

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of BARBARA EICHER, claiming as widow of GEORGE C. EICHER and  
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION  
ADMINISTRATION, Reno, NV

*Docket No. 99-15; Submitted on the Record;  
Issued April 19, 2000*

---

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

Appellant filed a claim for compensation by a widow (Form CA-5) alleging that the death of her 49-year-old husband on October 29, 1993 was causally related to factors of his federal employment. Appellant indicated that stress, harassment and discrimination at work caused the employee's "[b]ypass, [s]troke and death by [c]ancer." The Office, in an April 11, 1995 decision, denied appellant's claim for death benefits on the grounds that the evidence did not establish fact of injury. Appellant requested reconsideration on March 19, 1996. The Office reviewed the merits of the claim and, in a July 15, 1996 decision, denied modification of its prior decision. Thereafter, on July 7, 1997, appellant again requested reconsideration. By decision dated August 8, 1997, the Office found that the evidence submitted was irrelevant and insufficient to warrant review of the case on its merits.

By letter dated August 4, 1998, appellant requested reconsideration and submitted additional evidence. By decision dated August 17, 1998, the Office found that appellant's request for reconsideration was untimely as it was made more than one year from the last merit decision and that the evidence did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's August 17, 1998 decision denying appellant's request for a review on the merits of its July 15, 1996 decision denying her claim for death benefits. Because more than one year has elapsed between the

issuance of the Office's July 15, 1996 merit decision, its August 8, 1997 denial of merit review and September 9, 1998, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review either the July 15, 1996 or August 8, 1997 Office decisions.<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 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 filed a request for reconsideration on August 4, 1998. Since appellant filed the reconsideration request more than one year from the Office's July 15, 1996 merit decision, the Board finds that the Office properly determined that the request was untimely.

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.<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 manifest 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

---

<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. § 8128(a).

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

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

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 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.<sup>14</sup> The Board makes an independent determination as to 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. In support of her request for reconsideration, appellant submitted copies of medical reports, which either duplicated evidence already of record or did not address the relevant medical issue in the present case, which is the cause of the employee's death. The Board has held that the submission of evidence, which repeats or duplicates evidence already in the case record, or which does not address the particular issue involved, does not constitute a basis for reopening a case.<sup>16</sup>

Appellant further submitted articles from newsletters and medical journals. However, the Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee.<sup>17</sup>

The record contains statements from the employee's coworkers regarding the employee, which predate his death. The record also contains an oral reprimand given the employee in November 1989, his placement on a performance improvement program in January 1990, correspondence regarding the employee's request for a transfer in 1993 and a complete transcript of the employee's June 30, 1993 deposition for a coworkers' Merit Systems Protection Board

---

<sup>11</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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

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

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

<sup>16</sup> *Eugene F. Butler*, 36 ECAB 393 (1984); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>17</sup> *William C. Bush*, 40 ECAB 1064 (1989).

hearing. The evidence submitted does not support a finding that any action taken by the employing establishment was unreasonable or harassing in nature and thus it is insufficient to establish error by the Office.<sup>18</sup>

Appellant submitted a copy of the employee's October 29, 1993 death certificate in which the physician listed the cause of death as lymphoma. As the physician did not attribute the employee's death to factors of the employee's federal employment, it does not raise a substantial question concerning the correctness of the Office's prior merit decision.

As the evidence submitted by appellant in support of her untimely reconsideration request does not manifest on its face that the Office committed an error in its July 15, 1996 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated August 17, 1998 is hereby affirmed.

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

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

---

<sup>18</sup> Appellant argued that the employee incurred stress due to testifying before the MSPB. However, appellant further explained that the employee chose to testify on behalf of his coworker and that his supervisor recommended that he not testify due to his illness and as they already had his deposition.