

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE DAVIS NORRIS and DEPARTMENT OF VETERANS AFFAIRS,
CARL VINSON MEDICAL CENTER, Dublin, GA

*Docket No. 00-301; Submitted on the Record;
Issued December 19, 2000*

DECISION and ORDER

Before DAVID S. GERSON, PRISCILLA ANNE SCHWAB,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration on the grounds that the request was not timely filed and failed to present clear evidence of error.

On July 21, 1994 appellant, then a 40-year-old licensed practical nurse (LPN), injured her back when a patient attacked her at work. The Office accepted her claim for a contusion of the back and appellant returned to regular duty on July 27, 1994.

On November 7, 1995 appellant filed a notice of recurrence of disability alleging that coughing due to pulmonary problems aggravated her July 21, 1994 injury on or about October 25, 1995.¹ Appellant subsequently submitted medical and factual evidence regarding the claim.

In reports dated February 2 and 16, 1996, Dr. Kathy Lynn, a Board-certified internist, reported that appellant was evaluated for potential drug-induced lupus, but her symptoms were found to be most consistent with fibromyalgia.

In an April 10, 1996 report, Dr. Jeffrey Stephens, a Board-certified internist, reported that appellant was referred to him in September 1995 with a several-month history of pneumonia. Dr. Stephens stated: "My assessment at this time is pulmonary tuberculosis, much improved, chronic joint pain, uncertain etiology, though her medications may have contributed at one point."

In a May 2, 1996 report, Dr. William Hornback, a Board-certified surgeon, reported that appellant continued to be symptomatic with polyarthralgias and multiple joint pains and

¹ The medical record reflects that appellant was diagnosed with pulmonary tuberculosis in September 1995 and had stopped working as a result.

swelling. Dr. Hornback stated: “This apparently is secondary to anti-tuberculous therapy and it would appear that as long as she is on this anti-tuberculous therapy, these polyarthralgic symptoms will continue.”

By decision dated May 22, 1996, the Office rejected appellant’s claim on the grounds that the evidence did not demonstrate a causal relationship between her medical condition and her work injury. Appeal rights accompanying the decision indicated that any request for reconsideration must be made within one year of the date of the decision.

By letter dated January 21, 1997, appellant, through counsel, requested reconsideration. By decision dated February 27, 1997, the Office denied appellant’s request for review of the merits on the grounds that the evidence submitted was insufficient to warrant review of the prior decision.

By letter dated August 4, 1999, appellant again requested reconsideration and submitted a copy of a prescription and dismissal slips from Tift General Hospital, which discussed instructions for activity and care after receiving lumbar epidural injections. Appellant also submitted a July 30, 1999 report from Dr. James Mossell, an osteopath, who stated: “An extensive evaluation has been performed on [appellant] and has revealed the following diagnoses: Chronic lumbar and cervical radiculopathy; subligamentous disc herniation at the midline, L4 and L5; and fibromyalgia. Numerous x-rays as well as magnetic resonance imaging (MRI) of the spine have resulted in these diagnoses.”

By decision dated August 19, 1999, the Office found that appellant’s reconsideration request was untimely filed and did not establish clear evidence that the Office’s final decision was erroneous.

The Board finds that appellant’s request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed her appeal with the Board on October 19, 1999, the only decision properly before the Board is the August 19, 1999 decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,³ the Office’s regulations provide that a claimant’s application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law, or (2) advances a relevant legal argument not previously considered by the Office, or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.” To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application.” 5 U.S.C. § 8128(a).

reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁴ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish on its face, that such decision was erroneous.⁵

In this case, appellant was issued appeal rights with the May 22, 1996 merit decision, which stated that a reconsideration request must be made in writing to the Office within one year of the date of the decision. As appellant's August 4, 1999 reconsideration request was outside the one-year time limit, which began the day after May 22, 1996, appellant's application for review was untimely.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether the application establishes "clear evidence of error." The Office will reopen a claimant's case for merit review notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² The

⁴ 20 C.F.R. § 10.606(a).

⁵ 20 C.F.R. § 10.607(b).

⁶ 20 C.F.R. § 10.607(a).

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 0227 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

As noted above, the Office will not reopen a claim unless appellant shows that the Office erroneously applied or interpreted a point of law, advances a point of law or a fact not previously considered by the Office, or submits relevant and pertinent evidence not previously considered by the Office. This case involves a medical issue -- whether appellant's current back condition is causally related to her July 21, 1994 work injury. The evidence appellant submitted, including a copy of a prescription and hospital dismissal slips does not address the issue upon which she filed her reconsideration request.

Dr. Mossell diagnosed chronic lumbar and cervical radiculopathy and disc herniation, but did not indicate whether appellant's diagnosed conditions were causally related to her July 21, 1994 work injury. Because he did not address the issue of causal relationship, his report is not pertinent and relevant and is, therefore, insufficient to raise a substantial question as to the correctness of the Office's last merit decision.

Because appellant's untimely reconsideration request failed to present clear evidence of error, the Board finds that the Office acted within its discretion in refusing to reopen appellant's case for merit review under section 8128(a).

¹³ See *Gregory Griffin*, 41 ECAB 458 (1990).

The decision of the Office of Workers' Compensation Programs dated August 19, 1999 is hereby affirmed.

Dated, Washington, DC
December 19, 2000

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

Valerie D. Evans-Harrell
Alternate Member