

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BILLIE HOWARD and U.S. POSTAL SERVICE,  
POST OFFICE, Denver, Colo.

*Docket No. 96-1780; Submitted on the Record;  
Issued August 26, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective July 23, 1994 on the grounds that he had no residual disability or condition causally related to his accepted employment injuries; and (2) whether the Office properly denied appellant's request for reconsideration with respect to termination of compensation for his left upper extremity on the grounds that his request was untimely and lacked clear evidence of error.

On October 17, 1990 appellant, then a 58-year-old tire repairman, filed an occupational disease claim, alleging that he had degenerative arthritis in both hands and that his left hand was problematic due to factors of his federal employment. Appellant had several traumatic injuries to his right hand that predated his occupational disease claim. On April 27, 1978 the Office accepted a claim for abrasions on the third finger of the right hand. On August 17, 1987 the Office accepted a claim for contact dermatitis of the right hand. On November 30, 1988 the Office accepted a claim for temporary aggravation of arthritis of the right hand beginning January 1988. In November 1988, the Office also accepted a claim for a contusion of the right hand and temporary aggravation of preexisting degenerative arthritis. In relation to appellant's left hand, the Office accepted appellant's occupational disease claim for synovitis of the left wrist and arthritis of the thumb and fingers. On June 21, 1991 the Office found that appellant's synovitis of the left wrist was resolved. On July 18, 1991 the Office terminated appellant's compensation on the grounds that he ceased working in a medically suitable light-duty position on May 28, 1991 due to nonemployment-related medical conditions. In a merit decision dated September 26, 1991, the Office reaffirmed its July 18, 1991 decision, however, on December 17, 1991, the Office found a permanent impairment of appellant's left hand, specifically arthritis of the thumb and fingers. On April 3, 1996 the Office denied appellant's March 4, 1996 request for reconsideration of its July 18, 1991 decision as untimely and lacking clear evidence of error.

In a letter dated May 23, 1994, the Office proposed termination of appellant's compensation relating to any disability in his hands on the grounds that any current medical

conditions were not related to the accepted employment injuries. In a decision dated June 24, 1994, the Office terminated appellant's compensation effective July 23, 1994 on the grounds that he had no continuing disability or condition causally related to his accepted employment injuries. In a decision dated August 15, 1994, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant merit review. In a letter dated February 28, 1995, the Office advised appellant that his case was reopened for medical coverage concerning his right hand condition. In a merit decision dated March 7, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of its prior decisions. In a letter decision dated March 5, 1996, the Office found that appellant's March 4, 1996 request for reconsideration was *prima facie* insufficient to reopen the record for review. In a merit decision dated April 17, 1996, the Office again denied modification of the June 24, 1994 decision terminating appellant's compensation.

The Board finds that the Office improperly terminated appellant's compensation effective July 23, 1994 on the grounds that he had no residual disability or medical condition causally related to his accepted employment injuries.

Under the Federal Employees' Compensation Act,<sup>1</sup> once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.<sup>2</sup> After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.<sup>3</sup>

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.<sup>4</sup> Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after July 23, 1994 and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

In the present case, the Office terminated appellant's compensation based on the second opinion examination of Dr. Thomas G. Mordick, II, a Board-certified neurosurgeon specializing in hands.<sup>6</sup> In a report dated July 19, 1993, Dr. Mordick reported that the etiology of appellant's

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<sup>1</sup> 5 U.S.C. §§ 8101-8193 (1974).

<sup>2</sup> *William Kandel*, 43 ECAB 1011 (1992).

<sup>3</sup> *Carl D. Johnson*, 46 ECAB 804 (1995).

<sup>4</sup> *Dawn Sweazey*, 44 ECAB 824 (1993).

<sup>5</sup> *Mary Lou Barragy*, 46 ECAB 781 (1995).

<sup>6</sup> The Board notes that the right and left hand conditions were initially developed separately, and the Office did not combine appellant's various claims until a final determination was rendered concerning appellant's entitlement

hand dysfunction was not clear. At Dr. Mordick's request, appellant was sent for two consulting examinations with physicians, Dr. Kenneth P. Glassman, a Board-certified internist specializing in rheumatology and Drs. Charles O. Brantigan and Jon Senkowsky, who are Board-certified in internal medicine and specialize in vascular medicine. In a report dated November 10, 1993, Dr. Glassman noted appellant's history of injury to his hands, found a limited range of motion, moderate synovitis and that the physical examination was unremarkable. He diagnosed chronic destructive gouty tophaceous arthritis and incomplete CREST syndrome manifested by a positive anticentromere antibody, resorptive changes in the distal tufts and sclerodactyly. Dr. Glassman concluded that the etiology of appellant's hand dysfunction was related to chronic tophaceous gout and to sclerodactyly which were not work related. He noted that CREST syndrome is an auto-immune disease and that appellant's exposure to battery acid and resulting contact dermatitis was not an initiating cause of auto-immune disease. Drs. Brantigan and Senkowsky conducted an upper extremity external arterial study and noted digital destruction along with severe vasospasm bilaterally; however, they did not address the cause of these conditions. In a report dated November 18, 1993, Dr. Mordick indicated that he had reviewed the consulting reports by Drs. Glassman and Senkowsky. He noted that the radiograph revealed destructive gouty arthritis and digital vessel injury. Dr. Mordick concluded that appellant's current hand condition was not related to his employment but appeared to be the result of medical illness, notably constructive gouty arthritis and CREST syndrome which is an auto-immune disease. He further reported that he disagreed with the prior awards appellant received for permanent impairment of his hands in relation to his work injuries.

A review of the entire case record reveals that appellant submitted several reports by Dr. Robert L. Horner, a Board-certified orthopedic surgeon and one of his treating physicians, who found appellant suffered from gout, but also indicated that half of appellant's disability and hand dysfunction was related to cumulative trauma as a result of his accepted employment injuries. In a response to the notice of proposed termination of compensation, appellant also submitted several reports, including a report dated June 21, 1994 by Dr. Daryl K. MacCarter, a Board-certified internist specializing in rheumatology. Dr. MacCarter noted that appellant was seen for a rheumatology consultation and diagnosed polyarticular tophaceous gout involving the feet and hands, osteoarthritis involving both hands and CREST variant of scleroderma. Dr. MacCarter concluded that appellant's work as a tire repairman "certainly contributed" his underlying osteoarthritis and that his physical labor had aggravated his preexisting conditions although it was not the cause of his gout or CREST variant. He reiterated these findings in a report dated December 6, 1994. In report dated March 5, 1996, Dr. MacCarter repeated that appellant's hard physical labor and work on tires "most certainly aggravated" his preexisting conditions. He found that appellant's work-related injuries were contributing factors with stress and repeated trauma to arthritic joints.

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to compensation with respect to the occupational disease claim. In two earlier office referrals for second opinion examination, Drs. Phillip Heyman and Christopher S. Wilson related appellant's hand dysfunction and medical conditions, at least in part, to his work as a tire repairman and the repetitive nature of his duties.

Section 8123(a) of the Act<sup>7</sup> states that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. Because there exist unresolved conflicts between the opinions of Drs. Mordick and Glassman and Drs. Horner and MacCarter with respect to the cause of appellant's continuing disability and hand dysfunction, the Office has not met its burden of proof.

The Board also finds that the Office did not abuse its discretion in denying appellant's request for reconsideration with respect to the July 18, 1991 decision on the grounds that it was untimely and lacking clear evidence of error.

Under section 8128(a) of the Act,<sup>8</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations,<sup>9</sup> which provide guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."<sup>10</sup> In *Leon D. Faidley, Jr.*,<sup>11</sup> the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's Procedure Manual provides:

"The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written decision, any denial of modification following reconsideration, and decision by the Employees' Compensation Appeals Board, but does not include prereducement hearing/review decisions."<sup>12</sup>

The Office issued its last "decision denying or terminating a benefits," *i.e.*, a merit decision, with regarding appellant's left hand condition on September 26, 1991 when it reaffirmed the decision dated July 18, 1991. Inasmuch as the Office did not receive any applications for review of the September 21, 1991 decision until March 4, 1996, this application

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<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.138(b).

<sup>10</sup> 20 C.F.R. § 10.138(b)(2).

<sup>11</sup> 41 ECAB 104 (1989).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(a) (May 1991).

was dated over one year following the last merit decision and, therefore, was not timely filed.<sup>13</sup> Consequently, the Office properly found that appellant had filed an untimely appellant for review.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.<sup>14</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which is decided by the Office.<sup>15</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>16</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>17</sup> It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.<sup>18</sup> This entails a limited review by the Office of how the evidence submitted with the request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>19</sup> To show clear evidence of error, however, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish 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 fundamental question as to the correctness of the Office decision.<sup>20</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>21</sup>

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<sup>13</sup> See generally Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602(3)(a) (May 1991).

<sup>14</sup> *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); see, e.g., Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(b) which states: "the term 'clear evidence of error' is intended to present a difficult standard." The claimant must present evidence which on its face shows that the Office made an error.

<sup>15</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>16</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>17</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>18</sup> See *Leona N. Travis*, *supra* note 16.

<sup>19</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>20</sup> *Leon Faidley, Jr.*, *supra* note 11.

<sup>21</sup> *Gregory Griffin* *supra* note 14.

In the present case, appellant did not submit any evidence with his March 4, 1996 untimely request for reconsideration. Therefore, there is no evidence which demonstrates error in the Office's September 21, 1991 decision.

The decision of the Office of Workers' Compensation Programs dated April 3, 1996 is affirmed. The decisions of the Office dated April 17 and March 5, 1996 are hereby reversed.

Dated, Washington, D.C.  
August 26, 1998

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member