

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

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**MELVIN BOLLS, JR., Appellant** )  
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**and** ) **Docket No. 03-2133**  
 ) **Issued: May 4, 2005**  
**DEPARTMENT OF THE ARMY, CORPS OF** )  
**ENGINEERS, Vicksburg, MS. Employer** )  
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*Appearances:*  
*Melvin Bolles, Jr., pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On September 2, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 4, 2003 nonmerit decision, denying his request for further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's December 22, 1999 decision affirming its termination of appellant's compensation. Because more than one year has elapsed between the last merit decision and the filing of this appeal on September 2, 2003, the Board lacks jurisdiction to review the merits of this claim.<sup>1</sup>

**ISSUE**

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

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

## **FACTUAL HISTORY**

On May 10, 1993 appellant, then a 34-year-old welder, filed a traumatic injury claim alleging that he sustained a low back strain while pulling a sheave off a pipe at work on that date. The Office accepted that he sustained a back strain and a herniated nucleus pulposus at L4-5. On August 30, 1993 appellant underwent a laminectomy and discectomy at L4-5 which was authorized by the Office. Dr. Daniel P. Dare, an attending Board-certified orthopedic surgeon, released him for work on November 24, 1993 with restrictions, including no lifting more than 25 pounds, crawling or bending for extended periods. Dr. Dare continued to produce reports detailing appellant's work restrictions, indicating that he should not lift more than 20 pounds and should limit stooping, climbing, bending and crawling.

In early 1996, the employing establishment offered appellant a position as a welder. The position had work restrictions which were dictated by his current medical condition and was approved by Dr. Dare.<sup>2</sup> Appellant refused the job, indicating that he was physically unable to perform the duties of the position. By decision dated July 10, 1996, the Office terminated his compensation effective that date on the grounds that he refused an offer of suitable work.

The Office affirmed its July 10, 1996 termination of appellant's compensation in decisions dated September 4, 1997, April 13 and September 19, 1998 and March and December 22, 1999.<sup>3</sup>

In an undated letter received by the Office on May 27, 2003, appellant requested reconsideration of his claim. He argued that the evidence of record showed that he was physically unable to perform the welder position offered by the employing establishment in early 1996. Appellant claimed that the Office improperly relied on the opinion of Dr. Dare in determining that the position was suitable and terminating his compensation. The record also contains a July 17, 2003 letter, addressed to the Secretary of Labor, in which appellant advanced similar arguments concerning the termination of his compensation.

Appellant submitted medical reports detailing his back problems, including a March 15, 2001 report of Dr. Mark B. Stanley, an attending osteopath, and a July 19, 2002 report of Dr. Jose L. Ferrer, an attending Board-certified orthopedic surgeon. None of the reports addressed his medical condition in early 1996. Appellant also submitted physical therapy notes and various documents concerning formal grievances and complaints, disciplinary actions, applications for social security benefits, congressional communications, medical bills and personnel matters.

By decision dated August 4, 2003, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

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<sup>2</sup> The position did not require lifting more than 20 pounds and limited activities such as stooping, climbing, bending, crawling and twisting.

<sup>3</sup> By decisions dated June 29, 1999 and April 17, 2000, the Office denied appellant's requests for further merit review of his claim.

## LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.<sup>4</sup> 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 Federal Employees' Compensation Act.<sup>5</sup>

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. 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."<sup>6</sup> Office regulations and procedure 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.<sup>7</sup>

## ANALYSIS

The Office terminated appellant's compensation effective July 10, 1996 on the grounds that he refused an offer of suitable work, *i.e.*, the welder position which was offered by the employing establishment in early 1996. The Office affirmed this termination in several decisions, including the last merit decision of record dated December 22, 1999. By decision dated August 4, 2003, the Office denied appellant's request for further review of the merits of his claim.

In its August 4, 2003 decision, the Office properly determined that appellant filed an untimely request for reconsideration. His reconsideration request was filed on May 27, 2003 more than one year after the Office's December 22, 1999 merit decision and, therefore, he must demonstrate clear evidence of error on the part of the Office in issuing this decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>9</sup> Evidence which does not raise a

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<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>6</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>7</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "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." *Id.* at Chapter 2.1602.3c.

<sup>8</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>9</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> 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.<sup>12</sup> 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 decision.<sup>13</sup>

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its December 22, 1999 decision. He argued that he was physically unable to perform the welder position offered by the employing establishment in early 1996 and that the Office improperly relied on the opinion of Dr. Dare, an attending Board-certified orthopedic surgeon, in determining that the position was suitable. However, appellant's mere assertions regarding the sufficiency of the medical evidence would not be relevant to the main issue of the present case, *i.e.*, whether the medical evidence in early 1996 showed that he could perform the welder position such that his refusal of the position justified termination of his compensation. This medical issue should be resolved by the submission of pertinent medical evidence.<sup>14</sup>

Appellant submitted medical reports detailing his back problems, including a March 15, 2001 report of Dr. Stanley, an attending osteopath, and a July 19, 2002 report of Dr. Ferrer, an attending Board-certified orthopedic surgeon. However, these reports would not be relevant to the main issue of the present case, in that none of them relate to appellant's medical condition in early 1996, *i.e.*, the time when his physical ability to perform the offered position was assessed. Appellant also submitted physical therapy notes, but these notes would not be pertinent because the reports of nonphysicians do not constitute medical evidence and have no probative value regarding medical matters.<sup>15</sup> He submitted various documents concerning formal grievances and complaints, disciplinary actions, applications for social security benefits, congressional communications, medical bills and personnel matters. However, such nonmedical evidence would not be relevant to the medical issue of this case.

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<sup>10</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>11</sup> See *Leona N. Travis*, *supra* note 9.

<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 5.

<sup>14</sup> Appellant asserted that Dr. Dare did not receive a description of the physical requirements of the offered position. This argument is not relevant in that a cursory review of the record reveals that Dr. Dare was provided a description of the position's physical requirements.

<sup>15</sup> See *Jane A. White*, 34 ECAB 515, 518-19 (1983).

**CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' August 4, 2003 decision is affirmed.

Issued: May 4, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member