

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOWARD L. JORDAN and DEPARTMENT OF THE ARMY,
RED RIVER DEPOT, Texarkana, TX

*Docket No. 00-1919; Submitted on the Record;
Issued June 25, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not contain clear evidence of error.

Appellant, a 46-year-old artillery repairman filed a claim alleging that on March 15, 1968 he injured his back in the performance of duty. The Office accepted appellant's claim for lumbar strain on September 30, 1970. Appellant filed a notice of recurrence of disability on March 23, 1972 and the Office accepted this claim on September 5, 1972. The Office entered appellant on the periodic rolls. In a letter dated March 20, 1997, the Office proposed to terminate appellant's compensation benefits based on a report dated December 20, 1996 from his attending physician. By decision dated November 24, 1997, the Office terminated appellant's compensation benefits effective December 7, 1997 finding that appellant had recovered from his employment injury of lumbar strain.

Appellant requested reconsideration on December 2, 1997 and submitted additional medical evidence. By decision dated December 17, 1997, the Office denied modification of its November 24, 1997 decision. Appellant again requested reconsideration on July 13, 1998 and the Office reviewed appellant's claim on the merits and denied modification of its prior decisions on September 11, 1998.

Appellant requested reconsideration of the September 11, 1998 merit decision, on September 21, 1999 and submitted additional medical evidence. By decision dated November 16, 1999, the Office declined to reopen appellant's claim for review of the merits finding that the request for reconsideration was not timely and did not contain clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not contain clear evidence of error.

The only decision before the Board on this appeal is that of the Office dated November 16, 1999, in which it declined to reopen appellant's case on the merits because the request was not timely filed and did not show clear evidence of error. Since more than one year elapsed from the date of issuance of the Office's September 11, 1998 merit decision, to the date of the filing of appellant's appeal, on May 4, 2000, the Board lacks jurisdiction to review that decision.¹

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁶

Appellant requested reconsideration on September 21, 1999. Since appellant filed his reconsideration request more than one year from the Office's September 11, 1998 merit decision, the Board finds that the Office properly determined that said requests were untimely.

In those cases where requests for reconsideration are not timely filed, the Board has held 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.⁷ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.⁸

¹ See 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁴ *Id.* at 768; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁵ 20 C.F.R. § 10.138(b)(2). The Board has concurred in the Office's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

⁷ *Thankamma Mathews*, *supra* note 3 at 770.

⁸ See 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 which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ The Board must make 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.¹⁵

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in the case is a medical question of whether appellant has any continuing disability or medical residuals causally related to his accepted 1968 employment injury of lumbar strain.

In support of his claim, appellant submitted additional medical evidence. Dr. Barry Green, a Board-certified orthopedic surgeon and appellant's attending physician, completed a report dated September 29, 1998 and opined that due to appellant's employment injury "he had gradual degenerative changes, either to the facets and the disc degenerated and it is directly related." In a report dated January 28, 1999, Dr. Green asserted that appellant's 1968 employment injury resulted not only in a lumbar strain, but also in injury to his lumbar disc. He stated that the damage to appellant's disc resulted in progressive degeneration. On August 11, 1999 Dr. Green again stated that at the same time that appellant sprained his back he also injured his lumbar disc and that appellant's current condition of disc degeneration was directly related to the sprain on March 15, 1998.

⁹ *Thankamma Mathews*, *supra* note 3 at 770.

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Jesus D. Sanchez*, *supra* note 4 at 968.

¹² *Leona N. Travis*, *supra* note 10.

¹³ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁵ *Gregory Griffin*, *supra* note 5.

The evidence submitted is not sufficient to *prima facie* shift the burden of proof in support of appellant's claim as it lacks the medical rationale that would be necessary to establish that appellant's current condition is causally related to his accepted employment injury. Dr. Green opines that appellant's initial employment injury resulted in an additional injury to a lumbar disc. This additional condition has not been accepted by the Office as causally related to the employment injury. In order to establish that appellant sustained an additional injury in 1968, Dr. Green must submit bridging evidence indicating that symptoms of this condition have existed since the original injury. He must also provide a medical explanation of the mechanics involved including a detailed description of the employment events that resulted in appellant's accepted injury and how these events also caused the disc injury. Without such detailed medical reasoning, Dr. Green's reports are not sufficient to establish clear evidence of error on the part of the Office.

Appellant also submitted a report dated September 30, 1998 from Dr. B.C. Muthappa, a family practitioner. In this report, Dr. Muthappa diagnosed degenerative disc disease of the lumbar spine. He stated: "The only way I can explain is because of the injury sustained in 1968.... One cannot prove how it is directly related, but I feel that his old injury in 1968 may have contributed to his present state of severe degenerative disc disease in his back."

This report shares the defects found in Dr. Green's reports. Dr. Muthappa offers an opinion on the causal relationship between appellant's current condition and his employment injury, but fails to provide any medical reasoning in support of his conclusions. Without the necessary supportive medical rationale, his report is insufficient to establish a causal relationship and does not establish clear evidence of error on the part of the Office.

The November 16, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 25, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member