

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD L. TOZIER and U.S. POSTAL SERVICE,
POST OFFICE, Anaheim, CA

*Docket No. 02-158; Oral Argument Held March 4, 2003;
Issued November 12, 2003*

Appearances: *Steven E. Brown, Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act on the grounds that the application for review was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607(a) and that the application failed to present clear evidence of error.

On October 29, 1997 appellant, then a 44-year-old driver trainer, was injured when he fell while exiting a truck in the performance of duty. The Office accepted the traumatic injury claim for left knee medial meniscus tear with an anterior cruciate ligament reconstruction. Appellant was off work and received wage-loss compensation based on total disability from October 29, 1997 until April 15, 1998 when he returned to part-time limited duty. Thereafter, he received compensation for partial disability on the periodic rolls.

By letter dated October 6, 1998, the Office scheduled appellant for a second opinion examination with Dr. Ibrahim Yashruti, a Board-certified orthopedic surgeon, in order to ascertain the nature and extent of appellant's continuing disability. The appointment was scheduled for October 26, 1998, but Dr. Yshruti's office contacted the Office that day to advise them that appellant had not shown for his examination. On October 27, 1998 appellant's counsel notified the Office of his representation and requested a copy of the file to review. In a November 3, 1998 letter, the Office scheduled appellant for a second opinion evaluation with Dr. Frederick Lieb, a Board-certified orthopedic surgeon, for November 25, 1998.

On November 9, 1998 the Office issued a notice of proposed suspension of compensation. The Office informed appellant of the consequences for failing to appear at a scheduled medical examination and advised him that he had 14 days to present a written explanation for his failure to keep the appointment and of his intent on cooperation with any

future examinations. A report of a telephone call dated November 18, 1998 indicates that appellant was authorized for a bone scan and epidural at the Pain Care Center. On November 19, 1998 the Office sent a facsimile letter to the Pain Care Center of Van Nuys authorizing a comprehensive pain evaluation for appellant to include consultation with a pain specialist and a battery of pain measures and psychological tests.¹

By facsimile letter dated and transmitted on November 19, 1998, appellant indicated that he would not be able to attend the November 25, 1998 examination because he was scheduled for “medical examinations and [e]pidural injections on [November 24, 1998] beginning at 10:00 and ending probably after 5:00” at a location that was in excess of 120 miles roundtrip from his home. He alleged that it would take him at least three hours each way to get to and from Van Nuys since he had been directed by his physician to drive only minimal distances with frequent stops to stretch his knee. Appellant indicated that, due to the epidural injection, he was not suppose to drive and would be staying overnight in a hotel. Because he would have to hire a driver to get from Van Nuys to Chino in order to keep his second opinion evaluation on November 25, 1998, he thought it was impossible for him to keep the November 25, 1998 examination as scheduled. Appellant stated that his wife had made several attempts to reschedule through Dr. Lieb’s office but those requests had been denied.

On the right side of appellant’s November 19, 1998 letter, a handwritten note signed by a claims examiner states that a three-way call had been placed on November 23, 1998 between appellant, the Office and “Donna” from the office of appellant’s treating Board-certified orthopedic surgeon, Dr. Marc J. Freidman. It was noted that appellant was “not down for epidural on dates he thought.” The claims examiner indicated that there was no reason for appellant to miss his appointment. In a report of a telephone call dated December 9, 1998, the Office was advised by Donna of Dr. Freidman’s office that appellant had been placed on complete bed rest by Dr. Freidman effective November 25, 1998.

In a decision dated December 9, 1998, the Office suspended appellant’s compensation under 5 U.S.C. § 8123(d).

In an August 2, 2000 letter, appellant, by counsel, requested reconsideration, pointing out that he was requesting reconsideration based on materials received by appellant that had not been provided to him prior to that day. Appellant’s counsel argued that the Office’s suspension of appellant’s compensation was improper because the Office had been advised by appellant before the scheduled examination that he was unable to attend. Appellant stated that the Office improperly terminated benefits, based on the false conclusion that, since he had no epidural injections scheduled for November 24, 1998, he could have attended an Office-sponsored medical examination on that date. He alleged that the Office knew on or about April 24, 1999 that, in fact, he had a bone scan scheduled for November 24, 1998 which precluded him from attending an examination the next day. Appellant’s counsel concluded that there would be no justification for the Office’s conclusion that appellant failed to cooperate with the claims process when he was forced to miss a scheduled examination for medical reasons.

¹ Appellant’s treating physician, Dr. Marc Friedman, had referred appellant to the pain clinic as stated in a letter from the Pain Care Center of Van Nuys to the Office, which was also dated November 19, 1998.

In support of his request for reconsideration, appellant submitted a copy of a November 17, 1998 report from Dr. Friedman scheduling a bone scan and an April 24, 1999 letter to an Office claims examiner from Dr. Stanley J. Majcher, a Board-certified internist, who related that appellant had exceeded his medical restrictions in order to comply with Dr. Friedman's request to undergo a bone scan on November 24, 1998. Dr. Majcher advised that the procedure was long and painful and would cause considerable edema in a case like appellant's; therefore, it was entirely appropriate that his family physician, insisted that appellant be placed on total bed rest for 48 hours.

Appellant also submitted: (1) a copy of a November 19, 1998 letter addressed: (1) "[f]ax[ed] to Julie Landry" from appellant explaining that he would be unable to attend Dr. Lieb's scheduled examination for November 25, 1998 since he was undergoing lengthy medical testing in Van Nuys on November 24, 1998, the day before the scheduled examination; (2) copies of a Yahoo map verifying driving distances between appellant's house and Van Nuys; (3) copies of federal regulations pertaining to travel and patient rights; (4) copies of appellant's medical restrictions in effect on November 24, 1998 as prescribed by Dr. Thomas Bryan, a Board-certified orthopedic surgeon; (5) copies of medical treatment notes from Dr. Friedman dated November 25, 1998 whereby appellant was prescribed medication and bedrest; copy of a treatment note from Dr. Kang dated November 24, 1998 indicating that appellant had been prescribed bed rest; and (6) a copy of the report of bone scan dated November 24, 1998.

In a decision dated October 12, 2000, the Office denied appellant's reconsideration request as untimely filed under 20 C.F.R. § 10.607 and further determined that appellant failed to establish clear evidence of error.

The Board finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² Inasmuch as appellant filed his appeal with the Board on October 12, 2001, the Board only has jurisdiction to consider the propriety of the Office's October 12, 2000 decision denying appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

Section 8128(a) of the Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. § 8128(a).

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

whether it will review an award for or against compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ As one such limitation, the Office has stated that it 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.⁷ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁸

In this case, the Office suspended appellant's compensation by decision dated December 9, 1998. Appellant, by counsel, filed a request for reconsideration on August 2, 2000, well over one year after the Office' decision. Because appellant's reconsideration request was not filed with the Office within the one-year deadline for requesting reconsideration,⁹ the Office properly determined that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that 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.¹⁰ In accordance with Office procedures, 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.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

⁵ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁶ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b) (1999).

⁷ 20 C.F.R. § 10.607(a) (1999).

⁸ *See Leon D. Faidley, Jr., supra* note 4.

⁹ 20 C.F.R. § 10.607(a) (1999) states that a reconsideration request will be considered timely filed if postmarked by the U.S. Postal Service within the time period allowed. Otherwise if there is no postmark, the regulation permits the Office to rely on other evidence to establish the mailing date.

¹⁰ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹¹ 20 C.F.R. § 10.607(b) (1999); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹² *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

In this case, the Office suspended appellant's compensation on the grounds that he refused to submit to a second opinion medical evaluation. Section 8123(d) of the Act provides that, if an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee.¹⁹

Appellant maintains that he has demonstrated clear evidence of error on behalf of the Office in suspending his compensation. He maintains that the Office never adequately considered his explanation for having missed the scheduled appointment for November 25, 1998. Appellant points out it is irrelevant that Dr. Friedman's nurse informed the Office that appellant was not scheduled for epidural injections on November 25, 1998, since the Office was on prior notice that appellant had a bone scan scheduled for November 25, 1998. The Office was also advised that appellant had been placed on bed rest and would have been unable to attend the November 25, 2002 examination as scheduled. Appellant notes, however, that the Office summarily issuing a suspension order as opposed to addressing appellant's requests to reschedule the examination on a more convenient date. Appellant specifically denied any attempt by himself to obstruct the examination.

¹⁴ See *Jesus D. Sanchez*, *supra* note 4.

¹⁵ See *Leona N. Travis*, *supra* note 13.

¹⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁸ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁹ 5 U.S.C. § 8123(d); see *Lecil E. Stevens*, 49 ECAB 673 (1998); *Gustavo H. Mazon*, 49 ECAB 156 (1997).

The Board has carefully considered the record and finds that the evidence submitted by appellant on reconsideration does not rise to the level of establishing clear evidence of error on behalf of the Office in suspending appellant's compensation for failure to attend a scheduled second opinion evaluation. The Board notes that in order to establish clear evidence of error under the circumstances of this case, appellant would have to present evidence showing that the Office was properly notified of the problems he was to encounter attending the second opinion evaluation prior to the date of the examination.²⁰ In this regard, appellant submitted a copy of a letter dated November 19, 1998 wherein he explained that he was scheduled to obtain epidural injections that day before Dr. Lieb's evaluation and would therefore, be unable to attend the scheduled appointment. Appellant acknowledges that when the Office attempted to verify whether he was scheduled for epidural injections on November 25, 1998 the Office was told by Dr. Freidman's nurse that no such injections were planned for that date. Thus, the Office had no reason to comply with appellant's request to reschedule the examination. Furthermore, given the fact that appellant had already missed a prior second opinion evaluation scheduled on October 26, 1998, the Office had reason to believe that appellant was not willing to cooperate with the examination process. Because the November 19, 1998 letter does not clearly establish that the Office was aware that appellant's actual prior medical appointment was for a bone scan and not epidural injections as alleged by appellant, appellant has failed to demonstrate that his concerns regarding the scheduled examination were properly raised to the Office prior to the November 25, 1998 appointment.

With respect to the remaining evidence on reconsideration, the Board does not find any evidence to show clear evidence of error. Dr. Majcher's report, while stating that appellant would require bed rest after a bone scan, does not persuade the Board that the Office erred in suspending appellant's compensation. This is particularly true since the Office does not appear to have been aware of appellant's scheduled bone scan on November 24, 1998, appellant requested reconsideration of his suspension.

As noted earlier in this decision, it is not enough for appellant to merely to show that the evidence could be construed so as to produce a contrary conclusion. While appellant provided a full explanation of why he failed to attend the scheduled examination, he did so one year after fact. At the time the suspension order was issued, the Office had no reasonable information from which to conclude that appellant was unable to attend the scheduled examination for acceptable medical reasons. The Board therefore, finds that the Office properly denied appellant's reconsideration request on the grounds that it failed to demonstrate clear evidence of error.

²⁰ See *Gustavo H. Mazon*, *supra* note 19; (the Board held that if a claimant raises the issue of having difficulty attending a scheduled examination prior to the date of the examination and the Office failed to address those concerns, then the claimant would have grounds after the suspension order for challenging the propriety of the order. The challenge would be based on the argument that appellant provided a reasonable explanation for not attending the examination. The Board noted, however, that there is no basis for reasonable explanation if a claimant does not properly raise his or her concern prior to the scheduled examination).

The decision of the Office of Worker's Compensation Programs dated October 12, 2000 is hereby affirmed.

Dated, Washington, DC
November 12, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member