

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BERNARD A. BENTON and DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE, Golden, CO

*Docket No. 98-2280; Submitted on the Record;  
Issued May 11, 2000*

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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 denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly denied appellant's request for reconsideration as it was untimely filed and failed to present clear evidence of error.

On November 29, 1996 appellant, then a 50-year-old information system specialist, filed an occupational disease claim<sup>1</sup> alleging that he suffered a transient ischemic attack, hypertension, stress and severe allergies due to factors of his employment. No medical evidence was submitted with appellant's claim. Therefore, by letter dated January 8, 1997, the Office requested additional information. On February 18, 1997 after receiving no additional evidence from appellant, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that appellant sustained an injury as alleged.

By letter dated April 23, 1997, appellant requested reconsideration of the February 18, 1997 decision. By decision dated May 19, 1997, the Office denied appellant's April 23, 1997 request for reconsideration on the grounds that appellant failed to raise substantive legal questions nor include new and relevant evidence to support the request. Therefore, the request was insufficient to warrant review of the prior decision.

By letter dated April 29, 1998, appellant requested reconsideration of the Office's February 18, 1997 decision. In support of the request appellant submitted a June 9, 1997 report by Dr. Peter P. Steele; a July 23, 1997 report by Dr. Bernard F. Gipson; and a November 21, 1997 report by Dr. Ruth L. Fuller, a Board-certified psychiatrist. By decision dated May 28,

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<sup>1</sup> Appellant also filed a traumatic injury claim for a March 2, 1983 injury, which was not adjudicated by the Office.

1998, the Office denied appellant's April 29, 1998 reconsideration request as untimely filed and found that appellant failed to present clear evidence of error on the part of the Office.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>2</sup> 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>3</sup> 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.<sup>4</sup>

The Board finds that, since more than one year has elapsed from the date of issuance of the Office's February 18, 1997 merit decision, to the date that appellant's request for reconsideration was filed, April 29, 1998, appellant's request for reconsideration was untimely. The Board further finds that the evidence submitted by appellant in support of the request for reconsideration does not raise a substantial question as to the correctness of the Office's February 18, 1997 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.<sup>5</sup> In this regard, appellant submitted a June 9, 1997 report by Dr. Steele who stated that appellant has been his patient since 1982. He stated that appellant suffered from hypertension and in 1981 had a major stroke, from which he made a complete recovery. Dr. Steele also stated that, "Stroke was thought to be on the basis of elevated arterial blood pressure and [appellant] has had subsequent episodes that could well represent transient cerebral ischemia. He has been consistently treated with antithrombotic therapy since 1981," a July 23, 1997 report by Dr. Gipson who stated that "Appellant has been a patient of mine since the early 1980s. During that period of time, he has had hypertension and was hospitalized in the spring of 1981 with a major cerebrovascular accident. During that time, he was also seen in consultation by Dr. Steele, [a] cardiologist. Since his recovery, he has been under the care of myself and Dr. Fuller, [a] psychiatrist, for stress that he was under from work-related situations." Dr. Gipson also stated that "It is my contention that [appellant] has arterial elevated blood pressure and transient cerebral ischemia, both of which can be aggravated by stress and anxiety." In a November 21, 1997 report by Dr. Fuller, she stated that "[appellant], a married father of 3 girls, was referred for a psychiatric evaluation and treatment by his primary care physician, Dr. Gipson. [Appellant] has seen Dr. Gipson since 1978. The concerns are that the [patient] is experiencing ongoing stress in his work situation at the [employing establishment]. [Appellant's] blood pressure becomes concerningly high. He has a history of a transient ischemic episode in April 1981 and a milder episode in November 1995. He reports continuing his medications, Terrectin and Sulphaparazor, since May 1981." Dr. Fuller described the course of treatment and that "[t]he concern about [appellant's] symptoms following the

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<sup>2</sup> 5 U.S.C. § 8128(a).

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

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

<sup>5</sup> The term "clear evidence of error" is intended to represent a difficult standard. The evidence on its face must show that the Office made an error. Medical evidence which was requested by the Office and could have been submitted prior to the Office's denial does not show clear evidence of error.

transient ischemic episodes led to my referring him to the neuropsychology laboratory in the Department of Psychiatry, directed by Dr. Tish Thompson, arrangements for assessment in that lab are in the process of being made.” Dr. Fuller stated, “[Appellant] presents as a distressed employee who is disappointed in the organization that he has given years of loyal work, only to find that the organization has persons in position of authority who support discrimination in acts as blatant as name calling to acts as demoralizing as downgraded evaluations and blocked promotions.”

In his June 9, 1997 report, Dr. Steele failed to address a causal relationship between a diagnosed condition and accepted factors of appellant’s employment. Like Drs. Steele and Gipson, in his July 23, 1997 report, Dr. Fuller failed to provide a rationalized medical opinion addressing a causal relationship between a diagnosed condition and accepted factors of appellant’s employment. In her November 21, 1997 report, Dr. Fuller, a Board-certified psychiatrist, also failed to address a causal relationship between a diagnosed condition and accepted factors of appellant’s employment. Prior to issuing its February 18, 1997 decision, the Office requested a comprehensive medical report from appellant’s treating physician, by letter dated January 8, 1997, but none was provided.

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office’s February 18, 1997 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion by denying a merit review of his claim.

The decision of the Office of Workers’ Compensation Programs dated May 28, 1998 is affirmed.

Dated, Washington, D.C.  
May 11, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member