

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OTIS LAWSON and DEPARTMENT OF THE ARMY,
COMMANDER PINE BLUFF ARSENAL, Pine Bluff, AK

*Docket No. 99-2422; Submitted on the Record;
Issued January 4, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed beyond the one-year time limitation period set forth in 20 C.F.R. § 10.607(a) (1999) and did not demonstrate clear evidence of error.

On March 23, 1993 appellant, a 38-year-old senior incinerator plant operator, filed an occupational disease claim for shortness of breath caused by bronchospastic episodes upon exposure to chemicals. The Office accepted the claim for a temporary aggravation of shortness of breath due to chemical exposure.

In a November 17, 1993 decision, the Office terminated compensation benefits effective January 26, 1993 on the grounds that the disability and residuals arising from his temporary aggravation of his preexisting lung condition, occurring on November 3, 1992 and January 26, 1993 had ceased.

Appellant requested an oral hearing before an Office hearing representative on November 23, 1993 which was held on July 19, 1994.

In a September 23, 1994 decision, the hearing representative affirmed the November 17, 1993 decision finding that the medical evidence did not support a continuing work-related condition or disability.

In a letter received by the Office on February 16, 1999 and dated January 14, 1999, appellant requested reconsideration of the Office's September 23, 1994 decision. Accompanying his request were medical reports previously reviewed by the Office. He also submitted several documents including: a September 23, 1999 pathology report from Dr. Robert F. Schaefer, a Board-certified anatomic pathologist, which indicated that appellant had a right upper lobe mass; a September 4, 1997 preoperative diagnosis by Dr. Kang Fan, a Board-certified anatomic and clinical pathologist, which found that appellant had carcinoma, consistent with lung primarily poorly differentiated adenocarcinoma; and a September 23, 1997 operative report, which was

dictated by Dr. Cedric D. Sheffield, a surgeon, indicating that appellant had a right upper lobectomy, fiber optic bronchoscopy and a right thoracotomy.¹ Additionally, appellant supplied an unsigned discharge summary for the period September 23 to October 2, 1997 which indicated that appellant had a right upper lobectomy with chest wall resection and was discharged on October 2, 1997.² The reports did not address the cause of appellant's condition.

By decision dated April 28, 1999, the Office denied reconsideration without a merit review, finding appellant had not timely requested reconsideration and clear evidence of error was not established.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.³ As appellant filed his appeal with the Board on July 23, 1999, the Board lacks jurisdiction to review the Office's most recent merit decision dated September 23, 1994. Consequently, the only decision properly before the Board is the Office's April 28, 1999 decision denying appellant's request for reconsideration.

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 Federal Employees' Compensation Act,⁴ 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 an 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 discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.⁶ The Board has determined that the

¹ The report indicates that the surgery was performed September 23, 1997; however, the report was dictated and transcribed on September 28 and 29, 1997.

² Additional treatment notes regarding the September 23, 1997 operation charted appellant's progress from surgery to date of discharge.

³ 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998).

⁴ 5 U.S.C. § 8128(a).

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

⁶ 20 C.F.R. § 10.607(a) (1999).

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

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision on September 23, 1994. Appellant requested reconsideration on January 14, 1999 and it was received by the Office on February 16, 1999. Thus appellant's request for reconsideration is untimely as it was received outside the one-year time limitation.

In those cases where a request for reconsideration is not timely filed, the Office's regulations provide that the Office will nevertheless undertake review of the case when there is clear evidence of error pursuant to the untimely request.⁸ Office procedures state that the Office will re-open an appellant's case for merit review, notwithstanding the one-year filing limitation set, if the application for review shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not merely enough to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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 evidence of error on the part of the Office.¹⁴ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict of 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.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

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 607(b) (1999).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). See 20 C.F.R. § 607(b).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 5.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁶ *Thankamma Matthews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

In support of his January 14, 1999 request for reconsideration, appellant submitted medical reports concerning his right upper lobectomy. He also included treatment notes and discharge summaries. Additionally he submitted reports from the Chief Medical Officer showing he was not able to participate in the respiratory program. None of these treatment notes addressed whether the employment caused or aggravated any lung condition. Appellant did not manifest any arguments to establish clear evidence of error on the part of the Office. Consequently, appellant did not present any evidence to *prima facie* shift the weight of the evidence in his favor and raise a substantive question as to whether the Office's final merit decision was erroneous.

For these reasons, the Board finds that the Office's April 28, 1999 decision was proper in its denial of appellant's request for reconsideration based upon the grounds that it was untimely filed and did not demonstrate clear evidence of error.¹⁷

The decision of the Office of Workers' Compensation Programs dated April 28, 1999 is hereby affirmed.

Dated, Washington, DC
January 4, 2001

Michael J. Walsh
Chairman

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

¹⁷ Appellant's January 14, 1999 reconsideration request also referenced a request for a schedule award. However, any schedule award issue is premature as the Office has not issued a decision on this matter. Also, the Office only accepted a temporary aggravation of shortness of breath and appellant did not submit any medical evidence attributing a permanent impairment of the lungs to the accepted temporary aggravation. *See* 5 U.S.C. § 8102(a) (compensation benefits are only payable for injuries sustained in the performance of duty).