

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUNICE M. JAMES (claiming for the estate of) BLANCHE H. NEAL
(deceased) and GOVERNMENT PRINTING OFFICE, LAUREL WAREHOUSE,
Laurel, MD

*Docket No. 98-1460; Oral Argument Held January 24, 2001;
Issued February 26, 2001*

Appearances: *Richard T. Colaresi, Esq.*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that the employee's request for reconsideration was untimely and failed to show clear evidence of error.

In this case, the Office accepted that the employee sustained left and right wrist conditions causally related to factors of her federal employment. The employee eventually stopped work and was placed on the periodic rolls. By decision dated March 6, 1995, the Office terminated the employee's compensation benefits as the weight of the medical evidence established that the work-related bilateral carpal tunnel syndrome had ceased. By letter dated June 20, 1995, the employee requested a hearing. In a letter decision dated July 16, 1995, the Office denied the employee's request as untimely filed. In a series of reconsideration requests dated July 1 and 22 and August 1, 1995, the employee requested reconsideration and submitted additional evidence. By decision dated September 20, 1995, the Office, after conducting a merit review, denied the employee's request for reconsideration finding that the evidence submitted was insufficient to support modification of its prior decision. On July 18, 1997 the employee, through her attorney Richard T. Colaresi, again requested reconsideration and submitted additional evidence. By decision dated January 15, 1998, the Office denied the employee's reconsideration request finding that it was untimely and that the employee failed to present clear evidence that the Office's final decision was erroneous.

The employee passed away on January 2, 1998. By letter dated March 19, 1998, the employee's daughter, Ms. Eunice Mae James, appealed the January 15, 1998 decision of the Office and requested an oral argument. In orders dated March 1 and September 5, 2000, the Board denied the Director of the Office of Workers' Compensation Programs' motion to dismiss

the appeal.¹ Accordingly, the oral argument scheduled for January 24, 2001 proceeded as scheduled. The employee's daughter was represented by counsel, Mr. Colaresi.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.² Since appellant filed her appeal on March 19, 1998, the only decision over which the Board has jurisdiction on this appeal is the January 15, 1998 decision denying the employee's request for reconsideration.

The Board finds that the Office properly determined that the employee's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.³ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

"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 its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ 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.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁶

In this case, the Office properly determined that the employee failed to file a timely reconsideration request. The Office issued its last merit decision regarding the employee's claimed conditions on September 20, 1995. The employee requested reconsideration on July 18,

¹ Docket No. 98-1460.

² 20 C.F.R. § 501.3(d).

³ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley*, 41 ECAB 104 (1989).

⁴ Thus, 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 point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *See* cases cited *supra* note 3.

1997. As the employee's reconsideration request was outside the one-year time limit, the employee's request for reconsideration was untimely. On appeal appellant alleges that the employee was suffering from psychiatric problems until June 1997 which rendered her incapable of understanding the time limitation period for seeking reconsideration before the Office. Appellant argues that since the employee was incompetent, the time limitation should either be tolled or the late filing excused due employee's extenuating circumstances. Reference was made to a June 19, 1997 report of Dr. Antoinette Lewis, a Board-certified psychiatrist. Dr. Lewis diagnosed the employee as having major depressive episode, recurrent and panic disorder with agoraphobia. She opined that the employee's "depression and incapacitating anxiety resulted in impairment in memory and concentration significant enough to effect her timely filing of the appeal to the Department of Labor regarding her workers' compensation benefits." The record reflects that the employee had been under the care of Dr. Lewis for psychiatric problems since August 4, 1994. During that time the employee requested an oral hearing before the Branch of Hearings and Review on June 20, 1995 and wrote three letters dated July 1, July 22 and August 1, 1995 requesting reconsideration. Although Dr. Lewis opined that the employee's depression and incapacitating anxiety impacted upon her timely filing of the request, the Board finds that the record does not establish that the employee was so incapacitated as to prevent her filing of the reconsideration request and requesting an oral hearing in 1995. The record is devoid of any indication as to the employee's capacity from 1995 until the time of her death in 1998.

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. 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. § 10.138(b)(2), 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. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. 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 on the face of such evidence.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁸ *Jeanette Butler*, 47 ECAB 128 (1995); *Thankamma Mathews*, 44 ECAB 765 (1993).

In support of her July 18, 1997 request for reconsideration, the employee submitted the above-mentioned June 19, 1997 report from Dr. Lewis along with reports dated June 13 and 20, 1997, June 9 and June 16, 1995 from Dr. Inder Chawla, a rehabilitation specialist, and a previously considered report of Dr. Chawla dated June 21, 1995. Dr. Lewis' report of June 19, 1997 is of no probative value as emotional conditions were not an accepted condition in this case. In chronological order, Dr. Chawla's June 9, 1995 report diagnosed the employee with a possible recurrent carpal tunnel syndrome of mild to moderate severity. The June 16, 1995 report found that the employee had sensory carpal tunnel syndrome at the right wrist from an electrophysiological perspective. In his June 20, 1997 report of Dr. Chawla stated the electrophysiological diagnostic test demonstrated that the employee had residuals of carpal tunnel syndrome at the bilateral wrists, slightly greater on the right than on the left. Dr. Chawla failed to provide a medical opinion describing how the employee developed residuals of carpal tunnel syndrome at the bilateral wrists and how this was causally related to factors of her federal employment. The Board finds that these opinions are insufficient to *prima facie* shift the weight of the evidence in favor of the employee and raise a substantial question as to the correctness of the decision.⁹ For these reasons, the Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. The Office, therefore, did not abuse its discretion by refusing to reopen the employee's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

⁹ *Larry J. Lilton*, 44 ECAB 243 (1992).

The decision of the Office of Workers' Compensation Programs dated January 15, 1998 is hereby affirmed.

Dated, Washington, DC
February 26, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member