

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL E. BROOKS and TENNESSEE VALLEY AUTHORITY,
Rogersville, TN

*Docket No. 00-2354; Oral Argument Held April 23, 2003;
Issued June 11, 2003*

Appearances: *Carl E. Brooks, pro se; Julia Mankata-Tamakloe, Esq.,
for the Director, Office of Workers' Compensation Programs.*

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 declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On July 23, 1982 appellant, then a 30-year-old ground man, sustained an injury in the performance of duty when he was struck in the left groin area by a steel structure as it was being lifted by a tractor. Appellant underwent surgery on August 5, 1982 for repair of a left inguinal hernia and removal of a large hematoma from the left spermatic cord. The Office accepted appellant's claim for left inguinal contusion, left direct inguinal hernia, contusion of the left spermatic cord, ilioinguinal neuropathy and situational depression. Additionally, the Office placed appellant on the periodic compensation rolls effective March 22, 1984.

In a decision dated September 27, 1991, the Office terminated appellant's wage-loss compensation on the basis that he had no continuing disability as a result of the accepted injuries.¹ The Office based its decision on the July 22 and August 15, 1991 reports of Dr. Richard A. Brinner, a Board-certified surgeon and Office referral physician, who found that appellant's ongoing complaints were subjective without any objective basis. He also stated that there was no further care or treatment that would improve appellant's situation. The Office also relied on a psychologist's, Dr. Thomas E. Schacht, March 2, 1991 psychological evaluation. Dr. Schacht diagnosed status post major depression, by history, which was presently in "good remission," uneven cognitive profile and personality disorder not otherwise specified with obsessive-compulsive features. The latter two diagnoses were noted to be unrelated to appellant's job injury. Regarding appellant's history of depression, Dr. Schacht indicated that

¹ The Office issued a notice of proposed termination of compensation on August 27, 1991.

appellant's job injury was "probably at most a complicating factor and not a primary cause of his depression." Dr. Schacht found no psychological impediments that would either preclude or limit appellant's return to work.

In a separate decision dated September 27, 1991, the Office denied medical coverage for appellant's gastrointestinal problem as this condition was not employment related.

On August 22, 1998 appellant requested reconsideration. Appellant filed a notice of recurrence of disability on September 18, 1998. Appellant also submitted 1998 treatment records from Dr. Paul Peterson, a Board-certified neurosurgeon, who diagnosed left L5-S1 herniated disc and performed a left L5-S1 lumbar laminectomy and discectomy on July 30, 1998.

While the Office did not issue a formal decision with respect to appellant's September 18, 1998 claim for recurrence of disability, the Office reviewed the recently submitted medical evidence in response to appellant's August 22, 1998 request for reconsideration. In a decision dated October 16, 1998, the Office denied appellant's request for reconsideration on the basis that the request was untimely and appellant failed to present clear evidence of error. Accordingly, the Office declined to modify its September 27, 1991 decision terminating compensation.

Appellant again requested reconsideration on November 2, 1999 and resubmitted several of Dr. Peterson's earlier reports and treatment records concerning appellant's lumbar condition. By decision dated December 14, 1999, the Office denied appellant's request for reconsideration on the basis that the request was untimely and appellant failed to present clear evidence of error.

The Board finds that the Office properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶ Appellant failed to meet this particular requirement in that the Office issued its last merit decision on September 27, 1991 and appellant's request for reconsideration was dated November 2, 1999.

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 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." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607 (1999).

⁶ 20 C.F.R. § 10.607(a) (1999).

In those instances where a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office in its “most recent merit decision.”⁷ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁹ The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.¹⁰ Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³

In the instant case, appellant failed to demonstrate clear evidence of error as he did not submit any evidence with his November 2, 1999 request for reconsideration that was relevant to the issue decided by the Office in its September 27, 1991 decision. Dr. Peterson’s 1998 treatment records address appellant’s lumbar condition, which the Office did not accept as employment related.¹⁴ The Office accepted that appellant sustained a left inguinal contusion, left direct inguinal hernia, ilioinguinal neuropathy, contusion of the left spermatic cord and situational depression as a result of his July 23, 1982 employment injury. The September 27, 1991 decision terminating appellant’s compensation benefits pertained to whether appellant had any continuing disability arising from his accepted conditions. As Dr. Peterson’s 1998 treatment records do not address the question of whether appellant has any continuing disability as a result of his previously accepted employment conditions, this evidence is not relevant to the issue on

⁷ 20 C.F.R. § 10.607(b) (1999).

⁸ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ Where appellant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury. *Alice J. Tysinger*, 51 ECAB 638, 646 (2000).

reconsideration and does not establish clear evidence of error. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.¹⁵

The December 14, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 11, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁵ The Board notes that the Office has not yet issued a formal decision regarding appellant's September 18, 1998 claim for recurrence of disability. Appellant initially submitted Dr. Peterson's treatment records in connection with his claim for recurrence of disability. The issues of whether appellant sustained a recurrence of disability or whether the claim should be expanded to include appellant's lumbar condition as either a direct or consequential injury arising from his July 23, 1982 employment injury are not currently before the Board because the Office has not issued a final decision regarding these matter

s. 20 C.F.R. § 501.2(c).