Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on 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).

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

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

¹⁴ *Gregory Griffin*, *supra* note 11.

of record and considered by the Office in issuing its merit decision in June 1995. This evidence is repetitious and therefore insufficient to meet the clear evidence of error standard.¹⁵

Dr. Giles stated in his latest report that during the entire time he had treated appellant, his chronic neck, shoulder, and arm pain have “repeatedly been related” to his 1986 injury, from which he has remained symptomatic through the years, and which has resulted in multiple types of treatment. Dr. Hart reported that appellant complained to him many times that his job duties exacerbated his chronic neck pain. He added that appellant’s initial injury and resulting two surgeries would always cause him some pain. Neither of these physicians provided any medical rationale for their conclusions. Nor did they specifically relate appellant’s condition in October 1994 to the initial work injury.

Further, even if their reports were well rationalized, they would be insufficient to meet the clear evidence of error standard required to reopen appellant’s case. At best, these physicians could establish that appellant sustained an exacerbation of his cervical condition in October 1994. However, such an opinion is insufficient to establish clear evidence of error because the submitted evidence 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 June 12, 1995 decision.¹⁶ While both physicians concluded generally that appellant’s neck pain is related to the 1986 work injury, their opinions do not rise to the requisite standard.¹⁷

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 filed and he failed to submit evidence substantiating clear evidence of error,¹⁸ the Board finds that the Office did not abuse its discretion in denying merit review of the case.

¹⁵ See *Robert M. Pace*, 46 ECAB 551, 552 (1995) (finding that in determining clear evidence of error, Office procedures require a brief evaluation of the evidence so that a subsequent reviewer will be able to address the issue of Office discretion).

¹⁶ See *Mohamed Yunis*, 46 ECAB 827, 830 (1995) (finding that a medical report submitted in support of appellant’s untimely request for reconsideration failed to address the relevant issue and was therefore insufficient to demonstrate clear evidence of error).

¹⁷ 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).

¹⁸ 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 November 26 and June 12, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

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

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member