

**United States Department of Labor
Employees' Compensation Appeals Board**

CHARLES E. LEMONS, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Los Angeles, CA, Employer**

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**Docket No. 04-61
Issued: October 25, 2004**

Appearances:
Charles E. Lemons, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 6, 2003 appellant filed a timely appeal of a September 19, 2003 decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration, on the grounds that it was untimely filed and failed to present clear evidence of error. The Office previously denied his claim on the merits in a decision dated November 22, 1993. Because more than one year has elapsed between the last merit decision dated November 22, 1993 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The only decision properly before the Board is the Office's September 19, 2003 decision, denying his request for reconsideration.

ISSUE

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

FACTUAL HISTORY

This case is on appeal to the Board for the fourth time. On March 1, 1974 appellant, then a 43-year-old dental laboratory technician, sustained a traumatic back injury in the performance of duty, which the Office accepted for aggravation of degenerative joint disease, low back. He received appropriate wage-loss compensation through July 16, 1981, at which point the Office terminated his compensation. Appellant requested reconsideration and the Office denied modification in a decision dated October 25, 1982. In a decision finalized June 2, 1983, an Office hearing representative affirmed the October 25, 1982 decision.

In the first appeal, the Board affirmed the Office's decision dated June 2, 1983.¹ Following the Board's initial review, appellant requested reconsideration before the Office on five occasions. The Office reviewed his claim on the merits and denied modification in decisions dated November 23, 1988, February 9, April 5 and August 31, 1990 and July 18, 1991.

Appellant appealed the Office's July 18, 1991 denial of modification. In a decision dated May 29, 1992, the Board found that the case was not in posture for a decision regarding the issue of his employment-related disability after July 16, 1981. The Board found that an unresolved conflict of medical opinion existed and, therefore, remanded the case for referral to an impartial medical examiner.² After further development of the record, the Office issued a January 20, 1993 decision, finding that appellant had no medical condition or disability causally related to his March 1, 1974 employment injury. By decision dated July 14, 1993, an Office hearing representative set aside the June 20, 1993 decision. Appellant was referred for another impartial medical examination and in a decision dated November 22, 1993, the Office found that he had no medical condition or disability causally related to his March 1, 1974 employment injury. He subsequently requested a hearing, which was denied as untimely in a decision dated February 28, 1994. In an August 18, 1997 decision, the Office denied reconsideration because appellant's July 31, 1997 request was untimely filed and failed to present clear evidence of error.

On August 29, 1997 appellant filed an appeal with the Board.³ On October 10, 1997 the Board issued an order dismissing appellant's appeal.⁴ Subsequently, the Board reinstated the appeal and in a decision dated November 23, 1999, the Board affirmed the Office's August 18, 1997 decision denying reconsideration.⁵ Appellant's three prior appeals are incorporated herein by reference.

By letter dated June 11, 2003, appellant requested reconsideration and submitted additional evidence. The additional evidence included a December 1982 report from Dr. Charles M. North, a Board-certified radiologist, which was illegible, a December 17, 1982

¹ Docket No. 83-1984 (issued January 31, 1984).

² Docket No. 91-1893 (issued May 29, 1992).

³ The appeal was docketed as being received on September 5, 1997.

⁴ Docket No. 97-2811 (issued October 10, 1997).

⁵ Docket No. 97-2811 (issued November 23, 1999).

computerized tomography (CT) scan of the spine from Dr. North, an undated report from Dr. A.H. Oleynick, a Board-certified neurologist, who advised that appellant had mild limitation of the lumbar spine with a normal gait, no motor weakness and some reflex abnormality, duplicates of reports dated March 2, May 11 and July 6, 1978, from Dr. John L. Howard, Board-certified in occupational medicine, a January 24, 1982 medical certificate from a physician whose signature is illegible, indicating that appellant had a lumbar disc herniation, a duplicate report dated November 23, 1982 from Dr. James R. Tiegs, a Board-certified diagnostic radiologist, a duplicate of a December 7, 1982 report from Dr. George E. Locke, a Board-certified neurosurgeon, and a duplicate of a December 17, 1982 supplementary report from Dr. Locke. Appellant also provided a statement from June 12, 1978 describing his back pain. Additionally, he included a June 28, 1979 change in benefits statement.

In a decision dated September 19, 2003, the Office denied further review of the claim on the grounds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁶ does not entitle a claimant to a review of an Office decision as a matter of right.⁷ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁸ The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.⁹ 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).¹⁰

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.¹¹ Office regulations state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.¹²

⁶ 5 U.S.C. § 8128(a).

⁷ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁸ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁹ 20 C.F.R. §§ 10.607; 10.608(b). 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).

¹⁰ *Thankamma Mathews*, *supra* note 7 at 769; *Jesus D. Sanchez*, *supra* note 8 at 967.

¹¹ *Thankamma Mathews*, *supra* note 7 at 770.

¹² 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹³ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁷ 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's decision.¹⁸ The Board must make 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.¹⁹

ANALYSIS

In its September 19, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on November 22, 1993. Appellant's June 11, 2003 letter requesting reconsideration was submitted more than one year after the November 22, 1993 merit decision and was, therefore, untimely.

In accordance with 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, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether appellant had any disability after July 16, 1981 causally related to his employment injury.

¹³ *Thankamma Mathews*, *supra* note 7 at 770.

¹⁴ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁵ *Jesus D. Sanchez*, *supra* note 8 at 968.

¹⁶ *Leona N. Travis*, *supra* note 14.

¹⁷ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁹ *Gregory Griffin*, *supra* note 9.

With his June 11, 2003 request for reconsideration, appellant submitted several documents that were already included in the record from Drs. Howard, Tiegs and Locke. In reports dated March 2, May 11 and July 6, 1978, Dr. Howard noted appellant's history of injury and advised that appellant had chronic low back syndrome. However, these reports are insufficient to establish clear evidence of error as they predate the period in question and do not address whether appellant had any disability after July 16, 1981 causally related to appellant's employment injury. In a report dated November 23, 1982, Dr. Tiegs, a Board-certified diagnostic radiologist, diagnosed degenerative changes with L3-4 spondylolisthesis and disc narrowing at L5-S1. However, he did not offer any opinion with respect to whether appellant continued to be disabled after July 16, 1981. In reports dated December 7 and 17, 1982, Dr. Locke, a Board-certified neurosurgeon, noted appellant's chief complaints of low back pain and opined that appellant had possible arachnoiditis in the lumbosacral area and possible disc disease; however, he offered no opinion on appellant's continuing disability. As noted above, none of the aforementioned reports addressed causal relationship and whether appellant had any disability after July 16, 1981 causally related to appellant's employment injury.

Appellant also submitted a report from Dr. North which was illegible and of no probative value as no information could be ascertained from the report. Additionally, Dr. Oleynick's undated report and the January 24, 1982 report from a physician whose signature is illegible do not provide any evidence relevant to the issue of whether appellant had any disability after July 16, 1981 causally related to his employment injury. These reports do not show clear evidence of error. He also submitted a statement which appears to have been made for another agency and a change in benefits statement. However, the issue in the case is medical in nature and these statements are irrelevant.

Office procedures provide that 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 not only made an error. Evidence such as a detailed, well rationalized report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not, by itself, sufficient to create clear evidence of error and would not require a review of a case.²⁰ Rather, it must be of such probative value to *prima facie* shift the weight of evidence in favor of the claimant.

The Board finds that the evidence presented by appellant is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in denying his claim for disability after July 16, 1981.²¹ Therefore, the Board finds that appellant has not presented clear evidence of error.

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (June 2002). See *Annie L. Billingsley*, 50 ECAB 210 (1998).

²¹ *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member