

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD L. BRADY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, White City, OR

*Docket No. 03-357; Submitted on the Record;
Issued October 30, 2003*

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 refused 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.

This is the second appeal in this case. The Board issued a decision¹ on June 27, 2001 in which it affirmed the October 22, 1999 and July 27, 2000 decisions of the Office on the grounds that the Office properly terminated appellant's compensation, effective October 22, 1999, because he had no residuals of his March 14 and July 9, 1997 employment injuries after that date.² The Office had based its termination on a March 31, 1999 report of Dr. Thad C. Stanford, a Board-certified orthopedic surgeon, who served as an Office referral physician. The Board indicated that he had determined that appellant did not sustain an employment-related herniated cervical disc and that his problems could be explained by his preexisting degenerative condition and nonfunctional behavior.

The Board further noted that appellant had submitted reports, in which Dr. Ruth Lowengart, an attending Board-certified internist, specializing in orthopedic medicine, indicated that he sustained employment-related herniated cervical discs, but she did not provide adequate medical rationale in support of this opinion. The Board indicated that Dr. Lowengart last examined appellant in August 1998 and the record did not contain a report of an attending physician with a rationalized opinion on causal relationship from around the time of the termination of appellant's compensation. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

¹ Docket No. 00-2829 (issued June 27, 2001).

² On March 14, 1997 appellant, then a 50-year-old food service worker, sustained a cervical muscle strain while pulling a rack of pots at work. On July 9, 1997 he sustained cervical and thoracic strains while pulling a rack of pans.

By letter dated June 19, 2002, appellant requested reconsideration of his claim. In support of his reconsideration request, he submitted an April 20, 2002 report of Dr. Reginald L. Tall, an attending Board-certified orthopedic surgeon. By decision dated August 23, 2002, the Office refused 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.

The Board finds that the case is not in posture for a decision.

The only decision before the Board on this appeal is the Office's August 23, 2002 decision, denying appellant's request for a review on the merits of its July 27, 2000 decision. Because more than one year has elapsed between the issuance of the Office's July 27, 2000 decision and November 15, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the July 27, 2000 decision.³

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁷ 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."⁸ Office procedures provide that the Office will reopen a claimant's case for 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.⁹

³ See 20 C.F.R. § 501.3(d)(2).

⁴ 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

In its August 23, 2002 decision, the Office improperly determined that appellant failed to file a timely application for review. The last merit decision of record is the June 27, 2001 decision of the Board. According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but that the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including, inter alia, any merit decision by the Board.¹⁰ As appellant's request for reconsideration was dated June 19, 2002, less than one year after June 27, 2001, he filed a timely request for reconsideration.

Because the Office improperly found that appellant had filed an untimely request for reconsideration, it incorrectly evaluated his request by applying the "clear evidence of error" standard. Given that appellant's request for reconsideration was timely filed, the Office should evaluate his request, including any evidence submitted in support thereof, under the proper standard for a timely request for reconsideration.¹¹ The case shall be remanded to the Office for evaluation of appellant's request for reconsideration under the proper standards to be followed by the issuance of an appropriate decision.

The August 23, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
October 30, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (June 2002).

¹¹ *See supra* notes 4 through 7 and accompanying text for the proper standard for a timely request for reconsideration. In support of his reconsideration request, appellant submitted an April 20, 2002 report of Dr. Tall, an attending Board-certified orthopedic surgeon. In this report, he stated that it was his opinion that appellant's C4-5 herniation was "a direct result" of his March 14, 1997 employment injury.