

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALLACE W. WILSON and DEPARTMENT OF THE ARMY,
DEVELOPMENT & EDUCATION COMMAND, Fort Monmouth, NJ

*Docket No. 02-1031; Submitted on the Record;
Issued October 24, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's September 20, 2001 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On November 22, 1995 appellant, then a 46-year-old engineering technician, filed a notice of traumatic injury alleging that "on October 27, 1995 [he] was ordered to clean, arrange & move 100's of [pounds] of equipment in lab." Appellant advised he felt weakness on the right side of his body, which spread to the left with sharp pain in cervical and right shoulder areas. By decision dated January 29, 1996, the Office denied appellant's claim as the evidence failed to demonstrate that the claimed condition or disability was causally related to the incident of October 27, 1995. By decision dated February 11, 1997, an Office hearing representative affirmed the Office's January 29, 1996 decision. Appellant requested reconsideration by letter dated April 28, 1997. In a nonmerit decision dated June 25, 1997, the Office denied appellant's request for modification of the February 11, 1997 hearing representative's decision, on the basis that he had not submitted any relevant or material evidence in support of his request for reconsideration. By decision dated August 5, 1999, the Board affirmed the Office's decisions of February 11 and June 25, 1997.¹

On August 8, 2001 appellant filed a notice of recurrence of disability alleging that he suffered a recurrence of disability on November 22, 1995. Appellant alleged that during his conversation with Harold Christopher regarding his civil action, he began to experience severe pain in the right side of his neck and stiffening of the spine. Appellant related that he had an increase in symptoms associated with his original work injury without an intervening cause. On August 9, 2001 appellant filed another notice of recurrence of disability alleging that he suffered a recurrence of disability on March 28, 1996. In a letter dated August 19, 2001, the Office

¹ Docket No. 97-2883.

advised appellant that as he did not have an accepted claim, he could not have a recurrence of disability. Accordingly, the Office took no action on appellant's recurrence claims of November 22, 1995 and March 28, 1996.

By letter dated September 20, 2001, appellant, through his attorney, requested reconsideration. By decision dated December 13, 2001, appellant's request was denied as untimely filed and lacking clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on March 7, 2002 the only decision before the Board on this appeal is the Office's December 13, 2001 decision, denying reconsideration since the request was untimely filed and showed no clear evidence of error. The Board has no jurisdiction to consider the Office's previous decisions.²

The Board has reviewed the case record and finds that the Office, in its December 13, 2001 decision, acted within its discretion in denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

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.³ 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).⁴

The Office properly found, by its December 13, 2001 decision, that the request for reconsideration dated September 20, 2001 was untimely. Although appellant's attorney had requested reconsideration of the Office's decision dated January 29, 1996, the Board notes that the last merit decision of record was the Board's decision dated August 5, 1999. As the request for reconsideration was dated September 20, 2001, it was outside the one-year limit for filing a request for reconsideration of the last merit decision of record dated August 5, 1999 and was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, 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.⁵ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year

² The Board additionally notes that the Office approved appellant's attorney fees for the period March 8 through September 20, 2001, in a decision dated December 18, 2001. However, as appellant's attorney did not contest this decision on appeal, the Board need not review the December 18, 2001 decision.

³ 20 C.F.R. § 10.607(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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.⁶

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.⁷ 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.⁸

In support of his September 20, 2001 request for reconsideration, appellant submitted an April 5, 2001 medical report, from Dr. Arthur E. Brawer, a Board-certified internist specializing in rheumatology. The other medical documentation submitted by appellant was previously of record and is not a basis for reopening a claim.

While Dr. Brawer advised that his office records detail the exacerbation and aggravation of appellant's arthritis as a direct consequence of his federal employment-related activities and that the aggravation of appellant's preexisting arthritis is a permanent employment-related condition and will continue indefinitely, his statements do not raise a substantial question as to the correctness of the denial of appellant's claim. The Board notes, for example, that Dr. Brawer in his narrative report of October 14, 1996, had related appellant's medical conditions to his employment activities in terms of "some exacerbation." He also referred to appellant's workplace activities as causing a "gradual exacerbation" of appellant's symptomatology and concluded that appellant's disability on and after October 27, 1995 was, therefore, "caused by a combination of prior work-related stresses on his spine coupled with the specific work-related incident itself on October 27, 1995." The Board, in its previous decision of August 5, 1999, had affirmed the Office hearing representative's finding that Dr. Brawer's use of the term "exacerbation" described only an aggravation of symptomatology and not a material aggravation of the underlying and preexisting condition itself. Dr. Brawer's April 5, 2001 report fails to correct that deficiency. Moreover, the current report is not sufficiently supported by rationale to raise a substantial question as to the correctness of the denial of appellant's claim. It is appellant's burden to establish that the Office clearly erred in denying his initial claim. The evidence appellant submitted only establishes that Dr. Brawer reiterated his opinion regarding the cause of appellant's complaints, without any additional rationale in support of his stated conclusions.

Appellant's attorney alleged that appellant was denied a light-duty assignment and submitted a judgment for \$50,000.00 in appellant's favor against the employing establishment. The judgment does not explain the reasons appellant was awarded a judgment and, thus, is

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁷ *Leon D. Faidley, Jr.*, *supra* note 4.

⁸ *Gregory Griffin*, *supra* note 5.

insufficient to raise a substantial question as to the correctness of the Office's decisions denying appellant's initial claim.

Appellant's attorney further alleged that appellant had filed a Form CA-2A, recurrence of disability, on December 21, 1995. The evidence submitted reflects that a copy of a notice of recurrence filed December 17, 1995, discussed an alleged recurrence of December 22, 1995 along with a copy of a receipt for certified mail postmarked December 21, 1995. The evidence also reflects that the alleged recurrence of disability of December 22, 1995 is set forth more legibly in a recurrence claim dated August 8, 2001. The showing of a filing of a recurrence of disability, however, does not address the issue of causal relationship which was the basis for the denial of appellant's claimed conditions and disabilities. Accordingly, the filing of recurrence claims does not raise any new arguments or address any error on the part of the Office and thus does not constitute the necessary clear evidence of error. None of the other arguments proffered by appellant's attorney establish the necessary clear evidence of error.

As appellant's request was untimely filed and did not demonstrate clear evidence of error, the Office properly denied it.

The December 13, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 24, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member