

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE LEWIS and DEPARTMENT OF DEFENSE,
TOOELE ARMY DEPOT, Tooele, UT

*Docket No. 98-2488; Submitted on the Record;
Issued June 19, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error, constituted an abuse of discretion.

On August 22, 1985 appellant, then a 51-year-old printing equipment mechanic, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that he injured his right leg on July 25, 1985 when the drill bit he was using got snagged in his pants leg. On October 17, 1985 the Office accepted the claim for avulsion lacerations right leg.

On May 9, 1995 appellant filed a claim for a recurrence of disability alleging that his ankle continued to give way since his July 25, 1985 employment injury. By decision dated September 11, 1995, the Office denied appellant's recurrence claim on the basis that the evidence was insufficient to establish that his disability was causally related to his accepted employment injury.

By letter dated May 9, 1996, appellant requested reconsideration of the denial of his claim and submitted copies of chart notes from Dr. George D. Veasy, an attending Board-certified orthopedic surgeon, an occupational disease claim form, position description, a personal qualification form (SF-171) dated April 15, 1980, chart notes from the employing establishment, Form CA-35A detailing evidence required to support an occupational disease claim and a notification of personnel action dated October 1, 1995.

By merit decision dated June 12, 1996, the Office found that the evidence submitted was insufficient to establish that appellant's disability was causally related to his accepted July 25, 1985 employment injury and denied modification.

By letter dated March 4, 1998, appellant requested that his claim be reopened for consideration.

In a letter dated March 10, 1998, the Office advised appellant that the only avenue of appeal left for him was to appeal the denial of his claim.

In a letter dated May 21, 1998, appellant's Senator submitted his request for reconsideration and a chart dated November 15, 1991 and reports dated April 14, 1995, March 25, 1996 and June 2, 1997 from Dr. Veasy, an undated letter from appellant enclosing pictures of his right leg, a copy of the June 12, 1996 Office decision, a copy of appellant's May 9, 1996 letter requesting reconsideration.¹

In an April 14, 1995 report, Dr. Veasy opined that appellant had trouble walking and diagnosed "bilateral arthropathy with the left much worse than the right." Regarding permanent disability, he opined that appellant had a five percent permanent impairment for his right leg and a five percent impairment for his left leg.

Dr. Veasy, in a March 25, 1996 report, opined that appellant "continues to suffer from post-traumatic tibiotalar arthrosis in which he suffered from an injury on July 24, 1985" and that appellant "continues to suffer from intermittent arthritic symptoms."

In a letter received by the Office on September 17, 1997, appellant enclosed pictures of his ankle and a June 2, 1997 report by Dr. Veasy.

In his June 2, 1997 report, Dr. Veasy noted that appellant had been injured when a drill fell, caught his pants leg and injured his right ankle. He noted that appellant had "sharp pain in the right ankle, intermittent and general ankle pain with prolonged walking" and recommended limitations on lifting.

In a letter decision dated June 3, 1998, the Office denied reconsideration on the grounds that the request was untimely and that appellant had failed to present clear evidence of error. In the attached memorandum, the Office noted that appellant submitted additional medical evidence which was not present at the time of the prior decision and did not allege that the Office made an error of law. Therefore, the Office found that merit review of the June 12, 1996 decision was not warranted.

The Board finds that the Office did not abuse its discretion in denying appellant's May 21, 1998 request for reconsideration, submitted by his Senator, of the Office's June 22, 1993 decision.²

¹ The Board notes on September 17, 1997 that the Office received an undated letter and material from appellant regarding his claim that his current disability was related to his accepted July 24, 1995 employment injury.

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). Because appellant filed his notice of appeal on August 12, 1998, the Board has jurisdiction only of the Office's nonmerit decision dated June 3, 1998.

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 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.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

The Office properly determined, in this case, that appellant failed to timely file an application for review. The Office issued its last merit decision on June 12, 1996. As appellant's May 21, 1998 reconsideration request was outside the one-year time limit, which began the day after June 12, 1996 and ended on June 12, 1997, appellant's request reconsideration was untimely.¹⁰

In cases where a request for reconsideration is not timely filed, the Board has held that the Office must undertake a limited review of the case to determine whether or not clear evidence of

³ 5 U.S.C. §§ 8101-8193; 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. Litton*, 44 ECAB 243, 249 (1992).

⁶ *Leon D. Faidley, Jr.*, *supra* note 5 at 111.

⁷ *Bradley L. Matter*, 44 ECAB 809, 816 (1993).

⁸ *Howard A. Williams*, 45 ECAB 853, 857 (1994).

⁹ *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ The Board notes that the evidence submitted by appellant and received by the Office on September 17, 1997 could be construed as a request for reconsideration. However, as the evidence was submitted subsequent to the expiration of the one-year limit, appellant's request would still be considered untimely.

error has been presented with the reconsideration request.¹¹ Clear evidence of error is intended to represent a difficult standard.¹² 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 opinion requiring further evidentiary development by the Office, is not clear evidence of error.¹³

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.¹⁴ 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.¹⁵ 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.¹⁶

In support of his request for reconsideration, appellant submitted photographs of his ankle, a chart dated November 15, 1991 and reports dated April 14, 1995, March 25, 1996 and June 2, 1997 from Dr. Veasy, an undated letter from appellant enclosing pictures of his right leg, a copy of the June 12, 1996 Office decision, a copy of appellant's May 9, 1996 letter requesting reconsideration. As the issue before the Board is whether appellant's disability is causally related to his accepted employment injury, the photographs of appellant's ankle are insufficient to support appellant's burden of proof as the issue is a medical one requiring a rationalized medical opinion.

The Board finds that none of Dr. Veasy's reports provide a rationalized explanation of how appellant's current disability is causally related to his avulsion lacerations right leg he sustained on July 25, 1985 or note the effect of appellant's diabetes on his disability.¹⁷ Dr. Veasy's June 2, 1997 report provides no rationalized opinion explaining how appellant's current disability was related to his accepted employment injury. In his March 25, 1996 report, he opined that appellant continued to suffer from post-traumatic tibiotalar arthrosis which the physician attributed to the July 25, 1985 employment injury, but failed to provide supporting rationale explaining the causal relationship and the impact of appellant's diabetes. Lastly,

¹¹ *Rex L. Weaver*, Docket No. 91-701 (issued August 28, 1991), *petition for recon. denied*, 44 ECAB 535 (1993).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996)

¹³ *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).

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁵ *Bradley L. Mattern*, *supra* note 8 at 817.

¹⁶ *Gregory Griffin*, *supra* note 14.

¹⁷ See *Margarette B. Rogler*, 43 ECAB 1034, 1039 (1992) (finding that a physician's opinion that provides no medical rationale for its conclusion on causation is of diminished probative value).

Dr. Veasy's April 14, 1995 report is insufficient as it addresses a permanent impairment rating and contains no opinion as to the cause of appellant's disability and his accepted employment injury.

Furthermore, Dr. Veasy's March 25, 1996 report, while supportive of a causal relationship, 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 June 12, 1996 decision. His March 25, 1996 report, while favorable to appellant's assertions, does not meet the requisite standard.¹⁸

In conclusion, 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 untimely and he failed to submit evidence substantiating clear evidence of error,¹⁹ the Board finds that the Office did not abuse its discretion in denying merit review of the case.

The decision of the Office of Workers' Compensation Programs dated June 3, 1998 is hereby affirmed.

Dated, Washington, D.C.
June 19, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

¹⁸ 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).

¹⁹ 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).