

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILDRED HUNLEY, claiming as widow of JAMES R. HUNLEY and
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE,
Knoxville, TN

*Docket No. 99-2187; Submitted on the Record;
Issued January 24, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

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 and finds that 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 claim for compensation (Form CA-5) alleging that the death of her 75-year-old husband on November 26, 1994 was causally related to his accepted employment-related aggravation of his preexisting psychiatric condition. The Office, in an April 17, 1995 decision, denied appellant's claim for death benefits on the grounds that the evidence did not establish a causal relationship between the employee's death from a cerebral vascular accident and his accepted psychiatric condition. By letter dated October 20, 1995, appellant requested reconsideration of the Office's decision. In a decision dated March 5, 1996, the Office declined to reopen appellant's claim for merit review on the grounds that she failed to present any new and relevant evidence or to raise substantive legal questions. By letter dated April 3, 1996, appellant, through counsel, requested reconsideration and submitted additional medical evidence in support of her request. The Office reviewed the merits of the claim and, in an August 12, 1996 decision, denied modification of its prior decision.

By letter dated March 19, 1998, appellant requested reconsideration and submitted additional evidence. By decision dated March 31, 1999, the Office found that appellant's request for reconsideration was untimely as it was made more than one year from the last merit decision and that the evidence did not establish clear evidence of error.

Subsequent to the Office's March 31, 1999 decision, appellant again requested reconsideration and submitted additional evidence and arguments in support of her request. In a

decision dated May 27, 1999, the Office denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

The only decisions before the Board on this appeal are the Office's March 31 and May 27, 1999 decisions denying appellant's requests for a review on the merits of its August 12, 1996 decision denying her claim for death benefits. Because more than one year has elapsed between the issuance of the Office's March 5 and August 12, 1996 merit decisions, and June 29, 1999, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review either the March 5 or August 12, 1996 Office decisions.¹

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ 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.⁵ 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).⁶

Appellant filed her requests for reconsideration on March 19, 1998 and May 19, 1999. As appellant filed the reconsideration requests more than one year from the Office's August 12, 1996 merit decision, the Board finds that the Office properly determined that the requests were untimely.

When 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.⁷ 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.⁸

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁴ *Id.* at 768; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁵ 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).

⁶ *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

⁷ *Thankamma Mathews*, *supra* note 3 at 770.

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³

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.¹⁴ The Board makes an independent determination as to 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.¹⁵

In support of her requests for reconsideration, appellant submitted a medical report dated July 28, 1997 from Dr. Paul M. Watson, a Board-certified family practitioner and treating physician, who stated:

“[Appellant’s] nervous condition and chronic depression were factors in his not taking his medication (Thorazine), blood pressure reducing drugs, diuretics, etc., at prescribed times and in prescribed amounts.

“The mental stress of daily living, along with his nervous condition and chronic depression, was a major contributing factor to his heart attack. This, of course, resulted in his ultimate death.”

The Board finds that the report of Dr. Watson is not sufficient to establish clear evidence of error on the part of the Office as his report is based on an inaccurate medical history. The record contains a copy of the employee's death certificate, also signed by Dr. Watson, which indicates that death was caused by cerebral vascular accident, or stroke, due to hypertension, due to arteriosclerotic heart disease, due to arteriosclerosis and not a heart attack, as indicated by Dr. Watson in his July 28, 1997 report. The medical evidence required to establish a causal

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, *supra* note 4.

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁵ *Gregory Griffin*, *supra* note 5.

relationship, generally, is rationalized medical evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale.¹⁶ As Dr. Watson's report is based on an inaccurate medical history and as the physician failed to explain the discrepancy between the stated cause of death on the death certificate, also signed by him, and his July 28, 1997 opinion as to the cause of the employee's death, his report is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

Appellant also submitted copies of documents previously contained in the record. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.¹⁷

Appellant further submitted an article from a medical journal. However, the Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee.¹⁸

Appellant also submitted a list of medical definitions of words contained in the medical journal article, as well as a narrative statement and copies of her claim, letters from her senator and member of Congress, the Office's last merit decision, a memorandum from the Office, a letter requesting a change of physician and copies of medical evidence dating from 1953, approximately 40 years prior to the employee's death in 1994. The question of whether appellant has established that the employee's death was caused or contributed to by his accepted psychiatric condition is a medical question that can only be resolved by relevant medical opinion evidence.¹⁹ Therefore, the additional evidence submitted by appellant in support of her most recent request for reconsideration is insufficient to establish clear evidence of error.

As the evidence submitted by appellant in support of her untimely reconsideration requests does not manifest on its face that the Office committed an error in its August 12, 1996 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that her applications for review were not timely filed and failed to present clear evidence of error.

¹⁶ See *Joe L. Wilkerson*, 47 ECAB 604 (1996); *Alberta S. Williamson*, 47 ECAB 569 (1996).

¹⁷ See *James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

¹⁸ *William C. Bush*, 40 ECAB 1064 (1989).

¹⁹ *Arnold A. Alley*, 44 ECAB 912 (1993).

The decisions of the Office of Workers' Compensation Programs dated May 27 and March 31, 1999 are hereby affirmed.

Dated, Washington, DC
January 24, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member