

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GUION M. SAWYER and DEPARTMENT OF THE NAVY,
NAVAL AVIATION DEPOT, Cherry Point, NC

*Docket No. 00-1423; Submitted on the Record;
Issued May 1, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

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 Board has duly reviewed the case record and finds that appellant's application for review was not timely filed and failed to present clear evidence of error.

On December 20, 1978 appellant, then a 37-year-old equipment cleaner, sustained a corneal abrasion to his right eye when he was scraping the rubber seal from an F4 fuel cell and a piece of rubber coated with a chemical stripper broke off and entered his right eye.

On October 16, 1997 appellant filed a claim for a schedule award.¹ To support his claim, appellant submitted progress notes and reports dated December 21, 1978 to October 15, 1997 from Thomas H. Hetrick, a Board-certified family practitioner, and Dr. Cathy P. Doty, an optometrist.

On November 12, 1997 the Office referred appellant's file to an Office medical adviser. In his report, the Office medical adviser indicated that appellant had a normal right cornea, opined that appellant's present condition was related to glaucoma medication and concluded that appellant had no permanent disability.

¹ On April 10, 1995 appellant filed a second traumatic injury claim relating to his December 20, 1978 employment injury. On the claim form, he stated that on December 20, 1978 he sustained a right eye abrasion when he was scraping out a fuel cell liner and it entered his right eye. By letter dated July 5, 1995, the Office advised appellant that he may have sustained a recurrence of disability and it requested additional information to support his claim. On June 8, 1996 appellant filed a recurrence of disability claim alleging that he sustained an injury on December 20, 1978. The claim form did not indicate the date of his alleged recurrence or other relevant information. Appellant did not stop work following his injury. He alleged that he did not see his doctor frequently but he "constantly" used prescribed eyedrops. A review of the case file indicates that these claims were not further adjudicated.

By decision dated December 2, 1997, the Office denied appellant's claim on the grounds that the medical evidence of record failed to establish that he had a permanent impairment of the right eye resulting from his December 20, 1978 employment injury.

By letter dated November 6, 1999, appellant requested reconsideration. He alleged that his condition required frequent unscheduled visits to his optometrist due to constant irritation, sporadic pain, redness and dryness in his right eye. Appellant argued that Dr. Doty's April 26, 1995 report that he sustained long-term damage to his vision caused by his December 20, 1978 employment injury should be sufficient to establish his claim. Appellant further noted that Dr. Doty stated that appellant's condition could not be realized for several years and that he sustained permanent central and peripheral damage to his corneal epithelium.

By decision dated February 24, 2000, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. The Office stated that appellant's November 6, 1999 request was untimely because it was not dated within one year of the issuance of its December 2, 1997 decision. The Office noted that it considered the evidence submitted to support appellant's request and found that it did not show clear evidence of error on the part of the Office.

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 its 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 to the Office under 5 U.S.C. § 8128(a).⁶

Appellant's reconsideration request, dated November 6, 1999, was filed more than one year after the Office's December 2, 1997 decision. The Board, therefore, finds that the Office properly determined that the request was untimely.

In those cases where a request for reconsideration is 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

² 5 U.S.C. § 8101 *et seq.*; § 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. § 10.607(a). 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.

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

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 manifested 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 to determine 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 *prima facie* shift the weight of the evidence in favor of the claimant but also raise a substantial question as to the correctness of the Office decision.¹⁴ The Board must make an independent determination of whether a claimant 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 because it does not raise a substantial question as to the correctness of the Office's most recent merit decision. Appellant merely expressed his disagreement with the Office's December 2, 1997 decision and argued that the medical evidence of record established that he had a permanent impairment of the right eye. He did not submit any medical evidence to support his reconsideration request. Appellant's statement is insufficient to shift the weight of the evidence in his favor or raise a substantial question as to the correctness of the Office's decision.

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

⁹ *Thankamm 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*, 41 ECAB 458, 466 (1990).

As appellant failed to submit clear evidence of error, the Office acted within its discretion in denying further review of appellant's case.

The February 24, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 1, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member