

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BONNIE L. MARRESE and U.S. POSTAL SERVICE,  
GENERAL MAIL FACILITY, Rochester, N.Y.

*Docket No. 96-1387; Submitted on the Record;  
Issued June 26, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On May 6, 1994 appellant filed a claim alleging that she sustained a back injury as a result of twisting the wrong way in her federal employment. The claim was denied by the Office in a decision dated July 28, 1994 on the grounds that fact of injury was not established due to deficiencies in the factual and medical evidence.

By letter dated November 22, 1995, appellant requested reconsideration of her claim. Appellant submitted a copy of her job description statements from witnesses and various medical records and reports pertaining to her lower back. Included in the medical reports was a June 21, 1994 letter from Dr. Howard J. Silberstein, a neurological surgeon, who notes that appellant is status post left L5-S1 keyhole laminectomy and discectomy for removal of a large herniated disc that was responsible for cauda equina syndrome presentation. Dr. Silberstein stated that it was his belief that the herniated disc at the L5-S1 level with secondary cauda equina syndrome was a direct result of her work related injury back on April 30, 1994. In a July 29, 1994 treatment note, Dr. Anthony Suozzi, a Board-certified internist, noted that appellant has a herniated lumbar disc and was status post decompressive surgery. He stated that he strongly felt that this was a work related injury. In an October 11, 1994 report Dr. Suozzi states that he saw appellant for the work injury sustained on April 30, 1994 and that, from the history obtained by appellant, he believes that appellant's reaching down to pick up keys was the causal event of appellant's disability since her symptoms started immediately thereafter. In a October 12, 1995 report, Dr. Suozzi states that appellant's condition was due to her working on an LSM machine. The other medical records and reports submitted did not address whether a April 30, 1994 employment incident caused an injury. Appellant also submitted physical therapy records.

By decision dated December 6, 1995, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.<sup>1</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application present clear evidence of error that the Office's final merit decision was in error.<sup>2</sup> Since more than one year elapsed from the July 28, 1994 merit decision of the Office to appellant's November 22, 1995 reconsideration request, the request for reconsideration is untimely.

The Board has held, however, that a claimant has a right under 5 USC § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.<sup>3</sup> In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 CFR § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>4</sup>

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

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<sup>1</sup> 20 C.F.R. § 10.138(b)(2). *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>2</sup> *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>3</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (May 1991).

<sup>5</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>6</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>7</sup> *See Jesus D. Sanchez*, *supra* note 2.

<sup>8</sup> *See Leona N. Travis*, *supra* note 6.

<sup>9</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

and raise a substantial question as to the correctness of the Office decision.<sup>10</sup> 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.<sup>11</sup>

In this case, the evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in this case is both factual and medical in nature and that the medical reports submitted by appellant which address causal relationship between the claimed injury and the employment incident of April 30, 1994 are of limited probative value as they only provide unrationalized<sup>12</sup> support for causal relationship. Although the reports of Drs. Silberstein and Suozzi relate appellant's back condition to a employment incident of April 30, 1994, Dr. Silberstein does not provide a medical rationale explaining the medical reasons by which the April 30, 1994 incident would have caused a back injury and Dr. Suozzi, although providing a medical rationale for the injury, provides inconsistent histories of the injury.<sup>13</sup> Other medical evidence submitted by appellant does not specifically address whether the April 30, 1994 incident caused appellant's back condition. Thus, the evidence submitted by appellant is insufficient to establish clear evidence of error.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

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<sup>10</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>11</sup> *Gregory Griffin*, *supra* note 1.

<sup>12</sup> *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

<sup>13</sup> *Donald J. Miletta*, 34 ECAB 1822 (1983) (where the Board held that medical evidence must be based on a complete and accurate factual and medical history of the employee whose claim is being considered); *see also Vernon R. Stewart*, 5 ECAB 276, 280 (1953) (where the Board held that medical opinion based on histories that do not adequately reflect the basic facts are of little probative value).

The December 6, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
June 26, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member