

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIMPER LEE and DEPARTMENT OF THE NAVY,
MILITARY SEALIFT COMMAND, Oakland, CA

*Docket No. 99-1118; Oral Argument Held November 7, 2000;
Issued January 12, 2001*

Appearances: *Kimper Lee, pro se; Paul J. Klingenberg, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

On March 3, 1983 appellant, then 43 years old, filed a traumatic injury claim alleging that on August 28, 1978 he sustained a right inguinal hernia moving scrap iron, paint and other materials on board a ship in his capacity as a wiper.¹ The Office denied appellant's claim in merit decisions dated June 6, 1984, June 23, 1988, August 29, 1989, September 21, 1990, March 8 and December 30, 1991 and January 6, 1993. The case was previously before the Board and also denied by decision dated April 6, 1994.² The factual and medical history of the case is fully set forth in the Board's April 6, 1994 decision and is incorporated by reference herein. The Board specifically determined that the evidence was insufficient to establish that appellant's August 28, 1978 employment injury resulted in any condition that necessitated medical care beginning March 15, 1983 or disabled him from work. On September 13, 1994 the Board denied reconsideration.

Most recently, appellant filed a request for reconsideration on October 15, 1998. Attached to the reconsideration were handwritten medical dispensary notes dated August 28 and 30, 1978 and a copy of an application for a state workers' compensation claim dated November 5, 1985 for injuries sustained by appellant from October 17, 1983 -- September 20, 1984 while appellant was employed as a security guard with various employers.

¹ Appellant was terminated from his position effective February 9, 1979 for failure to follow orders.

² *Kimper Lee*, 45 ECAB 565 (1994).

In a decision dated November 4, 1998, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

The Board finds that the Office properly found that appellant's reconsideration request was not timely filed and that such request did not present clear evidence of error.

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 This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵ The Office, through 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 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 limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁸

In this case, appellant's request for reconsideration was dated October 5, 1998. Since this is more than one year after the Board's April 6, 1994 decision, the request was properly deemed by the Office to be untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has 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 In accordance with Office procedures, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹⁰

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

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) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ *See Leon D. Faidley, Jr.*, *supra* note 4.

⁹ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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 decision.¹⁶ 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.¹⁷

In the instant case, the Office properly noted that on reconsideration appellant submitted evidence, medical dispensary notes, that had already been considered by the Office in denying appellant's compensation claim. Although appellant submitted a copy of a state workers' compensation application form, that form pertains to injuries appellant sustained in jobs unrelated to his position as a wiper for the employing establishment. As such, appellant's evidence is immaterial and irrelevant to the issue of the case. The Board, therefore, finds that appellant's evidence on reconsideration does not establish clear evidence of error with respect to the Office's final merit decision.

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 4.

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

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

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁷ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

The decision of the Office of Workers' Compensation Programs dated November 4, 1998 is hereby affirmed.

Dated, Washington, DC
January 12, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member