

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

D.E., Appellant)

and)

**DEPARTMENT OF JUSTICE, FEDERAL
PRISONS SYSTEM, U.S. MEDICAL CENTER
FOR FEDERAL PRISONERS, Springfield, MO,
Employer**)

**Docket No. 10-1042
Issued: October 21, 2010**

Appearances:
Jerry M. Kirkey, Esq., for the appellant
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 February 26, 2010 appellant filed a timely appeal of the August 31, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for review of the merits.¹ As more than one year elapsed from the issuance of the Office's March 11, 2008 merit decision to the filing of the appeal pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 the Board does not have jurisdiction over the merits of the claim.²

¹ Under the Board's *Rules of Procedure* the 180-day period for determining jurisdiction is computed beginning on the day following the date of the Office's decision. *See* 20 C.F.R. § 501.3(f)(2). As the Office's decision was issued on August 31, 2009, the 180-day computation begins on September 1, 2009. One Hundred Eighty days from August 31, 2009 was March 1, 2010. Since using March 5, 2010, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is February 26, 2010 which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² For final adverse Office decisions issued prior to November 19, 2008 a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2).

ISSUE

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

On appeal, appellant contends, that he established clear evidence of error because both the second opinion physician and the impartial medical examiners were not Board-certified in the appropriate fields; he was not permitted to submit evidence that the treatments recommended by the impartial medical examiner were less than effective; and that return to work would violate the recommendations made by the impartial medical examiner.

FACTUAL HISTORY

On November 6, 2005 appellant, then a 32-year-old senior officer, sustained injury to his right ankle when, he stepped into a culvert and fell. On April 28, 2006 the Office accepted appellant's claim for a right ankle sprain/strain. On January 9, 2008 it revised its acceptance of appellant's claim to include the following: resolved right ankle sprain; resolved right ankle joint derangement; right sensory neuropathy and resolved reflex sympathetic dystrophy of the right lower limb. The Office paid wage-loss compensation and medical benefits.

The Office found a conflict between appellant's treating physician, Dr. Boyd Crockett, a Board-certified physiatrist and the second opinion physician, Dr. Michael Clarke, a Board-certified orthopedic surgeon. Dr. Crockett found that appellant was totally disabled from any work activities and needed additional medical care whereas Dr. Clarke stated that he was able to return to limited-duty work for eight hours a day.

By letter dated October 19, 2007, the Office referred appellant to Dr. Alice Martinson, a Board-certified orthopedic surgeon, for an impartial medical examination. In a November 23, 2007 report, Dr. Martinson stated that the diagnosed fracture of the right medial malleolus, dislocation of the right ankle and lesion of the sciatic nerve were erroneous; rather, appellant had a severe right ankle sprain which had resolved. He also noted that appellant no longer had physical findings of a reflex sympathetic dystrophy. Dr. Martinson found that appellant was not capable of his regular duties as a senior correctional officer due to preexisting emotional abnormalities. He also stated that it would be unwise to return appellant to an unpredictable violent environment while he was still wearing his subcutaneously implanted spinal cord stimulator. On December 28, 2007 Dr. Martinson responded to the Office's questions and indicated that all work-related conditions had either resolved or never existed.

On February 8, 2008 the Office proposed terminating appellant's benefits. By letter dated February 15, 2008, appellant challenged the proposed termination and contended that Dr. Martinson was not a Board-certified specialist in an appropriate field, that his suggestions were less than effective and that the Office failed to address the spinal cord stimulator issue.

In a decision dated March 11, 2008, the Office terminated appellant's wage-loss compensation benefits effective March 15, 2008 finding that the weight of the medical evidence

established that he was no longer disabled due to his accepted conditions. Appellant's claim remained open for medical benefits.

In a letter dated March 28, 2009 and received by the Office on April 3, 2009, appellant requested reconsideration of the March 11, 2008 decision. Appellant alleged clear evidence of error on the part of the Office, again questioning Dr. Martinson's qualification as an impartial medical examiner, the efficacy of his advice and that Dr. Martinson had questioned his ability to return to work in a correctional environment with a spinal cord stimulator.

By decision dated August 31, 2009, the Office denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.³

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁴ 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.⁵

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.⁶ 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.⁷

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

³ On August 24, 2010 the Board issued an *Order Denying Request for Oral Argument* in this case. Docket No. 10-1042 (issued August 24, 2010).

⁴ 20 C.F.R. § 10.607(a).

⁵ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ *Id.* at § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Id.* 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.

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

⁹ *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.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² 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.¹³

ANALYSIS

The Board notes that the most recent merit decision in this case was the March 11, 2008 decision terminating appellant's compensation benefits. Appellant did not request reconsideration until March 28, 2009. Accordingly, as his request was filed over one year after the last merit decision it was not timely filed.

As appellant's reconsideration request was untimely filed, the Office properly reviewed his request under the clear evidence of error standard. It found that the evidence submitted on reconsideration did not establish clear evidence of error. Appellant did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that the Office committed an error. His arguments on appeal were previously raised and considered by the Office in the decision terminating benefits and in the decision denying reconsideration. Appellant contested the weight given to the opinion of the impartial medical examiner, Dr. Martinson and his comments regarding appellant's ability to return to work. As noted the merits of the case are not presently before the Board. The sole question is whether appellant established clear evidence of error on the part of the Office in the issuance of its March 11, 2008 decision.

Appellant has not established that the Office's termination of wage-loss compensation based on the opinion of Dr. Martinson was clear evidence of error. 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 of a miscalculation in a schedule award). Even the submission of 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.¹⁴

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁴ *D.G.*, 59 ECAB 455 (2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

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 decision of the Office of Workers' Compensation Programs dated August 31, 2009 is affirmed.

Issued: October 21, 2010
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