

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROGER G. BRITTON and DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT, Reno, NV

*Docket No. 98-2174; Submitted on the Record;
Issued November 3, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

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 in the present 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 only decision before the Board on this appeal is the Office's March 31, 1998 decision denying appellant's request for a review on the merits of its July 21, 1993 decision. Because more than one year has elapsed between the issuance of the Office's July 21, 1993 decision and July 6, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the Office's July 21, 1993 decision and prior decisions.¹

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.³ 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.⁴

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. § 8128(a).

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

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

The Board finds that, since more than one year has elapsed from the date of issuance of the Office's July 21, 1993 merit decision to the date that appellant's request for reconsideration was filed, March 3, 1998, appellant's request for reconsideration is untimely. The Board further finds that the evidence submitted by appellant in support of such request does not raise a substantial question as to the correctness of the Office's July 21, 1993 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

Appellant contends on appeal that the Office should have ruled on his request for reconsideration dated July 18, 1994 as it was timely filed within a year of the Office's July 21, 1993 decision. Appellant stated that his attorney at the time erroneously submitted the July 18, 1994 reconsideration request under case No. A14-247880 when he should have submitted it under case No. A14-243835, which is the case number for this appeal. Appellant attached five documents to the July 18, 1994 request for reconsideration consisting of two medical reports from Dr. John F. Konings, a Board-certified family practitioner, dated July 2 and 26, 1993, respectively a medical report from Dr. Michael F. Hehmann, a neurologist, dated June 14, 1993, with an addendum to his report dated June 29, 1993, and a medical report from Dr. Mark J. Watt, a psychologist, dated July 8, 1993. The July 18, 1994 request for reconsideration and accompanying documents were date stamped received by the Office on October 30, 1997. Appellant noted that, by letter dated July 24, 1994, he explained to the Office that his attorney had erroneously sent in the request for reconsideration under the wrong case number. The letter is also date stamped received by the Office on October 30, 1997. Appellant stated that the Office did not respond either to the July 18, 1994 request for reconsideration or his July 24, 1994 letter. By letter dated June 1, 1995, also date stamped received by the Office on October 30, 1997, appellant requested that the status of his case be checked and reiterated that his attorney at the time filed a request for reconsideration in July 1994.

By letter dated June 10, 1997, appellant again inquired about the status of his case, noting that his July 1994 request for reconsideration had erroneously been sent to the Office under the wrong case number. Appellant stated that, in response to his June 1995 letter, he "was told to be patient and wait for two or more years for a response" which he did.

By letter dated June 16, 1997, the Office informed appellant that it was aware that appellant had two separate case record numbers, No. 14-0243835 and No. 14-027880, and the claim under the letter number had been denied on April 11, 1991, but it had no record that appellant appealed the Office's July 21, 1993 decision.

By letter dated October 28, 1997, appellant's current attorney summarized the chronology of appellant's effort to appeal the Office's July 21, 1993 decision, citing appellant's July 18, 1994 request for reconsideration and his follow-up inquiries on July 24, 1994 and June 1, 1995.

By letter dated November 6, 1997, the Office stated that case No. A14-247880, under which the July 18, 1994 request for reconsideration had been filed, was not part of the current case, No. A14-0243835 and case No. A14-247880 was retired at the Federal Records Center. The Office stated that it searched the case record for No. A14-0243835, but it did not show that a request for reconsideration or any related correspondence had been submitted and received by

the Office. The Office stated that the first correspondence it received from appellant addressing the problem was the June 10, 1997 letter. The Office requested that appellant clarify under which case he filed his request for reconsideration.

By letter dated March 3, 1998, appellant reiterated that the July 18, 1994 request for reconsideration was meant to be filed for case No. A14-243835 and that appellant noted in his July 24, 1994 letter to the Office that his attorney had erroneously filed the July 18, 1994 request under the wrong case number. He reiterated his request for reconsideration, stating that he would like the July 18, 1994 reconsideration request and accompanying documents which directly apply to his case to be considered.

By decision dated March 31, 1998, the Office denied appellant's request for reconsideration. The Office stated that appellant's letter requesting reconsideration was dated March 3, 1998 and, therefore, the request was untimely as it was filed more than a year after the Office's July 21, 1993 merit decision. The Office stated that it was unable to locate any copy of appellant's July 18, 1994 request for reconsideration or the July 24, 1994 letter indicating that the request was mailed. The Office stated that the receipt with the claim number indicated on the request for reconsideration would require that the case be retrieved from the Federal Records Center and that the case had not been retrieved since March 2, 1994 when it was sent to the center. The Office concluded that there was no evidence to support appellant's contention that the Office should have acted upon his July 18, 1994 reconsideration request as there was no evidence to support that the Office received the request.

Appellant has submitted insufficient evidence to establish that the Office received his July 18, 1994 request for reconsideration and the July 24, 1994 follow-up letter within a year of the Office's July 21, 1993 decision. He did not submit any mailing receipts or envelopes with the postmark date as to when the relevant documents were mailed to the Office. Therefore, the Office properly proceeded with an adjudication of appellant's March 3, 1998 request.

In the July 21, 1993 decision, the Office hearing representative found that the evidence of record did not establish that appellant's disability commencing November 3, 1989 was due to a seizure disorder, low back condition, bilateral knee condition or stress fracture of the left foot causally related to appellant's employment injuries on September 24, 1980, February 20, 1986 or May 9, 1989. The evidence which accompanied the July 18, 1994 reconsideration request is as follows. In his July 2, 1993 report, Dr. Konings stated that most of appellant's "trouble" comes from his September 1980 employment injury. He stated that appellant's subsequent work injuries consisting of a nonwork-related injury in 1985 and a work-related injury in 1986, in which he injured his head aggravated his original September 1980 employment injury. Further, Dr. Konings stated that "[t]o a reasonable medical certainty," appellant's head injury "probably" exacerbated his underlying seizure disorder. He concluded the multiple reinjuries appellant had sustained since the September 1980 employment injury served to produce a state of chronic neck and back pain. Dr. Konings advised against employment which required heavy lifting and manual labor and opined that appellant "will likely be bothered, at least intermittently" by symptoms of the chronic pain disorder for the rest of his life.

In his July 26, 1993 report, Dr. Konings reviewed numerous medical documents in the record including diagnostic test results and concluded that appellant's multiple orthopedic

problems stem from work-related accidents and assaults. He stated that appellant's September 1980 work-related head injury "could have" precipitated his seizure disorder. Dr. Konings stated that appellant's subsequent "head injuries and other trauma, both physical and emotional, incurred at work could aggravate his seizure disorder and produce more frequent and more severe seizures."

In his June 14, 1993 report, Dr. Hehmann stated that appellant presented with increasing seizure frequency since the fall in 1980 as well as the car accident in 1986. He noted that appellant's electroencephalograms (EEGs) were consistent with left temporal lobe spike and wave, and these temporal lobe abnormalities were not consistent with hereditary epilepsy but were one of an acquired nature." In his June 29, 1993 addendum, Dr. Hehmann stated that a head injury "can cause or exacerbate a seizure disorder." He stated that the "bouncing of the brain in the skull from a blow to the head can damage the surface of the brain with a resultant 'scar' which can be a source of seizures."

In his July 8, 1993 report, Dr. Watt stated that appellant had no confirmed seizure activity until he suffered a closed head injury subsequent to his fall in 1980, and with each subsequent head injury, his seizure activity increased and peaked during the years he was in Burns, Oregon working for the employing establishment. He stated that while working in Burns appellant suffered from a major depressive disorder, post-traumatic stress disorder, and psychological factors including epilepsy, stomach problems, diarrhea and headaches. Dr. Watt stated that, since appellant went on disability retirement in 1990, appellant's depression was in remission but he continued to suffer from recurring nightmares, suspicion, flashbacks, anxiety and rumination regarding his work experiences in Burns. He stated that it was impossible to attribute which intellectual, memory or personality changes were due to which traumatic events in appellant's life and that the etiology of epilepsy could be attributed to genetic, biochemical or head trauma. Dr. Watt stated the fact that appellant's seizures began and increased in severity after each head injury strongly suggested that the epileptic attacks were the result of head trauma and exacerbated by work-related stress.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence which 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

⁵ *Jimmy L. Day*, 48 ECAB 654, 656 (1997); see *Dean D. Beets*, 43 ECAB 1153 (1992).

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

⁷ See *Jesus D. Sanchez*, *supra* note 4.

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

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

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 merit review in the face of such evidence.¹¹

The issue in this case is whether appellant's disability commencing November 3, 1989 due to a seizure disorder, low back condition, bilateral knee condition and stress fracture of the left foot was causally related to his September 24, 1980, February 20, 1986 or May 9, 1989 employment injuries. Appellant bears the burden of establishing that his disability and/or specific condition, for which compensation is claimed, were causally related to the employment injury.¹²

The evidence appellant submitted to support his request for reconsideration is insufficient to show that the Office's July 21, 1993 decision contained clear evidence of error. The medical evidence appellant submitted is speculative or equivocal and does not contain a rationalized medical opinion relating appellant's disability to his employment injuries. The Board has held that medical opinions which are speculative or equivocal have little probative value.¹³ Dr. Konings' July 2, 1993 report is speculative in that he stated that appellant's head injury "probably" exacerbated appellant's underlying seizure disorder. Further, he did not provide a rationalized medical opinion as to how appellant's head injuries subsequent to his September 1980 employment injury aggravated that injury. Dr. Konings was also speculative in his July 26, 1993 report as he stated that appellant's September 1980 employment injury "could have" precipitated his seizure disorder and his subsequent head injuries and other physical and emotional trauma "could" have aggravated his seizure disorder and produce more frequent and more severe seizures.

In his June 14, 1993 report, Dr. Hehmann stated that the temporal lobe abnormalities revealed on appellant's EEGs were consistent with having been acquired rather than inherited. In his June 29, 1993 addendum, he stated that a head injury "can cause or exacerbate" a seizure disorder and that the bouncing of the brain in the skull from a blow to the head "can damage" the surface of the brain with a resultant scar which could be a source of seizures. Dr. Hehmann's report is vague and speculative.

In his July 8, 1993 report, Dr. Watt diagnosed major depressive disorder, post-traumatic stress disorder and psychological factors including epilepsy, stomach problems, diarrhea and headaches which he stated had been in remission since appellant retired in 1990 although appellant still had emotional problems related to his work experience. He stated, however, that

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

¹¹ *Gregory Griffin*, *supra* note 3.

¹² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

¹³ *Jennifer L. Sharp*, 48 ECAB 209, 212 n. 7 (1996); *William S. Wright*, 45 ECAB 498, 504 (1994).

“it was impossible” to attribute which intellectual, memory or personality changes were due to traumatic events and stated that the etiology of epilepsy “could be” attributed to genetic, biochemical or head trauma. He stated the fact that appellant’s seizures began and increased in severity after each head injury “strongly suggested” that the epileptic attacks were the result of head trauma and exacerbated by work-related stress. Dr. Watt’s opinion is similarly speculative in addressing the cause of appellant’s disability. The medical evidence appellant submitted does not clearly establish that the Office erred in denying his claim. The Board finds that the Office did not abuse its discretion by refusing 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.

The decision of the Office of Workers’ Compensation Programs dated March 31, 1998 is hereby affirmed.

Dated, Washington, DC
November 3, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member