

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GAY RICHARDSON and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Allen Park, MI

*Docket No. 00-1828; Submitted on the Record;
Issued June 13, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on the grounds that her request was not timely filed and failed to establish clear evidence of error.

Appellant, a 33-year-old distribution clerk, filed several claims for compensation with the Office. On July 29, 1996 she alleged that she developed tendinitis in both arms due to factors of her federal employment. The Office accepted this claim for sprain and tendinitis of the left hand and wrist. Appellant filed claims for recurrences of disability on October 30, 1996, December 17, 1997 and May 29, 1998. The Office denied these claims by decisions dated January 2, 1997, April 29 and August 11, 1998, respectively.¹

Appellant filed a notice of occupational disease on September 24, 1996 alleging that in June 1995 she developed cramping in her left arm diagnosed as tendinitis in both elbows and shoulders. The Office denied this claim by decision dated January 22, 1997 finding that the medical evidence failed to establish a causal relationship between appellant's employment duties and her condition. Appellant requested reconsideration on January 19, 2000. By decision dated March 10, 2000, the Office found that her request was not timely filed and failed to demonstrate clear evidence of error.

On June 4, 1997 appellant filed a claim alleging that a light fixture fell on her left hand. The Office accepted this claim for contusion of the left hand and wrist.

Appellant filed a claim on June 28, 1999 alleging that she developed a torn rotator cuff on the right and a partial tear on the left due to factors of her federal employment. The Office

¹ As these decisions were issued more than one year prior to the date of appellant's appeal to the Board on April 13, 2000, the Board does not have jurisdiction to review these decisions on appeal. 20 C.F.R. § 501.3(d)(2).

noted that this claim addressed the same injury as her September 24, 1996 claim and combined the case records. The Office did not issue a separate final decision on this claim.

The Board finds that the Office acted within its discretion by refusing to reopen appellant's claim for consideration of the merits.

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 requested reconsideration on January 19, 2000. Since she filed her reconsideration request more than one year from the Office's January 22, 1997 merit decision, the Board finds that the Office properly determined that the said request was untimely.

In those cases where request for reconsideration are 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

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

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. § 10.607. 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).

⁹ *Thankamma Mathews*, *supra* note 3 at 770.

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

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's decision.¹⁴ 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.¹⁵

The evidence submitted by appellant does not raise a substantial question about the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The issue in this case is whether appellant has established a causal relationship between her shoulder conditions and factors of her federal employment. Following the January 22, 1997 merit decision, appellant submitted additional medical evidence diagnosing her shoulder condition as tendon tears. She also submitted reports from physicians addressing the diagnostic studies. However, these reports do not address the issue of causal relationship and are therefore insufficient to meet her burden of proof to establish clear evidence of error in the January 22, 1997 decision.

In a report dated March 20, 1998, Dr. Haydon Moorman, a Board-certified internist, noted appellant's history of injury and performed a physical examination. Dr. Moorman stated:

"It is my opinion that [appellant] has bilateral subacromial/subdeltoid bursitis, pain, numbness and tingling of the left hand due to trauma, bilateral medial epicondylitis, possible bilateral carpal tunnel syndrome, anger and depression. I feel her work as a postal clerk with constant gripping with her hands and repetitive flexing of her wrists with heavy lifting caused and aggravated her shoulder, elbow, wrist and hand problems.... This relationship between her job and her complaints is evident by the fact that her symptoms worsen whenever she is returned to unrestricted full duty."

Although this report offers an opinion on the causal relationship between appellant's shoulder condition and her federal employment, it is not sufficiently probative to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the

¹¹ *Jesus D. Sanchez*, *supra* note 4 at 968.

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

¹³ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁵ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

correctness of the Office's 1997 decision. As the evidence submitted by appellant does not demonstrate clear evidence of error on the part of the Office in its January 22, 1997 decision, the Office properly declined to reopen appellant's claim.

The March 10, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 13, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member