

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

D.L., Appellant

and

**DEPARTMENT OF THE NAVY, PEARL
HARBOR NAVAL SHIPYARD, HI, Employer**

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**Docket No. 08-720
Issued: December 23, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 28, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision October 18, 2007 which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated December 20, 2002 to 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 501.3.¹

ISSUE

The issue is whether 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.

¹ According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (June 2002).

FACTUAL HISTORY

This case has been before the Board on five occasions. In a July 10, 1989 decision, the Board found that an impartial medical examiner's report was insufficient to constitute the weight of the medical opinion evidence as it lacked rationale and was not based on a proper factual background. The Office did not properly terminate appellant's compensation as he could not return to his date-of-injury position.² It reinstated appellant's compensation benefits. The Office subsequently terminated his benefits by decision dated January 26, 1998. The Board affirmed the Office's decision on June 16, 2000.³ The Board further found that appellant failed to establish entitlement to continuing compensation benefits on or after February 1, 1998, the date it terminated his benefits.

Following the Board's June 16, 2000 decision, appellant submitted additional medical evidence and requested reconsideration. By decision dated December 18, 2000, the Office denied his request as untimely and did not establish clear evidence of error. Appellant appealed this decision to the Board by letter dated March 16, 2001. In a September 18, 2001 order granting remand,⁴ the Board granted the Director's motion to remand the case for the Office to consider whether to reopen appellant's claim on the merits.

In a decision dated November 15, 2001, the Office denied modification of its decision terminating benefits. The medical evidence submitted was insufficient to overcome the weight of the impartial medical examiner, Dr. Bruce E. Bradley, a Board-certified orthopedic surgeon. Appellant requested reconsideration on January 22, 2002 and, by decision dated April 12, 2002, the Office again denied modification of its prior decisions. In a December 20, 2002 decision,⁵ the Board found that reports of Dr. Bradley J. Watters, a Board-certified orthopedic surgeon, were not based on a complete medical history and did not provide an opinion regarding appellant's ability to perform his date-of-injury position. The Board found that appellant did not establish continuing disability on or after February 1, 1998. The Board also found that appellant had no more than 12 percent impairment of his left lower extremity. The case was remanded for further development regarding appellant's entitlement to additional medical benefits. The Board subsequently reviewed appellant's claim on July 20, 2005⁶ and found that the Office properly declined his requests for reconsideration of the merits as they were not timely filed and did not establish clear evidence of error. The facts and history of the case as set forth in the Board's prior decisions are adopted herein by reference.

² *David Levin*, 40 ECAB 1076 (1989).

³ Docket No. 99-1019 (issued June 16, 2000).

⁴ Docket No. 01-1194 (issued September 18, 2001).

⁵ Docket No. 02-1925 (issued December 20, 2002).

⁶ Docket No. 05-768 (issued July 20, 2005).

By decision dated July 21, 2006, the Office denied appellant's request for reconsideration as untimely and found that he did not establish clear evidence of error.⁷

On July 10, 2007 appellant again requested reconsideration before the Office. He contended that the medical evidence had not been properly considered. In an August 24, 2000 report, Dr. Rick Dickson, a Board-certified orthopedic surgeon, noted appellant's history of injury and diagnosed left knee pain. Dr. Allen B. Richardson, a Board-certified orthopedic surgeon, completed a report on December 6, 1979 and stated that appellant would be able to return to work in the near future. Appellant resubmitted a portion from the Director's motion to remand in Docket No. 01-1194. He also submitted a portion of the Office's decision denying modification of the January 26, 1998 termination. Appellant alleged that Dr. Bradley and Dr. Robert Watkins, a Board-certified orthopedic surgeon, were friends, thus creating a conflict of interest. In a report dated June 2, 2003, Dr. Watters stated that appellant could not work as a marine machinist based on the 1982 reports of Dr. Watkins. He noted that appellant's knee condition did not improve and that he could not work as a marine machinist at the date of his first examination in August 24, 2000.

By decision dated October 18, 2007, the Office denied reconsideration on the grounds that his request was not timely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁸ does not entitle a claimant to review of an Office decision as a matter of right.⁹ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.¹⁰ Through its regulations, the Office 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.¹¹ 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).¹²

⁷ As this decision was issued more than one year prior to the date of appellant's appeal to the Board on November 28, 2007, it is not before the Board. 20 C.F.R. § 501.3(d)(2).

⁸ 5 U.S.C. § 8128(a).

⁹ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

¹⁰ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

¹¹ 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).

¹² 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 9 at 769; *Jesus D. Sanchez*, *supra* note 10 at 967.

The Office's regulations require that an application for reconsideration must be submitted in writing¹³ and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."¹⁴ The regulations provide:

"[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face that such decision was erroneous."¹⁵

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 regulations.¹⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁰ 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.²¹ 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.²² 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.²³

¹³ 20 C.F.R. § 10.606.

¹⁴ 20 C.F.R. § 10.605.

¹⁵ 20 C.F.R. § 10.607(b).

¹⁶ *Thankamma Mathews*, *supra* note 9.

¹⁷ *Id.*

¹⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁹ *Jesus D. Sanchez*, *supra* note 10 at 968.

²⁰ *Leona N. Travis*, *supra* note 18.

²¹ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

²² *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

²³ *Gregory Griffin*, *supra* note 11.

ANALYSIS

Appellant requested reconsideration on July 24, 2007 contending that he was entitled to wage-loss compensation due to his accepted employment injury. The Board issued the most recent merit decision in this issue on December 20, 2002. The Board found that appellant had not met his burden of proof to establish entitlement to continuing disability compensation on or after February 1, 1998, the date the Office terminated his compensation benefits. As appellant's request for reconsideration was not filed within one year of the date of the most recent merit decision, it was not timely filed.²⁴

Appellant submitted an August 24, 2000 report from Dr. Dickson, a Board-certified orthopedic surgeon, who diagnosed left knee pain. This report does not address appellant's condition at the time of the June 16, 2000 termination decision. Dr. Dickson's report is not based on a sufficiently detailed history of injury to establish continuing disability or to overcome the special weight attributed to Dr. Bradley, the impartial medical examiner. As noted, to show clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of medical opinion from the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.²⁵ Evidence, such as well-rationalized medical report that may have created a conflict in medical opinion is not clear evidence of error.²⁶ In this case, Dr. Dickson's finding of left knee pain is not sufficient to create a conflict with the opinion of the impartial medical examiner, Dr. Bradley, who found that appellant had no disability for work as a result of his accepted employment injury. His report does not raise a substantial question as to the correctness of the merit decision. This report does not establish clear evidence of error and is not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

The December 6, 1979 report of Dr. Richardson stated that appellant could return to work in the near future. This report was issued almost 10 years prior to the termination of appellant's compensation in 1998. The Office does not support appellant's claim that he was unable to return to his date-of-injury position or establish clear evidence of error on the part of the Office.

Appellant submitted a portion of Dr. Watter's June 2, 2003 report. Dr. Watters stated that appellant could not work as a marine machinist in 1982. This report is not sufficiently detailed and well rationalized to rise to the level of a conflict with the report of Dr. Bradley, the impartial medical adviser. Dr. Watters' report does not raise a substantial question as to the correctness of the merit decision. This report does not establish clear evidence of error and is not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

Appellant also submitted portions of prior decisions of the Office and motions of the Director. These documents do not establish clear evidence of error nor shift the weight of the

²⁴ 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*, *supra* note 11.

²⁵ *Leon D. Faidley, Jr.*, *supra* note 22.

²⁶ See *Dean D. Beets*, 43 ECAB 1153, 1158 (1992).

evidence in favor of him. Appellant also alleged that two of the physicians of record were friends. This contention does not raise a substantial question as to the correctness of the Office's decision. Appellant has not submitted any evidence substantiating that Dr. Bradley the impartial medical specialist was not appropriately selected nor that he had any bias against appellant.

CONCLUSION

The Board finds that appellant's request for reconsideration on July 24, 2007 was not timely filed and did not establish clear evidence of error. The Office properly declined to reopen appellant's claim for reconsideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 18, 2007 is affirmed.

Issued: December 23, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board