

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA G. CHASTAIN and TENNESSEE VALLEY AUTHORITY,
DIVISION OF MEDICAL SERVICES, Chattanooga, TN

*Docket No. 00-2714; Submitted on the Record;
Issued August 10, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's claim 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 the Office properly determined that appellant's claim was not timely filed and failed to present clear evidence of error.

On December 22, 1989 appellant, then a 35-year-old boilermaker welder, filed an occupational disease claim for a hernia like condition and pain in her chest which she felt might be a strain which she noticed on or about November 20, 1989. The Office subsequently developed appellant's chest pain/strain as an alleged thoracic outlet syndrome. The Office, in a February 5, 1990 decision, denied the claim on the grounds that the evidence of record failed to demonstrate that she sustained an injury as alleged. Appellant disagreed with the decision and requested reconsideration several times. Decisions denying modification were issued on February 25, July 29 and December 3, 1992 and February 4, 1993. A decision denying reconsideration was issued March 29, 1993 followed by decisions denying modification on September 13, 1993 and April 21, 1994. A decision denying reconsideration as not timely filed and failing to present clear evidence of error of the last merit decision of April 21, 1994 was issued on November 25, 1996. By letter dated January 7, 2000, appellant again requested reconsideration. By decision dated May 30, 2000, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's May 30, 2000 decision denying appellant's request for a review on the merits of its April 21, 1994 decision denying her claim for benefits due to a hernia and/or thoracic outlet condition. Because more than one year has elapsed between the issuance of the Office's April 21, 1994 decision and August 26, 2000,

the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the April 21, 1994 Office decision.¹

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.² When an application for review is untimely, the Office undertakes a limited review to determine whether the application present clear evidence of error that the Office's final merit decision was in error.³ Since more than one year elapsed from the April 21, 1994 merit decision of the Office to appellant's January 7, 2000 reconsideration request, the request for reconsideration is untimely.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ 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.¹⁰ The Board makes

¹ See 20 C.F.R. § 501.3(d)(2).

² 20 C.F.R. § 10.607(a) (1999).

³ 20 C.F.R. § 10.607(b) (1999).

⁴ *Id.*

⁵ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁶ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁷ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁸ See *Leona N. Travis*, *supra* note 6.

⁹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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.¹¹

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of her application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. In support of her reconsideration request, appellant submitted a letter contending that her appeal was timely because it was made within one year of the February 8, 1999 decision of the Board. The record, however, is devoid of any record of or reference to such a decision by the Board. The Office properly reasoned that a decision issued under another case file would not render appellant's present request for reconsideration timely under the present case file. Within appellant's letter, she references that she has two claims pending. The current claim, case file number 06-482683, deals with the unaccepted occupational conditions of hernia and thoracic outlet syndrome. The other claim, case file number 06-477953, concerns a left wrist strain. Appellant asserted numerous arguments which appear to concern her disagreement with the termination of her benefits under file number 06-477953. Inasmuch as those arguments pertain to another claim, it is irrelevant to the issue in this case which pertain to whether appellant has established fact of injury for her alleged occupational injuries of hernia and thoracic outlet syndrome. Appellant asserts that her chest strain/thoracic outlet syndrome injury was illegally denied as the Office never allowed a medical examination. She argues that the two claims should have been combined and her occupational chest strain/thoracic outlet syndrome should have been included in the statement of accepted facts under case file number 06-477953. The facts of this case indicate that appellant has never established fact of injury for her alleged occupational injuries of hernia and thoracic outlet syndrome. As such, she still maintains the burden of proof to establish the merits of her claim under case file number 06-482683.¹² Accordingly, the Office properly excluded such an unsubstantiated allegation in the statement of accepted facts in case file number 06-477953 and also properly refused to combine the two case files.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

¹¹ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹² *Elaine Pendleton*, 40 ECAB 1143 (1989).

The May 30, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
August 10, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member