

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GROVER C. DUKE and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, CA

*Docket No. 99-713; Submitted on the Record;
Issued December 20, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record on appeal and finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹ The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.² When an application for review is untimely, the Office takes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.³

The only decision before the Board on this appeal is the Office's May 1, 1998 decision, denying appellant's request for a review of the merits of its July 15, 1993 decision. Because more than one year has elapsed between the issuance of the Office's July 15, 1993 decision and August 3, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.138(b)(2); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

³ *Thankamma Matthews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

review the July 15, 1993 decision or any of the other Office's decisions issued prior to August 3, 1997.⁴

The Office accepted appellant's claim for a left shoulder strain, left rotator cuff tear, left elbow strain and lateral epicondylitis. Appellant had sustained other injuries at work including a knee injury and had been placed on light duty. On May 17, 1993 the employing establishment terminated appellant stating that the light-duty work remained available but appellant failed to meet a condition of employment in that he failed to maintain a security clearance. On May 27, 1993 appellant filed a claim for continuing disability, Form CA-8, stating that he, who was handicapped and on permanent light duty, was terminated by the employing establishment because he did not have a security clearance.

By decision dated July 15, 1993, the Office denied appellant's claims "for disability compensation from May 17, 1993 on," stating that appellant was not disabled but "was terminated from his available light duty through his own failure to maintain a condition of his federal employment."

By decision dated November 5, 1993, the Office awarded appellant a schedule award for 44 percent loss of use of the left arm.

By decision dated September 12, 1995, the Office awarded appellant a schedule award for a 26 percent impairment to the left arm and a 30 percent impairment to the right arm.

By decision dated November 22, 1996, the Office augmented the award to include a 30 percent impairment to the left arm.

By letter dated February 9, 1997, appellant requested reconsideration of the Office's decision, stating that he was entitled to a greater schedule award.

By decision dated April 10, 1997, the Office denied his request for modification.

By letter dated March 24, 1998, appellant requested reconsideration of the Office's decision. Appellant made clear in his request that he was challenging only the Office's July 15, 1993 decision in which his disability benefits were terminated. Appellant submitted evidence consisting of a duty status report, Form CA-17, dated April 26, 1993 showing that he was totally disabled from March 2, 1993 and continuing, a memorandum from the employing establishment dated April 14, 1993 informing appellant that he would be placed on nonduty, with pay status, concurrent with his proposed removal and a copy of the Office's July 15, 1993 decision. Appellant also submitted a copy of the decision of the California Unemployment Insurance Appeals Board dated May 4, 1994 in which it stated, the Board found that appellant was entitled to disability benefits based on its finding that his need for a security clearance was irrelevant to the light-duty position he held when the employing establishment terminated him. The California Unemployment Board found that appellant met the conditions of employment and that he was not discharged for misconduct.

⁴ See 20 C.F.R. § 501.3(d)(2).

By decision dated May 1, 1998, the Office denied appellant's request for reconsideration on the grounds that it was untimely, stating that appellant's letter dated March 24, 1998 was not filed within one year of the July 15, 1993 merit decision and failed to show clear evidence of error.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁵ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁶ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ 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.¹⁰ 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 a merit review in the face of such evidence.¹¹

In the present case, the April 26, 1993 duty status report showing appellant was totally disabled, the April 14, 1993 memorandum from the employing establishment explaining that appellant would be placed on nonduty pay status, pending his proposed removal and the copy of the Office's July 15, 1993 decision are not relevant as to whether the Office erred in determining that appellant was terminated from his employment due to a procedural matter unrelated to his work injury. Neither the disability report nor the April 14, 1993 memorandum address an error made by the Office in this regard. Further, the May 4, 1994 decision from the California Unemployment Insurance Appeals Board, which determined that based on its findings, the light-duty job appellant was performing at the time of his termination did not require a security clearance and, therefore, appellant was not discharged for misconduct is not binding on the Board.¹² Although, the California Unemployment Board gave reasons as to why it found that

⁵ See *Crescenciano Martinez*, 51 ECAB ___ (Docket No. 98-1743, issued February 2, 2000); *Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁷ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ See *Leona N. Travis*, *supra* note 6.

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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

¹² See *Donald E. Ewals*, 45 ECAB 111, 125 n.18. (1993); *Daniel Deparini*, 44 ECAB 657, 660 (1993).

appellant did not require a security clearance when he was terminated, the record does not contain the specific evidence the California Unemployment Board relied on in making this finding. Appellant has, therefore, failed to present sufficient evidence to establish that the Office committed clear evidence of error in its July 15, 1993 decision.

The decision of the Office of Workers' Compensation Programs dated May 1, 1998 is hereby affirmed.

Dated, Washington, DC
December 20, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member