

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARRELL STOVALL and DEPARTMENT OF THE AIR FORCE,
HANSCOM AIR FORCE BASE, MA

*Docket No. 99-2562; Oral Argument Held on February 14, 2001;
Issued March 14, 2001*

Appearances: *Darrell Stovall, pro se; Miriam D. Ozur, Esq.*, for the Director,
Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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 only decision before the Board on this appeal is the Office's July 2, 1999 decision, denying appellant's request for a review on the merits of its February 23, 1998 decision. Because more than one year has elapsed between the issuance of the Office's February 23, 1998 merit decision and August 9, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the Office's February 23, 1998 decision and prior decisions.¹

The Office accepted appellant's claim for cervical and lumbar strain and sciatica arising from the August 28, 1995 employment injury. By decision dated March 28, 1997, the Office terminated benefits stating that the medical evidence of record established that appellant had no continuing disability resulting from the August 28, 1995 employment injury. By letter dated April 4, 1997, appellant requested an oral hearing before an Office hearing representative, which was held on August 19, 1997. By decision dated October 16, 1997, the Office hearing representative affirmed the Office's March 28, 1997 decision. By letter dated December 17, 1997, appellant requested reconsideration of the Office's decision and submitted a deposition from his treating physician, Dr. Gregory B. Shankman, a Board-certified orthopedic surgeon. By decision dated February 23, 1998, the Office denied appellant's request for modification.

By letter dated March 20, 1998, appellant requested review of the written record, contending that a conflict in the medical evidence existed and the case should be remanded to an

¹ 20 C.F.R. § 501.3(d)(2).

impartial medical specialist to resolve the conflict. By decision May 11, 1998, the Branch of Hearings and Review denied appellant's request.

Subsequently, on a recurrence of disability claim form, Form CA-2a, dated January 19, 1999, appellant stated that he had new medical evidence that the referral physician, Dr. Anthony Nastasi, a Board-certified orthopedic surgeon, did not have at the time he examined appellant on February 26, 1997. Appellant stated that his original injury was August 28, 1995, that he stopped working the next day and requested that the Office "please look at" the new evidence and "reopen" his case.² He submitted a surgical report of a discogram dated December 16, 1998 performed by Dr. Shankman, who found a degenerated disc at L5-S1. Appellant also submitted a hospital report dated December 16, 1998 in which Dr. Shankman performed a physical examination, considered appellant's history of injury and diagnosed a herniated disc and a possible degenerative disc in the lumbar spine. Further, appellant submitted copies of previously submitted evidence consisting of the March 5, 1997 magnetic resonance imaging (MRI) scan showing concentric bulging of degenerated disc material into the anterior epidural space and intervertebral foramina, an undated letter from Dr. Ronald E. Femia, a Board-certified radiologist, with a specialty in internal medicine, in which he stated, in part, that the March 5, 1997 MRI scan showed disc material extending beyond the margins of the vertebrae in a concentric fashion at the L4-5 and L5-S1 levels and a letter dated January 28, 1998 from Dr. Lawrence M. Burgreen, a Board-certified radiologist, stating, in part, that bulging discs as in appellant's case "can produce symptoms which clinically cannot be differentiated from symptoms of herniated disc." Appellant also submitted a work restriction form dated July 28, 1998.

By letter dated June 25, 1999, appellant requested reconsideration of the Office's decision and resubmitted the December 16, 1998 discogram report and Dr. Shankman's December 16, 1998 hospital report diagnosing a herniated disc.

By decision dated July 2, 1999, the Office denied appellant's request for reconsideration, stating that his request dated June 25, 1999 was filed more than a year after the Office's February 23, 1998 decision and, therefore, was untimely. The Office further found that the evidence appellant submitted did not show clear evidence of error.

The Board has held that a request for reconsideration need not be on any particular form but must be in writing, identify the decision and the specific issue or issues for which reconsideration is being requested and be accompanied by relevant and pertinent new evidence or argument not previously considered.³

Appellant's submission of the January 19, 1999 recurrence claim form in which he indicated that he sought request for reconsideration of the Office's decision and was submitting new evidence in support of his request is sufficient to constitute a valid request for reconsideration. Moreover, since appellant's January 19, 1999 request for reconsideration was submitted within a year of the Office's February 23, 1998 decision, appellant's reconsideration

² At oral argument, appellant explained that he meant the form to constitute a request for reconsideration, having been sent the form by the Office when he told them he wanted to file a reconsideration request.

³ *Vincente P. Taimanglo*, 45 ECAB 504, 507 (1994).

request is timely. The Office, therefore, erred in determining appellant's reconsideration request was untimely and applying the "clear evidence of error" standard of review.⁴

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁵ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).⁶

The case must, therefore, be remanded for the Office to apply the "abuse of discretion" standard pursuant to section 8128(a) and determine whether appellant's request and the accompanying evidence is sufficient to warrant reopening of the record for review on the merits.⁷ After such further development as it deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated July 2, 1999 is reversed and the case is remanded for further consideration consistent with this decision.

Dated, Washington, DC
March 14, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

⁴ *Id.*

⁵ Section 10.606(b)(2)(i-iii).

⁶ Section 10.608(a).

⁷ See *Vincente P. Tamainglo*, *supra* note 3; *Douglas McLean*, 42 ECAB 759, 762 (1991).