



the right elbow, bruised right hip, post-traumatic neuroma of the right hip and leg, mononeuritis of the right leg and contusion of the right iliac area resulting in aggravation of cervical spondylosis with a herniated nucleus pulposus at C6-7.

On August 22, 1991 appellant filed a claim for a schedule award.

By decision dated April 20, 1994, the Office denied appellant's claim for a schedule award. It found that the medical evidence established that he did not sustain any permanent impairment causally related to his accepted employment-related injuries based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (4<sup>th</sup> ed. 1993). In a letter dated April 27, 1994, appellant requested an oral hearing or a review of the written record before an Office hearing representative. Also, by letter dated May 9, 1994, appellant, through his congressional representative, requested reconsideration.

In an August 3, 1994 decision, the Office denied modification of the April 20, 1994 decision. It found that a July 7, 1994 medical report of Dr. Gene G. Stunkle, an Office referral physician, established that appellant did not sustain permanent impairment to his right upper and lower extremities. On September 2, 1994 appellant requested a review of the written record before an Office hearing representative.

By decision dated August 23, 1995, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record on the grounds that his injury occurred before July 4, 1966 and, therefore, he was not entitled to an oral hearing or review of the written record as a matter of right. It further denied the request as it found that he could request reconsideration before the Office. In a September 18, 1995 letter, appellant, through counsel, requested reconsideration of the August 3, 1994 decision.

By decision dated October 4, 1995, the Office found that appellant's September 18, 1995 letter requesting reconsideration was dated more than one year after the August 3, 1994 decision, and was untimely. It further found that he did not submit any evidence establishing clear evidence of error in the Office's denial of his schedule award claim.

On April 19, 1996 the Office reissued the August 3, 1994 decision, finding that it failed to protect appellant's appeal rights pertaining to the August 3, 1994 decision as it delayed in issuing a decision on his September 2, 1994 request for a review of the written record. The Office then addressed appellant's May 9, 1994 request for reconsideration. It denied modification of its prior decision, finding that appellant did not sustain any permanent impairment based on Dr. Stunkles' July 7, 1994 report.

On April 14, 1997 appellant, through counsel, requested reconsideration. An April 3, 1997 report of Dr. Bruce E. Fredrickson, a Board-certified orthopedic surgeon, stated that appellant sustained a four to six percent impairment of the back based on the A.M.A., *Guides*.

By decision dated June 12, 1997, the Office denied modification of the April 19, 1996 decision. It found that Dr. Fredrickson's April 3, 1997 report was insufficient to establish appellant's entitlement to a schedule award. The Office found that the regulations did not provide for the payment of a schedule award for the permanent loss of use of the back. It also found that since his claim predated the September 6, 1966 changes to the Federal Employees'

Compensation Act and he sustained impairment to additional members of the body, such as the hand, he was not entitled to a schedule award.<sup>1</sup> The Office stated that he could only receive compensation for his loss of wage-earning capacity.

On September 26, 1997 appellant appealed the June 12, 1997 decision to the Board. In an order dated February 27, 1998, the Board dismissed appellant's appeal.<sup>2</sup> It granted his request to withdraw the appeal to pursue a request for an oral hearing before the Office.

On May 27, 1999 appellant requested an oral hearing before an Office hearing representative. By decision dated June 3, 1999, the Branch of Hearings and Review denied appellant's request for an oral hearing. It found that, since he had previously requested reconsideration on the same issue, he was not entitled to an oral hearing as a matter of right.

In a letter dated March 17, 2008 appellant, through his congressional representative, requested reconsideration. He contended that he sustained 10 percent loss of use of his hand.

By decision dated May 20, 2008, the Office found that appellant's March 17, 2008 letter requesting reconsideration was dated more than one year after the June 12, 1997 decision, and was untimely. It further found that he did not submit any evidence establishing clear evidence of error in the Office's denial of his claim.

### **LEGAL PRECEDENT**

Section 8128(a) of the Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provide that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>5</sup>

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.<sup>6</sup>

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<sup>1</sup> The Office noted that appellant received a prior schedule award for his hand but it was rescinded when the Office accepted his work-related back injury.

<sup>2</sup> Docket No. 98-183 (issued February 27, 1998).

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> *Id.* at § 10.607(b); *see also Alberta Dukes*, 56 ECAB 247 (2005).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>8</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</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>11</sup>

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 merit review in the face of such evidence.<sup>12</sup>

### ANALYSIS

The Board finds that appellant failed to file a timely application for review of the June 12, 1997 merit decision. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>13</sup>

The most recent merit decision was issued by the Office on June 12, 1997. It found that appellant did not sustain any permanent impairment of a scheduled member of the body causally related to his June 28, 1966 employment-related injuries. As his March 17, 2008 letter requesting reconsideration was made more than one year after the Office's June 12, 1997 decision, the Board finds that it was not timely filed.

Appellant did not submit any additional factual or medical evidence with his untimely reconsideration request. He merely contended that he sustained 10 percent loss of use of his hand. This unsupported contention by appellant fails to establish clear evidence of error on the part of the Office. Appellant has made no showing that the Office committed clear evidence of error in finding that he did not sustain any permanent impairment of a scheduled member of the body causally related to the accepted employment-related injuries. For these reasons, the Board finds that appellant has not established clear evidence of error on the part of the Office.

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<sup>7</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>8</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>9</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>10</sup> *Leona N. Travis*, *supra* note 8.

<sup>11</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>12</sup> *Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>13</sup> *Larry L. Litton*, 44 ECAB 243 (1992).

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 20, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board