

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REBECCA NUNN and DEPARTMENT OF THE ARMY,
U.S. ARMY TRAINING & DOCTRINE COMMAND, Fort Knox, KY

*Docket No. 98-768; Submitted on the Record;
Issued February 3, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs found that appellant's request for reconsideration was not timely filed; and (2) whether it failed to present clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's October 8, 1997 decision denying appellant's request for a review on the merits of its May 1, 1996 decision. By decision dated July 15, 1996, the Branch of Hearings and Review denied appellant's request for an oral argument before an Office hearing representative on the grounds that appellant's letter requesting a hearing was postmarked June 1, 1996, more than 30 days after the Office issued the May 1, 1996 decision. Because more than one year has elapsed between the issuance of the Office's May 1 and July 15, 1996 decisions and January 13, 1998, the date appellant filed the present appeal with the Board, the Board lacks jurisdiction to review the May 1 and July 15, 1996 decisions.¹

The Office accepted appellant's claim for a lumbar strain and a herniated nucleus pulposus. By decision dated May 1, 1996, the Office denied appellant's claim for compensation for proposed bilateral lumbar discectomy. The Office considered that on August 8, 1995 the district medical adviser opined that the bilateral lumbar discectomy recommended by appellant's treating physician, Dr. Peter G. Gianaris, a Board-certified neurological surgeon, on July 6, 1995 was not causally related to appellant's back strain which she sustained at work on June 27, 1988. The Office referred the case to Dr. Stanley W. Collis, a Board-certified orthopedic surgeon, who,

¹ See 20 C.F.R. § 501.3(d)(2); *Annie L. Billingsley*, 50 ECAB _____ (Docket No. 96-2547, issued December 24, 1998).

in a report dated September 9, 1995, opined that appellant did not have a surgical problem related to the June 27, 1988 employment injury, that he did not recommend surgery and surgery might make appellant's condition worse.

On July 14, 1997 appellant requested reconsideration of the Office's decision dated May 1, 1996 and resubmitted a magnetic resonance imaging (MRI) scan dated May 15, 1995 which showed a large right paracentral disc herniation at L5-S1 on which Dr. Gianaris based his recommendation for surgery.

By decision dated October 8, 1997, the Office denied appellant's request for reconsideration.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² The Office will not review a decision denying or terminating a benefits unless the application for review is filed within one year of the date of that decision.³ 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.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ 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.¹⁰ The Board makes

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b)(2); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁶ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁷ *See Jesus D. Sanchez*, *supra* note 4.

⁸ *See Leona N. Travis*, *supra* note 6.

⁹ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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 on the face of such evidence.¹¹

The Board finds that, since more than one year has elapsed from the date of the issuance of the Office's May 1, 1996 decision to the date appellant's request for reconsideration was filed with the Office on July 14, 1997, appellant's request for reconsideration is untimely. The evidence appellant submitted in support of her request for reconsideration was the May 15, 1995 MRI scan showing a large right paracentral disc herniation at the L5-S1 level. This MRI scan was in the record prior to the Office's issuance of its May 1, 1996 decision as the record indicates that Dr. John J. Guarnaschelli, a Board-certified neurological surgeon, faxed it to the Office on July 20, 1995. This May 15, 1995 MRI scan in itself, however, without a doctor's rationalized opinion addressing the cause between the need for surgery and appellant's accepted condition, is not sufficient to show that the Office committed clear evidence of error by denying surgery.¹²

The decision of the Office of Workers' Compensation Programs dated October 8, 1997 is hereby affirmed.

Dated, Washington, D.C.
February 3, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

¹¹ *Gregory Griffin, supra* note 3.

¹² *See Francis H. Smith*, 46 ECAB 392, 395 (1995).