

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. WOODS and U.S. POSTAL SERVICE,
POST OFFICE, New York, N.Y.

*Docket No. 97-1119, Submitted on the Record;
Issued May 24, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS:

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and appellant failed to present clear evidence of error.

The instant case, has a lengthy procedural history dating back approximately twenty-two years when appellant initially sustained a work-related injury on April 14, 1977. The Office accepted appellant's claim for lumbosacral sprain and she received compensation for various intermittent periods of temporary total disability through February 23, 1982. In a decision dated March 11, 1982, the Office determined that the weight of the medical evidence demonstrated that as of February 23, 1982, appellant no longer had a work-related disabling back condition. This decision was subsequently affirmed by an Office hearing representative on January 12, 1983. Appellant also filed a claim alleging a recurrence of disability on September 21, 1982, causally related to her accepted injury of April 14, 1977. The Office denied appellant's claim for recurrence in a decision dated August 31, 1983. On appeal, the Board affirmed the Office's decisions dated January 12 and August 31, 1983.¹ Since the Board initially considered appellant's claim in 1984, she has filed numerous requests for reconsideration, all of which, when reviewed on the merits, have been consistently denied based upon appellant's failure to submit rationalized medical opinion evidence relevant to the issue of causal relationship.

Appellant filed a second claim for a new traumatic injury to her back, which occurred on June 23, 1983. The Office accepted the claim for traumatic myalgia. Additionally, appellant filed three claims alleging recurrences of disability on August 1, August 23 and December 3, 1983, causally related to her June 23, 1983 accepted injury. In a decision dated November 8, 1984, the Office denied appellant's claims for recurrence of disability based upon her failure to submit reliable medical evidence establishing a causal relationship between her recurrences and

¹ *Patricia Woods*, Docket No. 84-453 (May 18, 1984).

her accepted injury of June 23, 1983. Appellant sought reconsideration on two separate occasions, and in each instance the Office denied modification based on appellant's failure to establish a causal relationship between her alleged recurrences and her accepted injury of June 23, 1983. After the denial of her second request for reconsideration on February 7, 1986, appellant requested a hearing. The Office, however, denied appellant's hearing request in a decision dated October 15, 1986, because she had already sought reconsideration on two prior occasions.

In response to yet another request for reconsideration the Office advised appellant by letter dated April 6, 1988, that her two claims would be consolidated and that the Office would review the entire "doubled file" before issuing a decision on reconsideration. The Office again denied reconsideration on three subsequent occasions; the most recent merit decision having been issued on June 29, 1989. Appellant filed the instant request for reconsideration on July 1, 1996, and by decision dated October 28, 1996, the Office denied appellant's request pursuant to 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed, and that she failed to present clear evidence of error. Appellant subsequently filed an appeal with the Board on January 27, 1997.²

The Board has duly reviewed the record and finds that the Office properly denied appellant's July 1, 1996 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation 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 whether it will review an award for or against payment of compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁶ One such limitation, is that a claimant must file his or her application for review within one year of the date of the decision denying or terminating benefits.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 section 8128(a).⁸

² Appellant submitted evidence on appeal that was not submitted to the Office prior to the issuance of its October 28, 1996 decision denying appellant's request for reconsideration. Inasmuch as the Board's review is limited to the evidence of record which was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

³ 5 U.S.C. § 8128(a).

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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." 5 U.S.C. § 8128(a).

⁶ *See* 20 C.F.R. § 10.138

⁷ 20 C.F.R. § 10.138(b)(2).

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

In its October 28, 1996 decision, the Office properly determined that appellant failed to file a timely request for reconsideration. The Office rendered its most recent merit decision on June 29, 1989, and appellant filed her request for reconsideration on July 1, 1996; more than seven years after the Office's June 29, 1989 decision denying compensation.⁹

The Office, however, may not deny a request for reconsideration solely on the grounds that the application was not timely filed. In those instances where a request for reconsideration is not timely filed, the Board has held that the Office must nonetheless undertake a limited review to determine whether the application presents "clear evidence that the Office's final merit decision was erroneous."¹⁰ Consistent with Board precedent, Office procedures 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. § 10.138(b)(2), 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 which was decided by the Office.¹² The evidence must be positive, precise and explicit, and it must be apparent 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 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 The evidence submitted must establish either a clear procedural error or be of sufficient probative value to create a conflict in medical opinion. Moreover, the evidence 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.¹⁶

⁹ The Office incorrectly noted that the last merit decision had been issued on March 7, 1986. With respect to the issue of timeliness, this error is harmless inasmuch as the Office's most recent merit decision also predates appellant's current request for reconsideration by more than one year.

¹⁰ *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). The Office therein 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 on the Director's own motion."

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

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

¹⁴ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

¹⁶ *Thankamma Mathews*, 44 ECAB 765 (1993); *Leon D. Faidley, Jr.*, *supra* note 4.

In determining whether claimant has demonstrated clear evidence of error, the Office is required to undertake a limited review of how the newly submitted evidence bears on the prior evidence of record.¹⁷ The Board, in addressing whether the Office abused its discretion in denying merit review, makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.¹⁸

In accordance with Board precedent and the Office's own internal guidelines, the Office performed a limited review of the record to determine whether appellant's request for reconsideration showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act.

The relevant medical evidence submitted with the request for reconsideration consists of three reports prepared by Christopher B. Michelsen, M.D., a Board-certified orthopedic surgeon. In a report dated February 26, 1996, Dr. Michelsen noted a history of injury which occurred "approximately 13 years" ago when appellant hurt her back while attempting to catch a tray of falling mail.¹⁹ He further noted that appellant has a history of recurrent injuries and experiences pain with heavy lifting. Dr. Michelsen indicated that appellant "probably has a herniated disc [at] L4-L5 vs. L5-S1." In a follow-up report dated March 23, 1996, Dr. Michelsen indicated that while appellant has "persistent discomfort," her magnetic resonance imaging (MRI) scan did not reveal a herniated disc. He prescribed a corset for appellant and referred her to the anesthesia pain service. Finally, in a report dated April 18, 1996, Dr. Michelsen noted that appellant was neither wearing the prescribed corset nor had she visited the anesthesia pain service, as previously recommended. Additionally, Dr. Michelson noted that he referred appellant for further testing in order to provide a more definitive diagnosis.

While Dr. Michelsen's February 26, 1996 report notes a history consistent with appellant's accepted injury of June 23, 1983, he neither provided a definitive diagnosis of appellant's current condition nor did he specifically indicate that appellant's condition was the result of her employment injury, which he indicated occurred "approximately 13 years" ago. In view of Dr. Michelsen's failure to offer a reasoned explanation regarding the relationship between appellant's condition and her employment, his opinion does not rise to the level of rationalized medical opinion evidence.²⁰ As such, Dr. Michelsen's February 26, 1996 report cannot be considered sufficient to establish clear evidence of error on the part of the Office. Furthermore, no other medical evidence submitted following the Office's June 29, 1989 decision is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant. As previously noted, the clear evidence of error standard is a difficult standard to meet. In view of the foregoing evidence, the Office properly concluded that appellant failed to present clear evidence of error on the part of the Office in denying compensation.

¹⁷ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁸ *Thankamma Mathews*, *supra* note 17; *Gregory Griffin*, 41 ECAB 458 (1990).

¹⁹ The following notation appears at the top of Dr. Michelsen's report: "D/A: April, 1977 and June, 1983."

²⁰ *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (the Board found that a medical opinion not fortified by medical rationale is of little probative value).

The decision of the Office of Workers' Compensation Programs dated October 28, 1996, is hereby affirmed.

Dated, Washington, D.C.
May 24, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member