

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT E. MORSE and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Denver, CO

*Docket No. 01-1930; Submitted on the Record;
Issued June 19, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

Appellant's claim for aggravation of his work-related neck and arm conditions,¹ filed on January 29, 1996 was initially denied on June 5, 1996 because the medical evidence failed to establish any causal relationship between appellant's work duties and his neck and arm symptoms. Following appellant's request for an oral hearing, the hearing representative remanded the case on May 8, 1997 for the Office to prepare a comprehensive statement of accepted facts and seek a second opinion evaluation of appellant's condition.

On remand, the Office referred appellant, the case record and a statement of accepted facts to Dr. Stanley H. Ginsburg, a Board-certified neurologist. Based on his August 22, 1997 report, the Office denied appellant's claim on October 17, 1997.

Appellant again requested a hearing, which was held on June 4, 1998. On August 12, 1998 the hearing representative denied appellant's claim on the grounds that the medical evidence failed to establish that appellant's cervical condition was causally related to his work duties, relying on Dr. Ginsburg's second opinion evaluation.

On March 23, 2001 appellant requested reconsideration and submitted a February 9, 2001 report from Dr. J. Tashof Bernton, appellant's long-time treating physician who is Board-certified in internal and occupational medicine, as well as a detailed history of appellant's medical problems and treatment. Appellant's attorney also presented legal arguments regarding the medical evidence in the file and the Office's procedures.

¹ Previous claims filed by appellant were accepted for thoracic outlet syndrome, right rotator cuff tear, right epicondylitis and overuse syndrome of his upper extremities and myofascial pain syndrome. Appellant has filed numerous claims, the first on May 6, 1987 and the latest on March 3, 2000.

On April 30, 2001 the Office denied reconsideration on the grounds that appellant's request was untimely filed and failed to establish clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The only Office decision before the Board on appeal is dated April 30, 2001, denying appellant's request for reconsideration. Because more than one year has elapsed between the Office's last merit decisions dated November 10, 1999 and August 12, 1998 and the filing of this appeal on July 31, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.²

Section 8128(a) of the Federal Employees' Compensation Act³ 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."⁴

The Office's imposition of a one-year time limitation, within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).⁵ This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶

In this case, appellant's request for reconsideration was filed on March 23, 2001 more than one year from the Office's November 10, 1999 and August 12, 1998 decisions and was, therefore, untimely.⁷

² 20 C.F.R. §§ 501.2(c); 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8128(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ The record contains appellant's handwritten letter dated September 20, 2000, seeking a "reexamination of written facts of evidence concerning" all of the eight claims filed by appellant. Three claims (Nos. 120188154, 155

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁰ Evidence that 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. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.¹²

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also 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.¹³

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.¹⁴ 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.¹⁵

and 156) were denied on June 8, 2000. The Office informed appellant, by letter dated September 25, 2000, that he must specify which decision he wanted reconsidered. The Office noted that separate claims for a cervical spine condition had been denied on August 12, 1998 and on October 29 and November 10, 1999 for disability beginning on May 14, 1999.

⁸ 20 C.F.R. § 10.607(b).

⁹ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

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

¹¹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹² *Annie Billingsley*, 50 ECAB 210, 212, n. 12 (1998); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

In this case, the arguments of appellant's attorney do not establish clear evidence of error. He argues that the statement of accepted facts provided to Drs. Leonard P. Burke, Richard Steig and Ginsburg, all Board-certified neurologists, was incorrect and inadequate and that, therefore, their opinions were insufficiently rationalized to meet the Office's burden of terminating benefits. However, the Office did not terminate benefits, it denied the claim for aggravation of his neck and arm symptoms. Thus, it was claimant's burden to establish a causal relationship between his alleged disability and employment factors. He failed to meet his burden of proof on this issue and the Office properly denied his claims. The attorney's arguments with regard to termination establish no error in the Office's decisions.

The medical evidence submitted on reconsideration consists of a lengthy and detailed summary of Dr. Bernton's review of appellant's medical history, beginning in May 1985. Dr. Bernton concludes that appellant "needs to have his claim accepted, dating from May 14, 1999 to the present," but does not explain how the Office erred in any of its decisions denying appellant's claims based on a cervical condition in 1995 and 1999.

Dr. Bernton attributes appellant's disability in May 1999 to aggravation of his preexisting cervical disc condition and takes issue with Dr. Ginsburg's conclusion that appellant's cervical problems were not related to work factors, specifically that any cervical radicular irritation secondary to appellant's degenerative disc disease was not occupationally related. Even if the Board were to construe Dr. Bernton's 2001 opinion as sufficient to create a conflict with the report of Dr. Ginsburg, such a construction would not establish clear evidence of error because a conflict in medical opinions means only that the weight of the evidence rests with neither side and is thus insufficient to shift the weight in favor of appellant.¹⁶

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review.

¹⁶ See *Fidel E. Perez*, 48 ECAB 663, 665 (1997) (finding that while a new medical report was supportive of continuing work-related residuals and was of equal weight with previous contrary reports, such evidence was insufficient to shift the probative weight of the evidence to claimant).

The April 30, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 19, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member