

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL G. FINNIE and DEPARTMENT OF LABOR,
MINE SAFETY & HEALTH ADMINISTRATION, Madisonville, KY

*Docket No. 01-648; Submitted on the Record;
Issued October 3, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
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.

On February 1, 1999 appellant, then a 52-year-old field office supervisor, filed an occupational disease claim alleging that he contracted osteoarthritis and underwent a right hip replacement due to factors of his federal employment. Appellant stated that he experienced "significant injuries" in a mining accident in December 1973,¹ that he began his federal employment in January 1978, that on December 7, 1998 he discovered that his right hip was "worn out" and that at this point he "began to consider the likelihood" that this preexisting condition was related to factors of his federal employment.

To support his claim, appellant submitted medical reports by Dr. James N. Donley, a Board-certified orthopedic surgeon, who performed a right total hip arthroplasty on January 19, 1999. Additionally, in response to an Office request for a description of the employment factors to which he attributed his claimed conditions, appellant submitted a narrative statement.

By decision dated April 7, 1999, the Office denied appellant's claim for compensation on the grounds that the medical evidence of record failed to establish that he had a diagnosed medical condition either caused or aggravated by factors of his federal employment.

¹ The record reveals that on December 21, 1973, while employed by the Peabody Coal Company Camp No. 1, appellant sustained multiple injuries, including a dislocated right hip and ruptured disc, when he was trapped between two pieces of equipment while performing his duties in the mine. The record further reveals that the Kentucky State Compensation Board determined that appellant was 25 percent disabled as a result and awarded him a disability pension, which he continues to receive.

In an undated letter received by the Office on September 11, 2000 appellant requested reconsideration and submitted a deposition taken from Dr. Donley on June 26, 2000.

By decision dated October 2, 2000, the Office denied appellant's reconsideration request as untimely filed. The Office further denied appellant's request on the grounds that the evidence submitted did not present clear evidence that the Office's April 7, 1999 decision was erroneous. The Office explained that Dr. Donley's deposition was insufficient to establish "on an unequivocal basis" that appellant's underlying condition was aggravated by the factors of his federal employment.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

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

The Office received appellant's request for reconsideration on September 11, 2000. Because appellant filed the reconsideration request more than one year from the Office's April 7, 1999 merit decision, the Board finds that the Office properly determined that said 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 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

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. § 10.607(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.

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 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 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

Dr. Donley opined that he believed appellant's total hip replacement in 1999 resulted from the 1973 mining accident that the dislocation was "fairly traumatic to the hip joint" and that over a period of time it "certainly" could cause the arthritic process. He explained that the arthritis resulted from an injury to the joint at the time of the dislocation, *i.e.*, "torn ligaments, capsule, damaged articular cartilage which has a very poor potential to heal. It just took some time to develop." Dr. Donley further opined that had it not been for the dislocation, appellant would not have developed arthritis.

He concluded that the arthritis in appellant's right hip became symptomatic as a consequence of his activities as a mine inspector, involving "duck walking," crawling, normal walking, "maneuvering over rough ground in low coal" and traveling extensively. Dr. Donley suggested that appellant's right hip could have become symptomatic even if he were not a mine inspector because he jogs, thereby causing trauma to the hip. Thus, Dr. Donley stated he was unable to conclude in terms of a "medical probability" that had appellant not engaged in the mine inspector duties following the dislocation of his right hip he might not be symptomatic currently.

Dr. Donley's deposition reveals that he was unable to conclude that the implicated factors of appellant's employment as a mine inspector caused the arthritis in his right hip to become

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*, 41 ECAB 458, 466 (1990).

symptomatic, thereby necessitating surgical intervention. The issue to be resolved was whether appellant's right hip replacement and osteoarthritis were in any way causally related to factors of his federal employment, by proximate cause, aggravation, acceleration or precipitation. Dr. Donley, appellant's attending physician, has not drawn such a conclusion. Thus, Dr. Donley's deposition is of little probative value and insufficient to establish appellant's claim for compensation.

As appellant has not, by the submission of Dr. Donley's deposition, raised a question as to the correctness of the Office's April 7, 1999 decision, he has failed to establish clear evidence of error. Accordingly, the Office did not abuse its discretion in denying a merit review of appellant's claim.

The April 7, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 3, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member