

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of PATRICIA PLATER and DEPARTMENT OF THE AIR FORCE, AIR FORCE  
COMMUNICATIONS COMMAND, ANDREWS AIR FORCE BASE, MD

*Docket No. 99-469; Submitted on the Record;  
Issued September 12, 2000*

---

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The Office accepted that on September 20, 1990 appellant, then a 43-year-old telephone operator sustained low back strain and a contusion to her right hip when she fell over a floorboard at work. She claimed a schedule award on December 9, 1994.

By decision dated June 21, 1995, the Office granted appellant a schedule award for a 12 percent permanent impairment of the right lower extremity.

Appellant claimed another schedule award on August 21, 1996 alleging that she was unable to work due to pains resulting from her accepted injury.

By decision dated January 24, 1997, the Office denied appellant's claim for an increased schedule award on the grounds that the evidence failed to establish that appellant had an additional percentage of impairment due to the work-related injury on September 20, 1990.

By letter dated June 17, 1998 received by the Office on June 22, 1998, appellant requested reconsideration of the January 24, 1997 decision based on new evidence. She submitted a medical report dated May 20, 1998 from Dr. Daniel Ignacio, a Board-certified specialist in physical medicine and rehabilitation, who had been treating her for injuries sustained on September 20, 1990. Dr. Ignacio reported that an electromyography (EMG) study performed on May 6, 1998 revealed evidence along the lumbar spine and the lower limbs consistent with bilateral L5 and S1 radiculopathy and reported her diagnosis of ruptured lumbar disc, bilateral lumbar radiculopathy and coccydynia. He restated his opinion that appellant had a 45 percent impairment of the right lower limb due to the right S1 and right L5 lumbosacral radiculopathy and a 20 percent impairment of the left lower limb due to the left L5 lumbar

radiculopathy. Dr. Ignacio related that appellant was unable to timely file for reconsideration due to ongoing treatment for cancer, unrelated to her work-related injuries. Appellant also submitted office notes from the Washington Hospital Center Cancer Institute evidencing ongoing cancer treatment.

By decision dated August 4, 1998, the Office denied appellant's request for reconsideration on the grounds that it was not dated within the one-year limit and presented no clear evidence of error that the Office's final merit decision was erroneous. In an accompanying memorandum, the Office found that appellant's record of treatment for cancer would not be considered in order to find her application timely as it did not relate to her work injury. The Office also found Dr. Ignacio's May 20, 1998 report repetitious of his June 13, 1996 EMG report previously considered, addressing appellant's impairment of the right lower extremity and proposing 45 percent permanent impairment of this area due to right L5 and S1 lumbar radiculopathy. The Office further found that other medical records submitted after the prior decision, namely Dr. Ignacio's November 4 and January 24, 1997 reports and a September 2, 1997 report from Dr. Michael Kuo, a Board-certified specialist in physical medicine and rehabilitation did not discuss leg impairment and therefore were irrelevant. Appellant also submitted reports from Dr. Shobha Chibdabaram, an attending physician, dated March 25 and April 29, 1997, which the Office found only reiterated Dr. Ignacio's impairment assessment. The Office found that physical therapy notes submitted by appellant after the prior decision were not offered by a physician and therefore not considered medical evidence.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The only decision before the Board in this appeal is the August 4, 1998 decision, in which the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. Since more than one year has elapsed between the date of the Office's merit decisions dated June 21, 1995 and January 24, 1997 and the filing of appellant's appeal on October 26, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

---

<sup>1</sup> 20 C.F.R. § 501.3(d)(2).

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>4</sup> As one such limitation, the Office has stated that it 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. 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>5</sup>

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. The Office issued its last merit decision in this case on January 24, 1997. Appellant's reconsideration request, filed on June 17, 1998 was outside the one-year time limit, therefore, the request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held however 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>6</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 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows clear evidence of error on the part of the Office.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>9</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>10</sup> It is not enough merely to show that the evidence could be

---

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

<sup>5</sup> *See* cases cited *supra* note 3.

<sup>6</sup> *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b) (May 1991).

<sup>8</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> *See Jesus D. Sanchez*, *supra* note 3.

construed so as to produce a contrary conclusion.<sup>11</sup> 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.<sup>12</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 substantial question as to the correctness of the Office decision.<sup>13</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

The additional evidence appellant submitted with her request for reconsideration consisted of her record of treatment for cancer, unrelated to her work-related injury and a medical report from Dr. Ignacio dated May 20, 1998. She had also submitted evidence subsequent to the January 24, 1997, which included physical therapy notes; reports from Dr. Ignacio dated November 4 and January 24, 1997; a September 2, 1997 report from Dr. Kuo and reports from Dr. Chibdabaram dated March 25 and April 29, 1997. The evidence submitted on reconsideration suggests that appellant has attempted to prove that the Office erred in its prior decision and not that her condition has progressed as a result of the employment-related condition entitling her to an additional schedule award.<sup>15</sup> Appellant however has failed to show error in the prior decision. The evidence related to appellant's impairment has been previously considered by the Office and therefore lacks probative value to *prima facie* shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office decision. Dr. Ignacio indicated in his May 20, 1998 report that appellant had a 45 percent impairment of the right lower limb due to the right S1 and right L5 lumbosacral radiculopathy and that she had a 20 percent impairment of the left lower limb due to the left L5 lumbar radiculopathy. He reached the same conclusion in his June 13 and August 8, 1996 reports, considered by the Office prior to its January 24, 1997 decision. Reports from Dr. Chibdabaram, dated March 25 and April 29, 1997, simply reiterated Dr. Ignacio's impairment assessment and Dr. Ignacio's November 4 and January 24, 1997 reports and Dr. Kuo's September 2, 1997 report

---

<sup>11</sup> See *Leona N. Travis*, *supra* note 9.

<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

<sup>14</sup> *Gregory Griffin*, *supra* note 5.

<sup>15</sup> See *Paul R. Reedy*, 45 ECAB 488 (1994). A claimant may seek an increased schedule award if the evidence establishes that she sustained an increased impairment at a later date causally related to her employment injury; See also Federal (FECA) Procedure Manual, Part 2 -- Claims, Schedule Award and Permanent Disability Claims, Chapter 2.808.7(b) (March 1995). This section states that if appellant requests review of an award, the case will be processed as a request for reconsideration, hearing, or appeal, whichever is applicable. To the extent that a claimant is asserting that the original award was erroneous based on his medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or when medical evidence indicates the progression of an employment-related condition, without new exposure to employment factors, resulting in a greater permanent impairment than previously calculated.

did not discuss leg impairment at all. The Office, therefore, properly concluded that appellant had not established clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated August 4, 1998 is affirmed.

Dated, Washington, D.C.  
September 12, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member