

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT BLEDSOE and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

*Docket No. 00-2484; Submitted on the Record;
Issued October 29, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits.

The Board has reviewed the case record and finds that the Office acted within its discretion in refusing to reopen appellant's claim for further review of the merits.

The Office initially accepted that appellant sustained head trauma, postconcussion, cervical trauma and neuropathy of the cervical spine while in the performance of duty on March 21, 1969.

By decision dated January 8, 1982, the Office terminated appellant's benefits effective July 30, 1981 on the grounds that he had refused an offer of suitable work.

By decision dated October 27, 1982, the Board set aside the Office's January 8, 1982 decision and remanded the case for further development.¹

By decision dated November 10, 1983, the Office terminated appellant's benefits on the grounds that the medical evidence failed to establish continuing medical residuals of his work-related injury and that his psychiatric condition was not work related.

¹ Docket No. 82-1657 (issued October 27, 1982). The issues in this case were whether the Office properly terminated appellant's compensation on the grounds that he refused a suitable job offer and whether appellant has an emotional condition related to his work-related injury. The Board set aside the Office's January 8, 1982 decision on the grounds that it failed to establish that the proffered job was suitable for appellant. With respect to appellant's claim for an emotional condition, the Board noted that appellant's evidence was insufficient to establish that his condition was work related, but that it was sufficient to warrant further development of the record. The Board required the Office to refer appellant to a Board-certified psychiatrist for an opinion regarding appellant's alleged work-related emotional condition.

By decision dated June 11, 1984, the Board affirmed the Office's November 10, 1983 termination decision.²

By decision dated October 6, 1989, the Board affirmed the Office's June 7 and November 21, 1998 decisions denying appellant's subsequent requests for reconsideration.³

By letter dated June 7, 2000, appellant requested reconsideration of the Office's November 10, 1983 decision terminating benefits.

By decision dated June 19, 2000, the Office found that appellant's request for reconsideration was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138, as it was not filed within one year of the last merit decision dated November 10, 1983.⁴ The Office further found that appellant's request failed to present clear evidence of error, as it did not establish that the termination decision was in error.

The Board finds that the Office properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a), and that the application failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's June 19, 2000 decision denying appellant's request for a review on the merits of the its November 10, 1983 decision terminating compensation benefits. Because more than one year has elapsed between November 10, 1983, the date of the Office's last merit decision and August 4, 2000, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the November 10, 1983 decision.⁵

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it 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.⁶ 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).⁷

² Docket No. 84-341.

³ Docket No. 89-923.

⁴ The Federal Register dated November 25, 1998 advised that, effective January 4, 1999, certain changes to 20 C.F.R. Parts 1 to 399 would be implemented. The regulation for filing a request for reconsideration within one year at the time of the Office's June 19, 2000 decision was 20 C.F.R. § 607(a). The Board notes, however, that the Office's reliance on the old regulation is harmless error as both the old and new regulation require appellant to file a request for reconsideration within one year of the date of the Office decision in question and, thus, it does not effect the ultimate result in this case.

⁵ 20 C.F.R. § 501.3(d)(2).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Nancy Marcano*, 50 ECAB 110 (1998).

The Office properly found in its June 19, 2000 decision that appellant's June 7, 2000 request for reconsideration of its November 10, 1983 decision exceeded the one-year time limit for filing a request for reconsideration and that, therefore, the June 7, 2000 request for reconsideration 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.⁸ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.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

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.¹⁵ 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 merit review in the face of such evidence.¹⁶

In support of his June 7, 2000 request for reconsideration, appellant submitted over 224 pages of evidence, most of which the Office had reviewed in prior decisions. However, several new medical reports were included in his submissions.

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹⁰ *Nancy Marcano, supra note 7.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

In a report dated August 26, 1999, Dr. Atul Sayal, a neurologist, noted appellant's conditions and referenced his work-related injury but did not provide a rationalized medical opinion in support of causality. In a report dated August 13, 1998, Dr. Michael E. Highhouse, an orthopedic surgeon, stated that appellant had multiple medical conditions but did not relate them to his work-related injury. In a report dated August 17, 1998, Dr. Cecelia Lim Ransom, a specialist in physical medicine and rehabilitation, noted conclusions similar to that of her colleague, Dr. Highhouse and likewise provided no rationalized medical opinion in support of a work-related causation.¹⁷ In a report dated May 7, 1991, Dr. James E. Burkhart, Board-certified in psychiatry and neurology, stated that appellant had post-traumatic syndrome and upper and lower extremity paresthesias. However, he provided no opinion with respect to the causes of appellant's conditions. In a report dated April 6, 1990, Brandon Davis, Ph.D. and Raymond S. Dean, Ph.D., stated that appellant's emotional problems may be caused by the effects of a head injury, "[H]owever, the indications from the present assessment have suggested borderline impairment ..." which must be considered along with his anxiety, depression and age.

None of the new medical evidence established that the Office committed an error in its June 19, 2000 decision. It is therefore, insufficient to establish clear evidence of error or a causal relationship between appellant's medical conditions and his work-related injury. Since the evidence appellant submitted with his request does not establish that the Office committed an error in its June 19, 2000 decision, it is insufficient to establish clear evidence of error. Therefore, the Office acted within its discretion in refusing to reopen appellant's claim for a review on the merits.

¹⁷ The Board notes that the Office attributed Drs. Highhouse and Ransom's reports to Dr. Arno. Dr. Arno requested the consultations.

The June 19, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 29, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member