

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ZEBEDEE L. McPHERSON and DEPARTMENT OF TRANSPORTATION,  
U.S. COAST GUARD, AIRCRAFT REPAIR & SUPPLY CENTER, Elizabeth City, NC

*Docket No. 02-2349; Submitted on the Record;  
Issued June 19, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that the request was untimely and failed to demonstrate clear evidence of error.

This case was previously before the Board.<sup>1</sup> By decision dated December 4, 1996, the Board affirmed the Office's decisions dated November 30 and July 20, 1994, in which the Office denied appellant's claim for a recurrence of disability on November 3, 1993 causally related to his April 20, 1993 employment injury and the Office's May 7, 1995 decision denying his request for a hearing. The Board's December 4, 1996 decision is herein incorporated by reference.

By letter dated June 24, 2002, appellant requested reconsideration of the Office's November 30, 1994 decision and submitted additional evidence.

By decision dated August 28, 2002, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and the evidence submitted in support of his request did not demonstrate clear evidence of error in its November 30, 1994 merit decision.<sup>2</sup>

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error.

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<sup>1</sup> See Docket No. 95-1722 (issued December 4, 1996).

<sup>2</sup> The record contains additional evidence that was not before the Office at the time it issued its August 28, 2002 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup>

The Board's jurisdiction to consider and decide appeals from final Office decisions extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>6</sup> As appellant filed his appeal with the Board on September 16, 2002, the only decision properly before the Board is the Office's August 28, 2002 decision denying appellant's request for reconsideration.<sup>7</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). The Office will not review a decision denying or terminating compensation benefits unless the application for review is filed within one year of the date of that decision.<sup>8</sup> The Board has held 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>

In its August 28, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office's last merit decision in appellant's claim was issued on November 30, 1994. Appellant requested reconsideration by letter dated June 24, 2002, which is more than one year after November 30, 1994.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."<sup>10</sup> Office procedures provide that the Office will reopen a claimant's case for a merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>11</sup> This entails a limited review by the Office of how the evidence submitted with

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *pet. for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> *Leon D. Faidley*, *supra* note 4.

<sup>6</sup> 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

<sup>7</sup> *Algimantas Bumelis*, 48 ECAB 679, 680 (1997).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> *See Gregory Griffin*, *supra* note 4.

<sup>10</sup> *Charles J. Prudencio*, 41 ECAB 499, 502 (1990).

<sup>11</sup> *Anthony Lucszynski*, 43 ECAB 1129, 1135 (1992).

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>12</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>13</sup> This evidence must establish, on its face, that such decision was erroneous.<sup>14</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</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>17</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>18</sup>

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of his request for reconsideration, appellant submitted reports dated May 10 and August 9, 2002 from Dr. David A. Teer, a Board-certified family practitioner. In these reports, Dr. Teer stated that he had treated appellant since April 30, 1993 for back pain caused by his April 20, 1993 employment-related low back strain. He stated that appellant had a chronically herniated disc at L5-S1, as shown on an April 7, 1994 magnetic resonance imaging (MRI) scan and was totally disabled. However, Dr. Teer did not mention the November 3, 1993 date of appellant's claimed recurrence of disability or explain how his herniated disc was causally related to his April 20, 1993 employment injury. Therefore, Dr. Teer's reports do not show clear evidence of error in the Office's November 30, 1994 decision denying appellant's claim for an employment-related recurrence of disability on November 3, 1993.

Appellant also submitted notes dated April 10, 1995 through October 8, 1996 and narrative reports dated October 10, 1996 and March 20, 1997 from Dr. J. Abbott Byrd, III, a Board-certified orthopedic surgeon. In these reports and notes, Dr. Byrd stated that he treated appellant for back and left lower extremity pain that, in his opinion, was secondary to spinal stenosis. He stated that appellant related his condition to his April 20, 1993 employment injury

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<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> See *Dean D. Beets*, 43 ECAB 1153, 1158 (1992).

<sup>14</sup> 20 C.F.R. § 10.607(b).

<sup>15</sup> See *Jimmy L. Day*, 48 ECAB 654, 656 (1997); *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>16</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>17</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>18</sup> See *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, *supra* note 4.

and this was “reasonable.” However, Dr. Byrd did not explain how appellant’s spinal stenosis condition was causally related to the April 20, 1993 employment injury. He also did not mention the alleged recurrence of disability on November 3, 1993. For these reasons, the medical evidence from Dr. Byrd does not show clear evidence of error in the Office’s November 30, 1994 decision.

The decision of the Office of Workers’ Compensation Programs dated August 28, 2002 is affirmed.

Dated, Washington, DC  
June 19, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member