

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE A. PERRY and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

*Docket No. 02-2224; Submitted on the Record;
Issued February 26, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On June 7, 1978 appellant, then a 35-year-old letter carrier, filed a claim alleging he injured his right hip. The Office accepted his claim for low back strain and right hip synovitis. Appellant stopped work on May 30, 1978 and did not return.¹

Appellant submitted various medical records in support of his claim from Dr. Gerald W. Deas, an internist, dated December 9, 1985 to January 8, 1991; and Dr. Morton Marks, a Board-certified neurologist, dated November 30, 1979 to September 1980. Dr. Deas noted treating appellant for various conditions including the residuals associated with a gunshot wound sustained in 1972; and low back pain radiating into his right hip and leg from a work-related fall. He indicated, in a note dated January 8, 1991, that appellant experienced pain in his right shoulder area, which radiated into his neck and back. Dr. Deas noted that the pain incapacitated appellant from doing his regular work. He indicated that he did not believe appellant was capable of gainful employment in the near future. Dr. Deas diagnosed him with neck and shoulder syndrome; low back syndrome; chronic arthritis of the right hip; and weakness of the right hand. Dr. Marks noted treating appellant for pain in his back and right lower quadrant. He indicated that appellant was not fit for duty.

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians.

¹ The record reveals that appellant sustained a gunshot wound in the performance of duty, which was accepted by the Office in claim No. 02-280712. The record further reveals that this claim was consolidated with the current claim, No. 02-400226.

On August 6, 1992 appellant was referred to Dr. Paul H. Wright, a Board-certified orthopedist, for evaluation. In a report dated August 6, 1992, Dr. Wright indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's condition. Dr. Wright noted that he could not determine the anatomic basis for appellant's 14-year pain pattern of the right hip and low back regions. He recommended a bone scan, which revealed no abnormalities. Dr. Wright noted that there was no significant orthopedic problem in the hip and lumbar spine. He reiterated that he could not find an orthopedic explanation for his right hip and low back pain pattern over the past 14 years. Dr. Wright indicated that it would be safe for appellant to return to work with restrictions.

On March 30, 1994 the Office issued a notice of proposed termination of compensation benefits on the grounds that Dr. Wright's reports dated August 6 and November 11, 1992 established no continuing disability as a result of the May 30, 1978 employment injury.

By decision dated June 15, 1994, the Office terminated appellant's benefits effective the same date on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from his May 30, 1978 employment injury.

By letter dated July 16, 1994, appellant requested a hearing before an Office hearing representative and submitted additional medical evidence. He submitted a report from Dr. Marks, dated August 14, 1981, who indicated that he has treated appellant since February 26, 1979 for persistent complaints of neck, right shoulder, right lower side and back. Dr. Marks diagnosed appellant with cervical and lumbar spine derangement with conversion features. He noted appellant was permanently unfit for duty as he is unable to carry or lift and his walking capacity was limited.

By decision dated August 3, 1994, the Office denied appellant's request for a hearing. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

In a letter dated August 25, 1994, appellant requested a review of the written record.

In a decision dated November 28, 1994, the Office denied appellant's request for a review of the written record. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

In a letter dated December 14, 1994, appellant requested reconsideration of the June 15, 1994 decision and submitted additional evidence.

In a decision dated February 9, 1995, the Office denied modification of the June 15, 1994 decision.

In a letter dated May 8, 1995, appellant requested reconsideration of the Office decision and submitted additional medical evidence.

In a decision dated August 10, 1995, the Office denied modification of the previous decisions.

In a letter dated March 8, 1996, appellant requested reconsideration of the Office decision and submitted additional medical evidence.

In a decision dated April 30, 1996, the Office denied modification of the previous decisions.

In a letter dated November 10, 1996, appellant requested reconsideration of the Office decision and submitted additional medical evidence.

In a decision dated April 9, 1997, the Office denied modification of the previous decisions.

In a letter dated April 3, 1998, appellant requested reconsideration of the Office decision and submitted additional medical evidence.

In a decision dated August 14, 1998, the Office denied appellant's request for reconsideration on the basis that the evidence submitted was insufficient to warrant modification of the previous decision.

In a letter dated February 12, 2001, appellant requested reconsideration of the Office decision and submitted additional medical evidence.² He submitted letters from his attorney dated February 12, 2001 and May 22, 2002 along with a brief; a certified mail receipt dated February 20, 2001; a letter from appellant requesting an extension on his reconsideration request; excerpts from the Federal Employees' Compensation Act practice guide; a letter from Dr. Deas dated January 8, 1981; an August 14, 1981 report from Dr. Marks; and a September 18, 1980 summary from the employing establishment outpatient clinic.

In a decision dated June 25, 2002, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and did not present clear evidence of error.

The only decision before the Board on this appeal is that of the Office dated June 25, 2002. Since more than one year elapsed from the date of the Office's August 14, 1998 merit decision to the date of the filing of appellant's appeal, September 3, 2002, the Board lacks jurisdiction to review this decision.³

² In a letter dated May 22, 2002, appellant's attorney provided a second submission of a brief previously filed on February 12, 2001 requesting reconsideration of the Office decision dated August 14, 1998. Apparently, the original submission was not in the record. However, the Office evaluated the timeliness of the claim based on the original submission by appellant on February 12, 2001.

³ See 20 C.F.R. § 501.3(d).

The Board finds that the Office properly determined that appellant's request for reconsideration dated February 12, 2001 was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Act 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, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁵

In its June 25, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on August 14, 1998 and appellant's request for reconsideration was dated February 12, 2001, which was more than one year after August 14, 1998. Accordingly, appellant's petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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's decision.⁷

Evidence that 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

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(b); *Annie L Billingsley*, 50 ECAB 210 (1998).

⁶ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L Billingsley*, *supra* note 5.

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁰ The Board makes an independent determination as to 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.¹¹

In accordance with its internal guidelines and Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to establish clear evidence of error.

Although appellant submitted an abundance of documents, most of this evidence does not specifically address whether he had any employment-related disability after June 15, 1994 but merely supports appellant's contention that he submitted his reconsideration request on February 12, 2001, a contention which is not disputed by the Office. The Board has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.¹² However, the Board notes that the request for reconsideration and accompanying brief were untimely as they were filed more than one year after the last merit decision in this case of 1998. Thus, this evidence is insufficient to show clear evidence of error in the Office's June 25, 2002 decision.

Appellant also submitted a letter from Dr. Deas dated January 8, 1981; an August 14, 1981 report from Dr. Marks; and a September 18, 1980 summary from the employing establishment outpatient clinic. These reports are cumulative of information already in the record and considered by the Office in its June 15 and August 3, 1994 decisions. The Board has determined that duplicative evidence has no evidentiary value.¹³ Thus, it cannot be said that these reports raise a substantial question as to the correctness of the Office's prior decisions.¹⁴ Consequently, appellant has not established clear evidence of error on the part of the Office.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB __ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

¹² *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹³ *See Daniel Deparini*, 44 ECAB 657 (1993) (where the Board determined that duplicative evidence has no evidentiary value).

¹⁴ *See Theron J. Barham*, 34 ECAB 1070 (1983) (where the Board found that a vague and unrationalized medical opinion on causal relationship had little probative value).

The decision of the Office of Workers' Compensation Programs dated June 25, 2002 is hereby affirmed.

Dated, Washington, DC
February 26, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member