

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENIA P. WOODS and DEPARTMENT OF THE ARMY,
FLORIDA NATIONAL GUARD, St. Augustine, FL

*Docket No. 98-965; Submitted on the Record;
Issued March 27, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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 appellant's application for review was not timely filed and failed to present clear evidence of error.

On April 15, 1992 appellant filed a claim for a traumatic injury for a back condition. The Office, in a decision dated December 18, 1992, denied the claim on the grounds that fact of injury was not established as appellant had not submitted sufficient medical evidence to establish that she sustained an injury on April 10, 1992 as alleged. Appellant subsequently requested an oral hearing. On April 19, 1994 an Office hearing representative affirmed the decision denying benefits. Appellant requested reconsideration and on June 3, 1994 the Office denied modification because the medical evidence still failed to establish that appellant sustained an injury as alleged. On May 8, 1995 appellant requested reconsideration. On May 19, 1995 the Office reviewed the merits of the claim and again denied modification. In a letter received by the Office on August 11, 1997, appellant again requested reconsideration, and resubmitted reports by her treating physician, Dr. R.G. Vail, a chiropractor, and Dr. Danita T. Heagy, a chiropractor. By decision dated September 3, 1997, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitled a claimant to a review of an Office decision as a matter of right.² This section vests the Office

¹ 5 U.S.C. § 8128(a).

² *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

with discretionary authority to determine whether it will review an award for or against compensation.³ 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.⁴ 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).⁵

Appellant filed a request for reconsideration on August 11, 1997. Since appellant filed the reconsideration request more than one year from the Office's May 19, 1995 merit decision, the Board finds 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.⁶ Office procedures state that the Office will reopen a claimant's case for a 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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² 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 clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant

³ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁴ 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).

⁵ *Thankamma Mathews*, *supra* note 2 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

⁶ *Thankamma Mathews*, *supra* note 2 at 770.

⁷ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

⁸ *Thankamma Mathews*, *supra* note 2 at 770.

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Jesus D. Sanchez*, *supra* note 3 at 968.

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

and raise a substantial question as to the correctness of the Office decision.¹³ 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.¹⁴

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 medical and that appellant failed to submit any new medical evidence in support of her claim. In this regard, appellant merely resubmitted reports from Drs. Vail and Heagy which were already part of the record. These reports are 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.

The September 3, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 27, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁴ *Gregory Griffin*, *supra* note 4.