

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBBIE R. CARTER and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 03-1473; Submitted on the Record;
Issued October 17, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for reconsideration of the merits of his claim on the grounds that it was untimely filed and failed to show clear evidence of error.

On November 6, 1999 appellant, then a 29-year-old clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that he pulled his rib cage and sustained a left arm injury. Appellant was off work from November 9 to 30, 1999 and returned to modified duty on December 1, 1999. The Office accepted appellant's claim for left shoulder and cervical strains.

In a March 2, 2000 decision, the Office denied appellant's claim for recurrence of disability commencing December 29, 1999. The Office found that the evidence of record failed to establish that appellant was totally disabled from performing his modified work assignment. By letter dated March 16, 2000, appellant requested a hearing which was held on December 6, 2000. By decision dated February 21, 2001, an Office hearing representative found that appellant had not met his burden of proof in establishing that on December 29, 1999 he sustained a recurrence of total disability causally related to his November 4, 1999 employment injury. The Office hearing representative modified the March 2, 2000 decision to find that the reports of Dr. Randal Stavinoha, Board-certified in internal medicine, were not sufficient to establish a causal relationship between the claimed cervical radiculopathy and disc protrusions and the accepted employment injury and affirmed the March 2, 2000 decision.

By letter dated February 24, 2003, appellant requested reconsideration of the February 21, 2001 decision and asked that the Office change his diagnosis from shoulder to neck sprain to cervical radiculitis and radiculopathy. In support of his request for reconsideration, appellant submitted several reports from Dr. Stavinoha, dating from November 11, 2002 to February 12, 2003.

In a February 12, 2003 report, Dr. Stavinoha indicated that appellant was initially diagnosed with cervical radiculopathy and a herniated disc secondary to his on-the-job injury. The doctor advised that appellant should undergo a magnetic resonance image (MRI) scan and diagnosed cervical radiculopathy, probably from a bulging herniated disc, causing neck, shoulder, parascapular, arm pain, numbness and tingling and indicated there should be no dispute that appellant sustained more than a shoulder injury. He further indicated that the "MRI [scan] did reveal a small bulge at C4-5 of questionable clinical significance of unknown clinical duration and it is not apparent whether this was related to his injury on the job or not." Dr. Stavinoha opined that his findings were consistent with left-sided C6-7 radiculitis and radiculopathy from a bulging disc at the C6-7 level as shown in his MRI scan.

By decision dated March 21, 2003, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

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.¹ As appellant filed his appeal on May 12, 2003, the only decision properly before the Board is the March 21, 2003 Office decision denying appellant's request for reconsideration.

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits of his claim on the grounds that it was untimely filed and failed to show clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation 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 compensation at any time or 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."²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128. 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. In the instant case, appellant requested review of the Office's February 21, 2001 last merit decision in his letter dated February 24, 2003, over one year after the decision.

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 establishes clear evidence of

¹ *William N. Downer*, 52 ECAB 217 (2001).

² 5 U.S.C. § 8128(a).

error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request and whether the new evidence demonstrated clear error on the part of the Office. 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 a merit review in the face of such evidence.³

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform 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, notwithstanding the untimeliness of his application. The Office reviewed the evidence submitted by appellant in support of his application for review and found that it did not clearly establish that the Office's prior decision was in error.

In the instant case, appellant submitted additional reports from Dr. Stavinoha including duty status reports and a detailed report dated February 12, 2003. However, these reports are speculative in part and repetitive in part. The majority of Dr. Stavinoha's report was repetitive of his February 2, 2000 report which had previously been considered by the Office, and the Board has long held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.⁴ The additional information added by Dr. Stavinoha was speculative as he could not confirm that the small bulge at C4-5 was related to the on-the-job injury or not.⁵ The other reports do not contain an opinion regarding whether appellant sustained a recurrence of disability on December 29, 1999 or further establish a causal relationship between the claimed cervical radiculopathy and disc protrusions and the accepted employment injury of left shoulder and cervical strains.

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 a mistake, for example, proof that a schedule award was miscalculated. Evidence, which, if submitted before the denial was issued, would have required opening the case for further development, is not clear evidence of error and would not require a review of the case.⁶ These reports do not establish that the Office erred in its prior decisions.

In his February 24, 2003 reconsideration request, appellant reargued the facts that were presented to the Office hearing representative, contending that he wanted the Office to change the accepted conditions from cervical strain and left shoulder strain to the diagnosis of cervical radiculitis and radiculopathy. As these arguments were raised by appellant and previously considered by the Office, his contentions are not sufficient to establish clear evidence of error.

³ *John Crawford*, 52 ECAB 395 (2001).

⁴ *See David J. McDonald*, 50 ECAB 185 (1998).

⁵ *See Vaheh Mokhtarians*, 51 ECAB 190, 195 n.8 (1999); *William S. Wright*, 45 ECAB 498, 504 (1994).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

His arguments are repetitious of arguments previously raised and are not sufficient to rise to the level of clear evidence of error. Therefore, appellant failed to establish clear evidence of error, and the Office properly denied a merit review of his claim.

The decision of the Office of Workers' Compensation Programs dated March 21, 2003 is hereby affirmed.

Dated, Washington, DC
October 17, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member