

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUANITA B. HAZLEY and U.S. POSTAL SERVICE,
POST OFFICE, Hamilton, OH

*Docket No. 01-2131; Submitted on the Record;
Issued September 9, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
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 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

This case has been before the Board previously. By decision dated November 26, 1999, the Board affirmed an Office decision in which the opinion of the physician who performed the independent medical evaluation was credited in terminating appellant's compensation effective January 2, 1998. The Board further found that appellant did not meet her burden of proof to establish that she had any disability after January 2, 1998 causally related to her employment injuries.¹ The law and facts as set forth in the previous Board decision and order is incorporated herein by reference.

Subsequent to the Board's November 26, 1999 decision, by letter dated June 18, 2001 appellant, through counsel, requested reconsideration and submitted a January 17, 2001 medical report from Dr. William R. Fitz, a Board-certified physiatrist. By decision dated July 17, 2001, the Office denied appellant's request on the grounds that it had not been filed within one year of the November 26, 1999 Board decision and did not show clear evidence of error. The instant appeal follows.

The only decision before the Board is the July 17, 2001 decision in which the Office denied appellant's request for reconsideration of the November 26, 1999 decision, because more

¹ Docket No. 98-1207.

than one year had elapsed between the issuance of this decision and August 7, 2001, the date appellant filed the instant appeal with the Board.²

In his January 17, 2001 report, Dr. Fitz stated that he originally saw appellant on April 9, 1998 when she was complaining of back pain radiating down the right leg. Physical examination demonstrated a positive straight leg raising test on the right and electromyography was positive for L5 radiculopathy. He again saw her in July 1999 with repeated complaints of back pain. Magnetic resonance imaging showed no evidence of disc herniation. Dr. Fitz concluded that “with a reasonable degree of medical probability that [appellant’s] symptoms of which she complains were directly related to her injury of July 31, 1975 [w]hich was an aggravation of her prior lumbar injury that had required surgery.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees’ Compensation Act.³ The Office 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 When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office’s final merit decision was in error.⁵

The Board finds that as more than one year had elapsed from the date of issuance of the November 26, 1999 decision and appellant’s request for reconsideration dated June 18, 2001, her request for reconsideration was untimely. The Board further finds that the evidence submitted by appellant in support of this request is insufficient to establish clear evidence of error.

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 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 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’s decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

² See 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.607(b) (1999); see *Gladys Mercado*, 52 ECAB ____ (Docket No. 00-898, issued February 12, 2001).

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.⁶

In this case, while appellant submitted a January 17, 2001 report in which Dr. Fitz opined that appellant's radiating back pain was directly related to her 1975 employment injury, the Board finds that this report is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant or to raise a substantial question as to the correctness of the prior decisions. Therefore, appellant failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of her claim.

The decision of the Office of Workers' Compensation Programs dated July 17, 2001 is hereby affirmed.

Dated, Washington, DC
September 9, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

⁶ *Nancy Marciano*, 50 ECAB 110 (1998).