

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE C. COLE and DEPARTMENT OF THE NAVY,
NAVAL SUPPLY CENTER, Norfolk, VA

*Docket No. 99-10; Submitted on the Record;
Issued March 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On January 8, 1996 appellant, a purchasing agent, filed a claim alleging that she injured her back in the performance of duty on July 21, 1995. The Office denied her claim by decision dated May 1, 1996, finding that she failed to submit the necessary medical opinion evidence to establish a causal relationship between her diagnosed condition of herniated disc L5-S1 and her accepted employment incident of falling in a chair. Appellant requested reconsideration and submitted additional medical evidence on May 31, 1996. The Office denied modification of its May 1, 1996 decision on July 16, 1996. Appellant requested reconsideration by letter dated July 14, 1997. By decision dated August 7, 1997, the Office declined to reopen appellant's claim for consideration of the merits. Appellant requested reconsideration on June 8, 1998. By decision dated July 6, 1998, the Office declined to reopen appellant's claim for review of the merits on the grounds that her request was not timely and did not contain clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against

¹ 5 U.S.C. § 8128(a).

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

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 requested reconsideration on June 8, 1998. Since appellant filed this reconsideration request more than one year from the Office's July 16, 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.⁶ 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.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 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

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's 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 the case is a medical question of whether there is a causal relationship between appellant's diagnosed condition and her accepted employment incident. In support of her request for reconsideration, appellant submitted two statements from witnesses regarding the onset of her back pain. These statements do not constitute medical evidence and are not relevant to the issue for which the Office denied appellant's claim. Therefore the statements are not sufficient to establish clear evidence of error on the part of the Office.

Appellant also submitted a report from Dr. Rick Bolt, a physician, dated July 15, 1997. Dr. Bolt noted appellant's fall on July 21, 1995 and stated, "It is my opinion that a fall such as the one that she had from her chair at work on July 21, 1995, could have been the causative agent for her ruptured disc and given the absence of any other history of trauma, I think this is likely." While this report provides some support for appellant's claim, it is couched in speculative terms and lacks the necessary medical rationale explaining how the employment incident could result in appellant's diagnosed condition of herniated disc. Appellant also submitted treatment notes from Dr. Bolt. However, these notes do not address the causal relationship between appellant's diagnosed condition her employment injury and do not establish clear evidence of error on the part of the Office.

Appellant has failed to submit the necessary medical evidence to establish clear evidence of error as the medical notes and report do not raise a substantial question as to the correctness of the Office's most recent merit decision and are of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

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

¹⁴ *Gregory Griffin*, *supra* note 4.

The July 6, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
March 16, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member