

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDRE G. PASTULA and DEPARTMENT OF THE ARMY,
FORT INDIANTOWN GAP, Annville, PA

*Docket No. 02-1207; Submitted on the Record;
Issued October 29, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

On September 1, 1994 appellant, then a 46-year-old computer specialist, filed a traumatic injury claim alleging that on August 10, 1994 he injured his left leg while in the performance of his federal job duties. The Office accepted the claim for a left knee contusion and appellant was paid his compensation benefits. Appellant returned to full duty on September 7, 1994.

On July 24, 1997 and September 7, 1999, appellant filed claims for recurrence of disability on September 6, 1994 and July 2, 1997.

By decision dated October 21, 1997, the Office denied appellant's claim for recurrence of disability on the basis that appellant's current disability or condition was not causally related to the initial injury of August 10, 1994.

By letter dated September 19, 2000, appellant requested reconsideration and enclosed additional evidence with his request.

With the request for reconsideration, he provided copies of medical notes from Dr. Thomas M. Stiles, a Board-certified orthopedic surgeon, dated September 23 and October 21, 1999. Appellant also submitted a medical report from Dr. Stiles dated May 2, 2000.

In a decision dated December 12, 2000, the Office denied the request for reconsideration as untimely and found that the evidence submitted in support of his request presented no clear evidence of error on the part of the Office.

By letter dated July 10, 2001, appellant requested reconsideration through his employer and again enclosed additional evidence.

In a May 25, 2001 report, Dr. Jeffery Carlson, a Board-certified orthopedic surgeon, indicated that appellant was seen for left hip aseptic necrosis status post injury in 1994. Dr. Carlson opined that appellant had been having left leg pain in August of 1994 and had persistent left knee pain and leg pain with difficulty getting up from a sitting to standing position. The physician explained that appellant was initially seen by a physician who noticed some possible chondromalacia around the left knee; however, he eventually underwent an x-ray of his hips in September 1999, which revealed aseptic necrosis around the left hip. Dr. Carlson was of the opinion that appellant had significant problems around his left lower extremity that seemed to be getting worse since his injury in 1994 and would need a total hip arthroplasty.

By decision dated November 23, 2001, the Office denied the request for reconsideration as untimely and found that the evidence in support of appellant's request presented no clear evidence of error on the part of the Office.

The only Office decision before the Board on this appeal is the November 23, 2001 decision denying appellant's request for reconsideration. More than one year has elapsed between the date of the Office's most recent merit decision on October 12, 1997 which denied appellant's claims for recurrence on September 6, 1994 and July 2, 1997 and the filing of appellant's appeal on December 21, 2001. The Board lacks jurisdiction to review the merits of appellant's claim.¹

The Board finds that the Office properly denied 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.² 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).³

The Office properly found in its November 23, 2001 decision that the one-year time limit for filing a request for reconsideration of the Office's October 12, 1997 decision expired on October 12, 1998 and that the request for reconsideration dated July 10, 2001 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.⁴ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

² 20 C.F.R. § 10.607(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰

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.¹¹ 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.¹²

In support of his request for reconsideration, appellant submitted a medical report from Dr. Carlson. Appellant's claim for recurrence was denied on October 12, 1997 because appellant did not submit any rationalized medical evidence establishing causal relationship between his August 10, 1994 condition and factors of his federal employment. Dr. Carlson, in his May 25, 2001 report, discussed the history of appellant's left leg injury and noted that appellant was being seen for aseptic necrosis status post injury in 1994. Dr. Carlson opined that appellant had persistent knee and leg pain since the injury and indicated these problems had worsened since 1994. Dr. Carlson advised that a total hip arthroplasty was needed. However, he did not state that appellant's condition was causally related to the accepted employment injury and his conclusion was not supported by findings or medical rationale to raise a substantial question as to the correctness of the denial of appellant's claim. Since the evidence appellant submitted with his request does not establish that the Office committed an error in its October 12, 1997 decision, it is insufficient to establish clear evidence of error.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsiderations, Chapter 2.1602.3(b) (May 1991).

⁶ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *Jesus D. Sanchez*, *supra* note 3.

⁹ *Leona N. Travis*, *supra* note 7.

¹⁰ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 3.

¹² *Gregory Griffin*, *supra* note 4.

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's October 12, 1997 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

The November 23, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 29, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member