

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOANNE TRACY and U.S. POSTAL SERVICE,  
POST OFFICE, Liberty Lake, WA

*Docket No. 98-2586; Submitted on the Record;  
Issued April 19, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on the grounds that her request for reconsideration was not timely filed and did not contain clear evidence of error.

The Board has duly reviewed the case on appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on the grounds that her request for reconsideration was not timely filed and did not contain clear evidence of error.

Appellant, a clerk, filed a claim on April 26, 1993 alleging that, on April 19, 1993, she injured her shoulder in the performance of duty. The Office accepted her claim for a left shoulder strain and temporary aggravation of preexisting spondylitis. By decision dated April 29, 1996, the Office terminated appellant's compensation benefits. She requested a review of the written record. By decision dated October 9, 1996 and finalized October 10, 1996, the hearing representative affirmed the Office's April 29, 1996 decision. Appellant requested reconsideration in a letter received by the Office on March 18, 1998. By decision dated June 25, 1998, the Office found that appellant's request was not timely and that she had not established clear evidence of error on the part of the Office.<sup>1</sup> Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of

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<sup>1</sup> Appellant also requested review of the written record of claim number 14-255038 which she filed in 1990. The hearing representative did not address this claim in the October 10, 1996 decision. Appellant also requested reconsideration of claim number 14-255038. In its June 25, 1998 decision, the Office stated that her 1990 claim would have to be reviewed separately as the case records had not been combined. Appellant requested review of the claim number 14-255038 on appeal to the Board and this claim will be addressed in a separate Board decision.

<sup>2</sup> 5 U.S.C. § 8128(a).

right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> The Office, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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>5</sup> 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).<sup>6</sup>

Appellant requested reconsideration on March 18, 1998. Since appellant filed her reconsideration request more than one year from the Office's October 10, 1996 merit decision, the Board finds that the Office properly determined that said request was untimely.

In those cases where requests for reconsideration are 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.<sup>7</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>10</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>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</sup> To

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<sup>3</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>4</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2). 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).

<sup>6</sup> *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

<sup>7</sup> *Thankamma Mathews*, *supra* note 3 at 770.

<sup>8</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>9</sup> *Thankamma Mathews*, *supra* note 3 at 770.

<sup>10</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>11</sup> *Jesus D. Sanchez*, *supra* note 4 at 968.

<sup>12</sup> *Leona N. Travis*, *supra* note 10.

<sup>13</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.<sup>14</sup> The Board must make 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>15</sup>

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 the case is whether appellant has continuing disability causally related to her 1993 employment injury. The issue of disability for work is established through medical evidence. In support of her March 18, 1998 reconsideration request, appellant submitted statements from lay persons regarding her medical conditions. These statements are not relevant to the issue in this case, whether the medical evidence establishing continuing disability or residuals due to the accepted employment injury. Appellant also resubmitted medical evidence already considered by the Office in reaching its October 10, 1996 decision. As this evidence was already considered by the Office it is not sufficient to establish clear evidence of error by the Office in its October 10, 1996 decision.

Appellant submitted two form reports from her attending physician, Dr. P.Z. Pearce, a Board-certified family practitioner, noting that appellant's condition had not changed from 1995. These reports did not add any new medical opinion evidence to the record and are essentially repetitive of medical evidence already considered by the Office.

In a report dated February 17, 1998, Dr. Judith A. Heusner, Board-certified in occupational medicine, noted that appellant had developed additional conditions of fibromyalgia, degenerative cervical and lumbar spine changes, carpal tunnel syndrome and "restless leg syndrome." He opined that appellant was totally disabled.

This report is not sufficient to establish clear evidence of error on the part of the Office as Dr. Heusner did not provide an opinion on the causal relationship between appellant's diagnosed conditions and her accepted employment injury. The Office had accepted appellant's claim only for left shoulder strain and aggravation of preexisting cervical spondylitis. Without an opinion relating appellant's current condition to these accepted injuries, Dr. Heusner's report is not sufficient to establish continuing disability due to the accepted employment injuries and is not sufficient to establish clear evidence of error on the part of the Office.

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<sup>14</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>15</sup> *Gregory Griffin*, *supra* note 5 (1990).

The June 25, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.  
April 19, 2000

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member