

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARVIN L. McCLENDON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Biloxi, MS

*Docket No. 03-192; Submitted on the Record;
Issued March 21, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits of his claim under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error.

On September 19, 2000 appellant, then a 51-year-old housekeeping aide, filed a claim for occupational disease, Form CA-2, alleging that he developed an emotional condition as a result of the combined effect of a June 6, 2000 employment-related needle stick and the harassment he subsequently received from his supervisor regarding the incident. Appellant, who carries a 50 percent service-related disability rating, 30 percent of which is for depression, explained that on June 7, 2000, the day after the needle stick, his supervisor reprimanded him for failing to follow proper trash handling procedures, which require employees to use only one hand when handling trash bags. Appellant stated that his supervisor told him in a hostile manner that he could be charged with negligence and removed from his position, without first investigating the incident or asking appellant why he handled the trash improperly. Appellant stated that the bag was too heavy to be handled with one hand, especially in light of the fact that he suffers from shoulder spurs. Appellant asserted that the stress and aggravation he felt from being threatened compounded his feelings of fatigue, mental stress and sleep deprivation arising from his worry over the human immunodeficiency virus (HIV) ramifications of the needle stick itself and combined to exacerbate both his preexisting arthritis and his preexisting depression.¹ Appellant stopped work on August 17, 2000 and returned to work on November 21, 2000. The record reflects that on June 12, 2000 appellant filed a separate claim for a traumatic injury regarding the

¹ Appellant explained that he must wait six months to a year to learn whether the needle stick caused an HIV infection.

needle stick itself. There is no indication in the record before the Board of whether the Office ever adjudicated appellant's traumatic injury claim.²

In a January 25, 2001 decision, the Office denied appellant's claim for an emotional condition on the grounds that he had not established that his emotional condition was due to factors of his federal employment. The Office specifically found that the reprimand from appellant's supervisor was an administrative function and, therefore, not a compensable factor of employment and that appellant's worry and anxiety over the needle stick were self-generated, and therefore, not compensable factors of employment.

By letter dated February 15, 2001, appellant requested reconsideration of the Office's decision. In a June 27, 2001 merit decision, the Office denied appellant's request for modification of the January 25, 2001 decision on the grounds that appellant's emotional condition did not arise in the performance of duty.

By letter dated July 6, 2001, appellant requested reconsideration, asserting that the needle stick had occurred in the performance of duty. Appellant submitted new evidence in support of his request. In a merit decision dated August 16, 2001, the Office denied appellant's request for modification of the prior decision.

By letter dated July 30, 2002 and received by the Office on August 7, 2002, appellant, through counsel, requested reconsideration of the Office's prior decision. Subsequently, appellant submitted additional letters in support of his claim. In a letter of response dated September 3, 2002, the Office responded to appellant's letters advising him to follow the appeal rights which accompanied the prior decision. By letter dated October 1, 2002 and received by the Office on October 7, 2002, appellant requested reconsideration of the prior decision. In a decision dated October 17, 2002, the Office found that appellant's October 1, 2002 request for reconsideration was not filed within one year of its August 16, 2001 decision and that appellant had not established clear evidence of error with respect to his untimely request for reconsideration. The Office acknowledged that appellant's counsel had submitted an earlier request for reconsideration dated July 30, 2002, but noted that there were no attachments accompanying this letter.

The Board finds that the Office improperly determined that appellant's application for review was not timely filed.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.³ As appellant filed his appeal with the Board on October 24, 2002, the only decision properly before the Board is the Office's October 17, 2002 decision denying appellant's request for reconsideration.

² The record contains a copy of the CA-1 claim and July 6, 2001 letter from appellant stating that he would like his needle stick claim formally adjudicated.

³ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Section 8128(a) of the Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ 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.⁷ 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).⁸

In this case, the Office issued its last merit decision denying appellant's request for modification on August 16, 2001. On August 7, 2002 the Office received a letter dated July 30, 2002 from B. Steven Burt, appellant's authorized representative, who identified appellant and the Office claim number and requested reconsideration of the prior decision. The Board finds that under these circumstances the July 30, 2002 letter, received on August 7, 2002, constitutes a valid request for reconsideration filed within one year of the August 16, 2001 decision.

As appellant's request for reconsideration of the Office's decision was timely, the Office must evaluate the request under the appropriate standard.⁹ The "clear evidence of error" standard utilized in this case is appropriate only for untimely reconsideration requests. Accordingly, the case will be remanded to the Office for proper consideration of appellant's timely request for reconsideration of the Office's August 16, 2001 decision. In addition, the Board notes that, by letter dated July 6, 2001, appellant requested that his prior CA-1 claim for an employment-related needle stick be formally adjudicated. As noted above, the record before the Board does not reflect whether the Office has issued a formal decision on that claim. If not, then the Office should develop appellant's CA-1 claim and issue an appropriate decision.

⁴ 5 U.S.C. § 8128(a).

⁵ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁶ 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 point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.606(b).

⁷ 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ *See Veletta C. Coleman*, *supra* note 5.

⁹ As noted above, a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.606(b).

The decision of the Office of Workers' Compensation Programs dated October 17, 2002 is reversed and the case remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
March 21, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member