

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE ELDER and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, GA

*Docket No. 00-1620; Submitted on the Record;
Issued April 3, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for further review on the merits under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On March 8, 1995 appellant, a 47-year-old letter carrier, filed a claim for benefits, alleging that he sustained a blood clot in his left leg due to factors of his employment; *i.e.*, lifting heavy sacks of mail, bending, twisting and turning his leg.¹ The Office accepted his claim for deep venous thrombophlebitis of the left lower extremity and pulmonary embolus. The Office paid appellant temporary total disability compensation for appropriate periods and placed him on the periodic rolls.

By letter dated June 20, 1997, the employing establishment offered appellant a limited-duty job as a modified clerk.

On July 23, 1997 appellant's treating physician, after reviewing the duties of the position, certified that he was medically able to perform the duties of the modified clerk job.

By letter dated August 1, 1997, the Office notified appellant that he had 30 days to accept the suitable job offer as a modified clerk or it would terminate his compensation pursuant to section 8106(c)(2) of the Federal Employees' Compensation Act. He did not respond to this notice within 30 days.

By decision dated September 10, 1997, the Office terminated appellant's compensation based on his refusal to accept a suitable job pursuant to section 8106(c)(2) of the Act.

¹ Appellant previously filed a Form CA-1 claim for traumatic injury on November 21, 1994, which the Office denied by decision dated January 25, 1995 and affirmed by nonmerit decision dated June 5, 1995. The Office combined the two claims by memorandum dated April 4, 1995.

By letter dated November 16, 1997, appellant requested reconsideration.

By decision dated October 21, 1998, the Office denied reconsideration, finding that appellant failed to submit medical evidence sufficient to warrant modification of its previous decision.

By letter dated October 23, 1998, appellant requested reconsideration.

By decision dated December 18, 1998, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

By letter dated June 16, 1999, appellant requested reconsideration. He submitted no new medical evidence with his request.

By decision dated August 11, 1999, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

By letter dated October 8, 1999, appellant requested reconsideration. He submitted no new medical evidence with his request.

By decision dated October 20, 1999, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

By letter dated November 1, 1999, appellant requested reconsideration. Accompanying the request were April 3, 1997 and October 29, 1999 reports from Dr. C. Steven Schramm, a Board-certified family practitioner. In his April 3, 1997 report, he reviewed the history of appellant's employment injury and advised that his condition had become static and was now a chronic disability. Dr. Schramm stated that appellant's attempt to work on a limited basis at the employing establishment had only worsened his symptoms and made his condition unbearable. He advised that appellant was totally disabled. In his October 29, 1999 report, Dr. Schramm stated that appellant would never recover from his condition, because it was permanent.

By decision dated January 13, 2000, the Office denied reconsideration without a merit review, finding appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that he was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error. The Office therefore denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.607, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by

advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.² Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.³

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and his requests did not contain any new and relevant medical evidence for the Office to review. Additionally, his June 16 and October 8, 1999 letters failed to show the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Although appellant generally contended that he continued to suffer residuals from his accepted employment condition, he failed to submit new and relevant medical evidence in support of this contention. Therefore, the Office did not abuse its discretion in refusing to reopen his claim for a review on the merits. The Board therefore affirms the Office's August 11 and October 20, 1999 decisions.

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

Section 8128(a) of the Act⁴ does not entitle an employee to a review of an Office decision as a matter of right.⁵ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, or increase the compensation awarded; or
- (2) award compensation previously refused: or
- (3) discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ As one such limitation, the Office has stated

² 20 C.F.R. § 10.607(b)(1). *See generally* 5 U.S.C. § 8128(a).

³ *Howard A. Williams*, 45 ECAB 853 (1994).

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

that it 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.⁷ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority by the Office granted under 5 U.S.C. § 8128(a).⁸

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on October 21, 1998. Appellant requested reconsideration on November 1, 1999; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁹ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.¹⁰

To establish clear evidence of error, an appellant 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 manifested 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's decision.¹⁶ The Board makes an independent determination of whether an appellant has submitted clear evidence of error on

⁷ 20 C.F.R. § 10.607(b).

⁸ See cases cited *supra* note 7.

⁹ *Rex L. Weaver*, 44 ECAB 535 (1993).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹¹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ See *Jesus D. Sanchez*, *supra* note 5.

¹⁴ See *Leona N. Travis*, *supra* note 12.

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

¹⁶ *Leon D. Faidley* *supra* note 5.

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 finds that appellant's November 1, 1999 request for reconsideration fails to show clear evidence of error. The Office reviewed the April 3, 1997 and October 29, 1999 reports from Dr. Schramm. While the reports from Dr. Schramm are generally relevant to the issue of whether appellant continues to experience residual disability from his accepted left leg condition, the reports are not sufficient to *prima facie* shift the weight of the evidence in favor of appellant. The medical opinion evidence did not present any evidence of error on the part of the Office, and appellant did not present such evidence in his request letter. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The October 20, August 11, 1999 and January 13, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 3, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

¹⁷ *Gregory Griffin*, 41 ECAB 458 (1990).