

U. S. DEPARTMENT OF LABOR

Employees, Compensation Appeals Board

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In the Matter of HAROLD C. BANKS and DEPARTMENT OF VETERANS AFFAIRS,  
PALO ALTO VETERANS HOSPITAL, Palo Alto, CA

*Docket No. 00-2; Submitted on the Record;  
Issued October 24, 2000*

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DECISION and ORDER

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

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 the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

Appellant filed a traumatic injury claim (No. 95828-13-1147335) alleging that on November 7, 1997 he sustained injury to his psyche, head, stomach, nervous system, and a reinjury to his right rib cage and lower back.<sup>1</sup> By decision dated March 19, 1998, the Office denied appellant's claim on the grounds that he had not established fact of injury. Appellant subsequently requested reconsideration in an April 24, 1999 letter and forwarded a doctor's first report of occupational injury or illness, signed by Dr. Susan Scholey, an occupational medicine specialist, dated November 8, 1997 and a Kaiser Permanente attending physician's report dated April 13, 1998, also signed by Dr. Scholey.<sup>2</sup>

In a decision dated May 27, 1999, the Office denied the request for reconsideration as untimely and found that the statements appellant made in support of his request and the evidence submitted presented no clear evidence of error on the part of the Office.

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<sup>1</sup> Appellant previously filed other claims for traumatic injury. One such claim was accepted by the Office under Office number 13-1134059. Appellant also filed a notice of occupational disease regarding his emotional condition claim. The emotional condition claim is not before the Board in the present appeal.

<sup>2</sup> Appellant, in his request for reconsideration, alluded to a prior request for reconsideration. However, such a request does not appear in the case file.

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> 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.<sup>6</sup> 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).<sup>7</sup>

The Board finds that since more than one year has elapsed between the date of issuance of the Office's March 19, 1998 merit decision and the date that appellant's request for reconsideration was filed, April 24, 1999, appellant's request for reconsideration is 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.<sup>8</sup> 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.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>11</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Thankamma Mathews*, 44 ECAB 765 (1993).

<sup>5</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>6</sup> 20 C.F.R. § 10.607(a) (1999). 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).

<sup>7</sup> *Thankamma Mathews*, *supra* note 4 at 769; *Jesus D. Sanchez*, *supra* note 5 at 967.

<sup>8</sup> *Thankamma Mathews*, *supra* note 4 at 770.

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>10</sup> *Thankamma Mathews*, *supra* note 4 at 770.

<sup>11</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>12</sup> *Jesus D. Sanchez*, *supra* note 5 at 968.

<sup>13</sup> *Leona N. Travis*, *supra* note 11.

record and whether the new evidence demonstrates clear error on the part of the Office.<sup>14</sup> 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 substantive question as to the correctness of the Office decision.<sup>15</sup> 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.<sup>16</sup>

The Board further finds that the evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's March 19, 1998 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In this regard, appellant submitted a treatment report from Dr. Scholey dated November 8, 1997, in which she notes that appellant stated that he reinjured his right rib cage and lower back while attempting to close a defective cyclone fence. Dr. Scholey also noted that appellant was suffering from occupational problems, which appellant alleged were caused by intimidation and humiliation by his supervisors. Appellant also forwarded an attending physician's report, signed by Dr. Scholey, dated November 19, 1997, which diagnosed a thoracic lumbar strain and chest wall strain. Additionally, she listed appellant's work limitations and noted that appellant should be able to return to full duty on November 24, 1997. Dr. Scholey checked a box "yes" on these form reports to indicate that her findings and diagnosis were consistent with appellant's account of the injury and related to his employment.

However, Dr. Scholey's reports are of little probative value, because she did not address the issue of causal relationship between the diagnosed condition and factors of appellant's federal employment, nor did Dr. Scholey discuss the employment factors which appellant implicated as either causing or contributing to his condition and why they caused or contributed to the claimed condition. Furthermore, the Board has held that checking a box "yes" in support of causal relationship is insufficient to establish a claim in the absence of medical rationale explaining the basis of Dr. Scholey's decision.<sup>17</sup> No medical rationale supporting her causal relationship opinion is contained in the report.

In view of these deficiencies, Dr. Scholey's reports are insufficient to establish clear evidence of error.<sup>18</sup>

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's March 19, 1998 decision, he has failed

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<sup>14</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>15</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>16</sup> *Gregory Griffin*, *supra* note 6.

<sup>17</sup> *Alberta S. Williamson*, 47 ECAB 569 (1996).

<sup>18</sup> *See George Randolph Taylor*, 6 ECAB 986, 988 (1954).

to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

The decision of the Office of Workers' Compensation Programs dated May 27, 1999 is hereby affirmed.

Dated, Washington, DC  
October 24, 2000

David S. Gerson  
Member

Priscilla Anne Schwab  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member