

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLIFFORD D. JACKSON and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, CA

*Docket No. 00-1627; Oral Argument Held June 5, 2002;
Issued August 5, 2002*

Appearances: *Clifford D. Jackson, pro se; Julia Mankata, Esq.*, for the Director,
Office of Workers' Compensation Programs.

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On June 15, 1993 appellant, then a 28-year-old welder, filed a claim for traumatic injury (Form CA-1), alleging that he sustained injuries to his right wrist, right shoulder, neck and back, when he fell down a ladder wall in the performance of duty. The Office initially accepted appellant's claim for right wrist sprain, right shoulder sprain, cervical sprain and contusion of the back. The Office subsequently expanded its acceptance to include right shoulder impingement syndrome and authorized surgical repair.

In a decision dated January 8, 1996, after giving appellant proper notice and an opportunity to respond, the Office terminated appellant's compensation benefits on the grounds that the medical evidence of record established that he had no residuals of his employment injury.

By letter to the Office dated June 15, 1996, appellant requested reconsideration of the prior decision and submitted additional evidence in support of his request. In a merit decision dated August 19, 1996, the Office found the newly submitted evidence insufficient to warrant modification of the prior decision. By letter dated July 29, 1997, appellant again requested reconsideration and submitted additional evidence in support of his request. In a merit decision dated October 27, 1997, the Office found the newly submitted evidence insufficient to warrant

modification of the prior decision. By letter received October 28, 1998, appellant requested reconsideration and in a decision dated November 19, 1998, the Office denied appellant's request for reconsideration on the grounds that his request neither raised substantive legal questions nor included new and relevant evidence and, therefore, was insufficient to warrant further merit review of the prior decision.

By letter dated October 30, 1999 and received by the Office on November 18, 1999, appellant requested reconsideration of the Office's prior decision and submitted additional medical evidence in support of his request.

In a decision dated November 29, 1999, the Office found that appellant's request for reconsideration was not filed within one year of its October 27, 1997 merit decision and that appellant had not established clear evidence of error with respect to his untimely request for reconsideration.

The only decision before the Board on this appeal is the Office's November 29, 1999 decision, which denied appellant's request for a review of the merits of his case because his request for review was not timely and it did not establish any evidence of error. As more than one year elapsed from the Office's most recent merit decision, dated October 27, 1997 and the November 19, 1998 decision, denying reconsideration and the date of the filing of appellant's appeal on March 31, 2000, the Board lacks jurisdiction to review the prior decisions.¹

The Board finds that the Office properly refused to reopen appellant's claim for further consideration of the merits of his claim under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607(a) and did not show clear evidence of error.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Board has found that the imposition of this one-

¹ See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).²

In the present case, the most recent merit decision by the Office was October 27, 1997. As appellant's request for reconsideration, received by the Office on November 18, 1999, was not filed within one year from the date of the most recent merit decision, the Office properly determined that appellant's application for review was not timely filed pursuant to 20 C.F.R. § 10.607(a).

The Office, however, 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 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.³ Office procedures state 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.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996), states:

"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). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

⁵ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁷ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ *See Leona N. Travis*, *supra* note 6.

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

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.¹⁰ 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.¹¹

In support of his request for reconsideration, appellant submitted the results of magnetic resonance imaging (MRI) of his right shoulder performed on July 17, 1997, which revealed the presence of a small cyst in the humeral head.¹² While appellant asserts that the cyst is causally related to his accepted shoulder injuries and is the source of his continuing pain and disability, the belief of appellant that the condition was caused or aggravated by employment conditions, is not sufficient to establish causal relation.¹³ The evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.¹⁴ Rationalized medical opinion evidence is medical evidence that includes a physician's reasoned opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.¹⁵ As the MRI report submitted by appellant does not offer any discussion as to whether the conditions revealed by the MRI are causally related to appellant's accepted employment injuries, the Board finds that this report does not raise a substantial question as to the correctness of the Office's October 27, 1997 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's October 27, 1997 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

¹⁰ *Leon D. Faidley, Jr.*, *supra* note 2.

¹¹ *Gregory Griffin*, *supra* note 3.

¹² The MRI further revealed no joint effusion and no rotator cuff abnormalities, intact rotator cuff tendons and glenohumeral space, multiple lobulated low signal areas in the right shoulder adjacent to the acromioclavicular joint region superior to the right humeral head under the skin, loss of subcutaneous fat in the area of the above-described signal void lesions.

¹³ *Charles E. Evans*, 48 ECAB 692 (1997).

¹⁴ *Kathy Marshall (Dennis Marshall)*, 45 ECAB 827 (1994).

¹⁵ *Charles E. Evans*, *supra* note 13; *Earl D. Smith*, 48 ECAB 615 (1997).

The decision of the Office of Workers' Compensation Programs dated November 29, 1999 is hereby affirmed.¹⁶

Dated, Washington, DC
August 5, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁶ At the oral argument before the Board, appellant asserted that he believed his shoulder cysts were a consequence of the prior surgical procedure to repair his accepted shoulder condition. The Board cannot address the merits of this issue, as this issue was not adjudicated by the Office. The Board's jurisdiction to consider and decide appeals extends only to final decisions of the Office. *Algimantas Bumelis*, 48 ECAB 679 (1997). Appellant may submit this evidence to the Office together with a claim for a consequential injury.