



In a June 15, 1995 report, Dr. Michael Tan, a physician, recommended that appellant undergo surgery for carpal tunnel release, cubital tunnel release and percutaneous discogram. The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Elliot Friedman for an examination and second opinion on whether appellant's conditions were related to his employment injury. In a November 30, 1995 report, Dr. Friedman diagnosed degenerative disc disease, L4-5, chronic cervical spine sprain, obesity and possible ulnar nerve compression on the medial aspect of each elbow. He concluded that the low back condition was related to the January 12, 1981 employment injury and added that the complaints in appellant's arms were also related, although the evidence to confirm his opinion was not clearcut. He recommended that appellant go through a reduction of weight and an exercise program would be more beneficial to appellant than any surgery. He also recommended that surgery on appellant's elbows should be tried.

In a December 21, 1995 memorandum, an Office senior examiner indicated that she had contacted Dr. Friedman's office to request clarification of his opinion. His medical staff responded that he was scheduled to leave on December 21, 1995 and would not be back until the spring.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Edwin Mohler, a Board-certified orthopedic surgeon, for an examination and second opinion. In a January 23, 1996 report, Dr. Mohler diagnosed recurring arthralgia of the wrist and elbow bilaterally, and of the lumbosacral spine; degenerative disc disease with protrusion improving at L4-5; facet arthropathy of the lumbar spine; and posterior osteophyte formation in the body of L4. Dr. Mohler stated that appellant had no current objective findings that were related to his January 12, 1981 employment injury. He declared that appellant did not have a disc herniation, had no objective findings of carpal tunnel or ulnar nerve compression of the arms. He indicated that appellant had intact neurovascular muscles and skeletal systems. He pointed out that appellant had neither positive electrodiagnostic studies of bilateral ulnar and median nerve studies nor objective findings involving the dysfunction of the ulnar and median nerves. He added that appellant had no evidence of muscle atrophy or weakness. Dr. Mohler commented that the evidence indicated that appellant had no need for surgery on his arms or his back.

In a March 25, 1996 letter, the Office proposed to terminate appellant's compensation on the basis of Dr. Mohler's report. The Office gave appellant 30 days to submit additional evidence or argument if he disagreed with the proposed termination. In a May 8, 1996 decision, the Office terminated appellant's compensation on the grounds that he was no longer disabled due to the employment injury.

In a May 17, 1996 decision, appellant requested a hearing before an Office hearing representative. In a February 23, 1997 decision, issued without a hearing, the Office hearing representative found a conflict in the medical evidence between Dr. Tan and Dr. Mohler on the diagnosis of appellant's condition and its relationship to his employment injury. He also noted that Dr. Friedman had concluded that appellant's condition was related to the employment injury. He therefore remanded the case to the Office for referral of appellant to an impartial medical specialist to resolve the conflict in the medical evidence.

The Office referred appellant to Dr. Anthony Nastasi, a Board-certified orthopedic surgeon. In a May 27, 1997 report, Dr. Nastasi stated that appellant had a normal cervical examination. He indicated that appellant had negative neurological findings in his arms despite his complaints of numbness and pain in the arms extending into both hands. Dr. Nastasi commented that appellant had a normal cervical examination. He reported that appellant had generalized lumbar complaints extending from the thoracolumbar region to the buttocks. Dr. Nastasi stated that appellant had a normal lumbar examination showing a normal lumbar examination and negative neurological findings in both legs. He concluded that appellant had no objective findings to support his complaints referable to his back, legs, cervical region and arms.

In an August 11, 1997 decision, the Office again terminated appellant's compensation on the grounds that the medical evidence of record established that appellant had no medical conditions causally related to his January 21, 1981 employment injury.

In an August 21, 1997 letter, appellant requested a hearing before an Office hearing representative which was conducted on June 23, 1998. In a September 4, 1998 decision, the Office hearing representative found that the Office had met its burden of proof in terminating appellant's compensation.

In an April 22, 1999 letter, appellant requested reconsideration. He submitted medical evidence in support of his request. In a July 9, 1999 decision, the Office denied appellant's request for modification on the grounds that the evidence submitted had insufficient probative value to warrant modification of the September 4, 1998 decision. In an October 11, 1999 letter, appellant requested that the Office reconsider its July 9, 1999 decision. In a November 4, 1999 merit decision, the Office denied appellant's request for modification on the grounds that the evidence he submitted was insufficient to warrant modification of the September 4, 1998 decision.

In a November 3, 2000 letter, appellant again requested reconsideration. In a December 8, 2000 decision, the Office denied appellant's request on the grounds that that the evidence he submitted was insufficient to warrant a merit review because the supporting evidence was not from a physician.

In an April 23, 2003 letter, appellant requested an appeal. He asked that Dr. Nastasi's report be stricken from the record. He stated that, in the opinion of Dr. Tan, Dr. Nastasi's report was biased. He indicated that many cases in which Dr. Nastasi wrote a report were reversed by judges.

Appellant submitted several medical reports in support of his request. In a December 21, 2001 report, Dr. Tan diagnosed a herniated disc at L4-5, a herniated disc at C6-7, and bilateral ulnar and median nerve neuropathy. He stated that his examination with supporting MRI scans and electrodiagnostic tests demonstrated and confirmed appellant's diagnosis. Dr. Tan noted that appellant had undergone a cervical discectomy. He concluded that the employment injury was competent in producing appellant's current disability and all his current symptoms were causally related to that injury. Dr. Tan declared that appellant was totally, permanently disabled. He stated that every physician who had examined appellant had concluded that the injuries to his neck, back, chest and hands was causally related to the employment injury. In an April 3, 2003

report, Dr. Tan stated that appellant's condition was essentially unchanged. He related that appellant had undergone surgery for fusion of the C6-7 herniated disc. Dr. Tan indicated that appellant had persistent, bilateral carpal tunnel syndrome and cubital tunnel syndrome, all of which arose from the employment injury. He again stated that appellant's conditions were causally related to the employment injury.

In an April 1, 2001 report, Dr. Robert J. Weber, a Board-certified physiatrist, stated that electrodiagnostic tests showed evidence of a mild polyneuropathy in the legs and nerve root irritation in the L5 nerve roots, mainly on the right side. In an October 5, 2001 note, Dr. Bruce E. Fredrickson, a physician, indicated that appellant had significant discomfort in his neck, back, arms and legs. He stated that it appeared that appellant's symptoms date back to his original injury in 1981. In a November 28, 2001 report, Dr. Nameer Haider, Board-certified in pain medicine, diagnosed cervical and lumbar myofascial pain syndrome, right L5 radiculopathy, right plantar fasciitis, and discogenic back pain.

The Office asked appellant to clarify which form of appeal he wanted. In an October 23, 2003 letter, appellant stated that he wanted reconsideration. He added that Dr. Nastasi had been put out of business for incompetence and was no longer practicing medicine in New York.

In a January 21, 2004 decision, the Office denied appellant's request for reconsideration on the grounds that his request was untimely and the evidence submitted did not show clear evidence of error.

### **LEGAL PRECEDENT**

The Office through regulations has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). The Office will not review a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision.<sup>1</sup> When an application is untimely, the Office undertakes a limited review to determine whether there is clear evidence of error pursuant to the untimely request.<sup>2</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough to show that the evidence could be construed so as to produce a contrary conclusion. To show clear evidence of error, however, 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 fundamental question as to the correctness of the Office decision. The Board makes an independent determination of whether a claimant has

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<sup>1</sup> 20 C.F.R. § 10.607.

<sup>2</sup> *Thankamma Mathews*, 44 ECAB 765, 769 (1993).

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>3</sup>

### **ANALYSIS**

The Office issued its last merit decision on November 4, 1999. As the Office did not receive the most recent application for review until April 23, 2003, the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

The evidence submitted by appellant does not establish clear evidence of error. The reports of Dr. Tan and Dr. Fredrickson, that all of appellant's conditions were causally related to the employment injury, are repetitive of all the previous reports submitted by these physicians. As Dr. Tan formed one part of the conflict of the medical evidence which Dr. Nastasi addressed, his reports are insufficient to create a new conflict in the medical evidence or to overcome the opinion of the impartial medical specialist.<sup>4</sup> The reports of Drs. Tan and Fredrickson, therefore, do not show any clear evidence of error in the Office's prior decisions in this case.

Dr. Weber reported that electrodiagnostic tests showed a polyneuropathy in appellant's legs and L5 nerve root irritation. Dr. Haider diagnosed cervical and lumbar myofascial pain syndrome, right L5 radiculopathy, right plantar fasciitis, and discogenic back pain. Neither physician gave an opinion on whether the conditions they diagnosed were causally related to the January 12, 1981 employment injury. Their reports, therefore, are irrelevant to the issue of whether the Office properly terminated appellant's compensation because he had no disabling conditions causally related to the employment injury. These reports are insufficient to show clear evidence of error.

Appellant claimed that Dr. Nastasi's report was biased and that judges often disregard his reports as unreliable. He also claimed that Dr. Nastasi had his medical license revoked in New York due to incompetence. Appellant did not submit any evidence in support of his claims. He did not submit a copy of any official decision that Dr. Nastasi's medical license had been revoked with the reasons for the revocation. He also did not discuss whether any alleged incompetence by Dr. Nastasi would make his report in this case unreliable and not entitled to any special weight as the report of an impartial medical specialist. Appellant, therefore, has not submitted any evidence and argument to support his request to strike Dr. Nastasi's report from the record. His unsupported contentions on official action taken in regard to Dr. Nastasi's alleged incompetence are insufficient to establish clear evidence of error.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for compensation as untimely and lacking any clear evidence of error in the Office's prior decisions.

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<sup>3</sup> *Cresenciano Martinez*, 51 ECAB 322.

<sup>4</sup> *Michael Hughes*, 52 ECAB 387, 391 (2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 21, 2004 be affirmed.

Issued: November 18, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member