

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KIMPER LEE and DEPARTMENT OF THE NAVY,  
MILITARY SEALIFT COMMAND, Oakland, CA

*Docket No. 03-1084; Submitted on the Record;  
Issued August 21, 2003*

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DECISION and ORDER

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

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

This case has been before the Board on two previous occasions. By decision dated April 6, 1994, the Board determined that the evidence was insufficient to establish that appellant's August 28, 1978 employment injury resulted in any condition that necessitated medical care beginning March 15, 1983 or disabled him from work.<sup>1</sup> Appellant requested reconsideration of the Board decision. By order dated September 13, 1994, the Board denied his request. Appellant next filed a request for reconsideration with the Office on October 15, 1998. In a decision dated November 4, 1998, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Appellant again appealed to the Board and, by decision dated January 12, 2001, the Board affirmed the Office decision.<sup>2</sup> Appellant again filed a reconsideration request with the Board, which was denied in an April 16, 2001 order. The law and the facts as set forth in the previous Board decisions and orders are incorporated herein by reference.

By letter dated August 8, 2002, appellant again requested reconsideration with the Office. In conjunction with his request, appellant submitted copies of two medical reports that were previously of record.<sup>3</sup> In a decision dated January 14, 2003, the Office denied appellant's

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<sup>1</sup> *Kimper Lee*, 45 ECAB 565 (1994).

<sup>2</sup> *Kimper Lee*, Docket No. 99-1118 (issued January 12, 2001).

<sup>3</sup> Appellant's evidence included an October 26, 1990 report from Dr. Perinchery Narayan, a Board-certified urologist, and a March 21, 1988 report from Dr. Lawrence H. Werboff, a Board-certified urologist. These reports were previously considered by the Office in its April 6, 1994 decision. The Board notes that the Office incorrectly referenced the date of Dr. Narayan's report as October 6 when it is dated October 26, 1990.

request for reconsideration, finding that it was untimely filed and failed to establish clear evidence of error.

The Board finds that the Office properly denied appellant's reconsideration request on the grounds that it was not timely filed and it did not present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act<sup>4</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>5</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>6</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>7</sup> 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.<sup>8</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>9</sup>

As noted above, the last merit decision in the instant case was the Board decision issued on April 6, 1994.<sup>10</sup> A merit decision of the Board provides a one-year period to request reconsideration with the Office.<sup>11</sup> In this case, appellant's request for reconsideration was dated August 8, 2002. Since this is more than one year after the Board's April 6, 1994 decision, the Office correctly deemed the request to be 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.<sup>12</sup> In accordance with Office procedures, the Office will reopen a claimant's case for merit review, notwithstanding the

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

<sup>7</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a legal argument previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b)(2) (2002).

<sup>8</sup> 20 C.F.R. § 10.607 (2002).

<sup>9</sup> *See Leon D. Faidley, Jr.*, *supra* note 5.

<sup>10</sup> *Supra* note 1.

<sup>11</sup> *See Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>12</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>13</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>14</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>15</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>16</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

The Board finds that appellant has not established clear evidence of error. In support of his reconsideration request, appellant merely submitted copies of medical evidence that was already of record. Duplicate evidence does not raise a substantial question as to the correctness of the Office's denial of compensation.<sup>21</sup> Insofar as the Office has already weighed the evidence presented by appellant and found it to be insufficient to carry his burden of proof, the Board is unable to find that the Office erred in denying appellant's reconsideration request.

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<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (February 2002).

<sup>14</sup> *Howard Y. Miyashiro*, *supra* note 11; *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>15</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>16</sup> *Id.*

<sup>17</sup> *See Howard Y. Miyashiro*, *supra* note 11; *Leona N. Travis*, *supra* note 15.

<sup>18</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>19</sup> *Howard Y. Miyashiro*, *supra* note 11.

<sup>20</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>21</sup> The Board has held that the submission of evidence or legal argument that repeats or duplicates that already in the case record does not constitute a basis for reopening a case. *Denis M. Dupor*, 51 ECAB 482 (2000).

The decision of the Office of Workers' Compensation Programs dated January 14, 2003 is hereby affirmed.

Dated, Washington, DC  
August 21, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member