

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NOELLA HARFORD and DEPARTMENT OF THE ARMY,
FORT RICHARDSON, Fort Richardson, AK

*Docket No. 02-636; Submitted on the Record;
Issued January 27, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration, received by the Office on July 5, 2001, was untimely filed and did not present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).³ 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.⁴ 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).⁵

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

¹ 5 U.S.C. § 8128(a).

² *Veletta C. Coleman*, 48 ECAB 367 (1997).

³ 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 point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.606(b).

⁴ 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ See *Veletta C. Coleman*, *supra* note 2.

In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶ The Office issued its last merit decision in this case on August 9, 1999, wherein the Office found that the evidence and arguments submitted with appellant's July 7, 1996 request for reconsideration were insufficient to warrant modification of the prior decision, in which the Office relied on the opinion of the Office referral physician in denying appellant's claim for a recurrence of disability beginning April 26, 1994 causally related to her accepted acute supra spinatus tendinitis, C5-6 disc protrusion or related cervical fusion.

By letter dated April 29, 2001 and received by the Office on May 4, 2001, appellant asked the Office to reopen her case and submitted additional evidence in support of her request. In a letter dated May 25, 2001, the Office acknowledged appellant's correspondence and advised her to follow the appeal rights which accompanied the Office's last decision.

By letter dated June 25, 2001 and received by the Office on July 5, 2001, appellant asked the Office to reconsider their prior decision and submitted additional medical evidence in support of her request. In a decision dated September 25, 2001, the Office denied appellant's request for reconsideration on the basis that it was not filed with the one-year time limit set forth by 20 C.F.R. § 10.607(a) and that it did not present clear evidence of error

In this case, the Office issued its last merit decision on August 9, 1999, wherein the Office found the arguments and evidence submitted together with appellant's July 7, 1996 request for reconsideration insufficient to warrant modification of the prior decision denying appellant's claim for a recurrence of disability beginning April 26, 1994. As appellant's July 25, 2001 request for reconsideration was made outside the one-year time limitation, which began the day after August 9, 1999, appellant's request for reconsideration was untimely.⁷

In those cases where a request for reconsideration is not timely filed, the Board has held 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.⁸ 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. § 10.606(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁹

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. Evidence, which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

⁶ *Veletta C. Coleman, supra note 2; Larry L. Lilton, 44 ECAB 243 (1992).*

⁷ The Board notes that even if appellant's earlier April 29, 2001 letter constituted a valid request for reconsideration, this too would have been an untimely request.

⁸ *Veletta C. Coleman, supra note 2; Gregory Griffin, supra note 4.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

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 in the face of such evidence.¹⁰

In support of her request for reconsideration, appellant submitted several medical reports and progress notes from her treating physicians. In a report dated September 16, 1999, Dr. Larry A. Levine, appellant's treating Board-certified physiatrist, diagnosed chronic pain syndrome with known C8 radiculopathy, remote, status post C5-6 anterior cervical fusion with post laminectomy syndrome and degenerative disc changes. Dr. Levine further noted that appellant's initial cervical strain had contributed to these conditions. With respect to the issue of whether appellant's 1994 recurrence of disability was due to her accepted conditions, Dr. Levine stated that he found it surprising that the Office had denied appellant's claim in its August 9, 1999 decision, especially in light of the fact that earlier medical evidence had specifically related appellant's overall difficulties to her previous work injury. Dr. Levine further noted that he agreed with the prior medical evidence that one is more likely to have degenerative changes increased at levels above and below a fusion. In a report dated June 15, 2000, he reviewed the results of a November 24, 1999 magnetic resonance imaging (MRI) report, which showed prominent right-sided foramina narrowing at C3-4, prominent left-sided foramen narrowing at C6-7 and canal stenosis at C6-7, without evidence of cord deformity. Dr. Levine stated that "some of these degenerative issues may play a role in [appellant's] overall situation and certainly are increased based on post C5-6 anterior cervical fusion and post laminectomy syndrome." In a more recent letter dated April 2, 2001, he noted that appellant had first been injured in 1974 in a work-related incident and has had ongoing problems since then. Dr. Levine further stated that in October 1985 appellant underwent a fusion of the cervical region, which was also followed by ongoing difficulties. He explained that by November 1994, appellant was having numbness in her left arm into the second and third fingers and afterwards developed ongoing difficulties with pain, numbness and decreased range of motion in her cervical region, which decreased her ability to function and ultimately affected her avocational and vocational abilities. Dr. Levine concluded that the cervical fusion appellant underwent in 1985 was required because of injuries she sustained in 1974 and that the pain she experiences today had been going on for quite some time after the surgery was completed. As he did not provide any rationalized explanation for his conclusions that appellant's degenerative cervical changes and associated symptoms are causally related to her 1985 accepted fusion surgery and further did not explain why, in 1994, appellant became totally disabled from her diagnosed conditions, Dr. Levine's reports are of insufficient

¹⁰ *Veletta C. Coleman, supra* note 2.

probative value to establish that the Office erred in denying appellant's claim for a 1994 recurrence of disability.¹¹

In a report dated June 15, 2000, Dr. Paul D. Raymond, appellant's treating Board-certified family practitioner, noted her history of injury and treatment and agreed with Dr. Levine that appellant had suffered ongoing difficulties with her neck since her 1985 cervical fusion. He stated that by 1999, she was having increased left-sided radiculopathy and an MRI performed at that time revealed prominent foramina narrowing. Dr. Raymond stated that the narrowing was due to hypertrophic osteophytic changes, which were most likely increased as a result of the past fusion surgery and added that the degenerative changes in the remainder of appellant's neck were also most likely exacerbated by the fusion. He concluded that as the fusion was necessitated by appellant's employment injury, it seemed reasonable that the degenerative changes, which had increased as a result of the surgery and were creating symptoms were also related to her employment injuries. Dr. Raymond does not clearly address the primary issue in this case, which is whether appellant became totally disabled in 1994 as a result of her employment-related conditions. Finally, to the extent that both Dr. Levine's and Dr. Raymond's reports can be construed as supportive of a finding that all of appellant's cervical problems since 1974 are causally related to her employment injury and its sequela, at best their reports could only be interpreted as demonstrating that there are diverse opinions in the case record regarding whether appellant became disabled in 1994 due to continuing residuals of her accepted work-related neck injuries. However, neither Dr. Levine's nor Dr. Raymond's reports are sufficient to establish clear evidence of error as the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or to establish a procedural error, but it 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's August 9, 1999 decision.¹²

Finally, the record contains additional progress notes from Dr. Levine dated April 12, 1999, March 6, 2000, April 2 and August 14, 2001, additional progress notes from Dr. Raymond dated October 29 and December 1, 1999 and August 21, 2001, the November 24, 1999 MRI report and the results of various laboratory tests. However, these treatment notes and laboratory results only discuss appellant's current condition and treatment options and do not address the cause of her diagnosed conditions or whether she became disabled due to these conditions in 1994. Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹³

¹¹ Rationalized medical evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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 specific employment factors identified by the claimant. *Joe L. Wilkerson*, 47 ECAB 604 (1996); *Alberta S. Williamson*, 47 ECAB 569 (1996).

¹² *Mamie L. Morgan*, 47 ECAB 281 (1996); *Jeanette Butler*, 47 ECAB 128 (1995).

¹³ *Linda I. Sprague*, 48 ECAB 386 (1997).

Therefore, the Board finds that the Office's September 25, 2001 decision properly determined that appellant had not presented clear evidence of error, as she did not submit any medical or factual evidence sufficient to show that the Office erred in its prior decisions.

The decision of the Office of Workers' Compensation Programs dated September 25, 2001 is hereby affirmed.

Dated, Washington, DC
January 27, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member