

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL W. FOSTER and U.S. POSTAL SERVICE,
GREENPOINT STATION, Brooklyn, NY

*Docket No. 01-1310; Submitted on the Record;
Issued February 1, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs acted within its discretion in denying appellant's December 18, 2000 request for reconsideration.

On February 11, 1994 appellant, then a 39-year-old letter carrier, sustained a traumatic injury when he slipped and fell while delivering mail. The Office accepted his claim for lumbosacral strain and paid compensation benefits. Appellant returned to limited duty on September 2, 1994 but sustained a recurrence of disability on December 9, 1994 as a result of his accepted employment injury. He returned to limited duty on December 19, 1994.

On December 5, 1995 appellant filed a claim asserting that he sustained a recurrence of disability on or about December 5, 1995 as a result of his February 11, 1994 employment injury.

In a decision dated March 4, 1996, but issued on March 12, 1996, the Office denied this claim of recurrence on the grounds that the evidence failed to demonstrate a causal relationship between the injury and the claimed condition or disability. The Office further found that the evidence submitted did not establish a worsening of appellant's medical condition or a change in the nature and extent of appellant's limited-duty assignment.

On October 2, 1996 appellant requested a review of the written record by an Office hearing representative. In a decision dated November 27, 1996, the hearing representative denied appellant's request because it was untimely and because appellant could address the issue equally well through the reconsideration process.

In the prior appeal of this case,¹ the Board found that appellant had not met his burden of proof to establish that he sustained a recurrence of disability on or about December 5, 1995 as a result of his accepted lumbosacral strain of February 11, 1994. The Board also found that the

¹ Docket No. 97-1312 (issued March 24, 1999).

Office properly denied appellant's request for a review of the written record on the grounds that it was untimely filed.²

On May 13, 1999 appellant filed a claim asserting that he sustained a recurrence of disability on or about November 2, 1996 as a result of his February 11, 1994 employment injury. He explained that prior to November 2, 1996 he was working limited duty eight hours a day, but on November 2, 1996 he was forced to reduce the hours worked in this position to six. On that day he experienced an increase in pain and stiffness and a reduction in mobility. Specifically, appellant explained, he sustained a spontaneous return of symptoms of the injuries and conditions causally related to the original federal employment incident of February 11, 1994. Appellant stated that a detailed medical narrative report would follow.

On February 15, 2000 the Office advised appellant that it was returning his claim of recurrence because certain blocks of information were not completed. Without this information, the Office explained, the claim could not be processed.

On December 18, 2000 appellant requested reconsideration. He argued that the medical evidence of file and controlling principles of law unequivocally established that the reduction of his work hours from eight to six on November 2, 1996 was a result of the incident that occurred on February 11, 1994. Appellant attached a January 30, 1997 report from his attending physician, who stated that appellant was incapable of working eight hours a day and that his condition had not changed over the past two and a half years.

Appellant also argued that the Office erroneously failed to accept as compensable all injuries and conditions he sustained as a result of the employment incident of February 11, 1994. He argued that the Office must expand the class of accepted conditions to include all conditions outlined in the medical evidence of file.

In a decision dated February 5, 2001, the Office denied appellant's request for reconsideration. The Office found that the request was not filed within one year of the March 12, 1996 decision and was, therefore, untimely. The Office further found that the evidence submitted in support of appellant's request was insufficient to warrant reopening the claim.

The Board finds that the Office acted within its discretion in denying appellant's December 18, 2000 request for reconsideration.

² The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”³

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

The Office issued no decision on appellant's claim that he sustained a recurrence of disability on or about November 2, 1996. The Office returned the claim form to appellant because it was incomplete and could not be processed without additional information. Without a final decision, appellant has no review or appeal rights to exercise with respect thereto. The Office properly treated appellant's December 18, 2000 request for reconsideration as a request for review of the Office's most recent merit decision, namely, the March 12, 1996 decision denying appellant's claim of recurrence on or about December 5, 1995.

Because appellant made his December 18, 2000 request for reconsideration more than one year after the Office's March 12, 1996 decision, the request for reconsideration is untimely. The question for determination, therefore, is whether appellant's December 18, 2000 request for reconsideration shows clear evidence of error in the Office's March 12, 1996 decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁵ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁶ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by the Office of how the

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁷ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ See *Leona N. Travis*, *supra* note 6.

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.⁹ 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 decision.¹⁰ 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 a merit review in the face of such evidence.¹¹

Appellant's December 18, 2000 request for reconsideration fails to demonstrate clear evidence of error in the Office's March 12, 1996 decision. The arguments that appellant made and the evidence he submitted, concerning an alleged recurrence of disability on November 2, 1996, are irrelevant to the issue decided by the Office's March 12, 1996 decision. In that decision, the Office denied appellant's claim that he sustained a recurrence of disability on or about December 5, 1995, as a result of his February 11, 1994 employment injury. Arguments and evidence concerning an alleged November 2, 1996 recurrence have no bearing on this issue.

Appellant also argued that the Office must expand the class of accepted conditions to include all conditions outlined in the medical evidence. The mere mention of a condition in the medical evidence, however, is no basis for acceptance. Appellant bears the burden of proof to establish that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.¹² Further, the evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between his current condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.¹³ Appellant has offered no such evidence to support his argument that the Office should expand the class of accepted conditions.

Moreover, an expanded acceptance of appellant's claim would not in itself demonstrate clear error in the Office's March 12, 1996 decision. The Office denied appellant's claim that he sustained a recurrence of disability on or about December 5, 1995 because the evidence failed to demonstrate a causal relationship between the accepted employment injury and the claimed disability for work. The Office further found that the evidence submitted did not establish a worsening of appellant's employment-related medical condition or a change in the nature and extent of appellant's limited-duty assignment. An expansion of the accepted conditions to

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

¹³ *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

include, for the sake of argument, chronic discogenic low back derangement with possible L5 radiculopathy, would not in itself establish that appellant sustained a recurrence of disability on or about December 5, 1995 as a result of his February 11, 1994 employment injury.

Because appellant's December 18, 2000 request for reconsideration fails to demonstrate clear evidence of error in the Office's March 12, 1996 decision, the Office acted within its discretion in denying a merit review of appellant's claim.

The February 5, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 1, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member