

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VESTA M. HAGLER and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 02-286; Submitted on the Record;
Issued June 25, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On August 6, 1999 appellant, then a 53-year-old mail clerk, filed a claim for traumatic injury (Form CA-1), alleging that she sustained back, neck and arm injuries while helping to dispatch flats of mail from buckets to hampers prior to her shift.

In a decision dated October 1, 1999, the Office found that the evidence of file established that appellant actually experienced the claimed incident, but was insufficient to establish that she sustained a diagnosed condition as a result of the incident. The Office specifically found that the medical evidence of file, which included the results of electromyography (EMG) and cervical and lumbar magnetic resonance imaging (MRI), did not contain a rationalized medical opinion explaining the causal relationship, if any, between appellant's diagnosed conditions and her employment duties.¹

¹ The August 5, 1999 EMG revealed mild chronic C8-T1 radiculopathy, but no evidence of focal right or left median neuropathy at the wrist, right ulnar neuropathy at the wrist or elbow, right median neuropathy at the elbow, or polyneuropathy. A cervical MRI performed on August 25, 1999 revealed: (1) moderate C5-6 central canal stenosis with focal indentation of the spinal cord due to moderate focal disc protrusion; (2) mild caudal right C3-4 foraminal narrowing, multilevel mild to moderate effacement of the central margin of the thecal due to degenerative disc and uncovertebral joint disease; and (3) moderate diffuse chronic degenerative disc changes, most prominent at C4-5 and C5-6. A lumbar MRI also performed on August 25, 1999 revealed: (1) mild left L4-5 foraminal stenosis, moderate caudal left L3-4 and mild caudal L5-S1 foraminal narrowing due to degenerative disc and facet joint disease; and (2) mild to moderate chronic degenerative disc changes.

By letter to the Office dated November 17, 1999, appellant requested an “appeal” of the prior decision. In a response dated November 24, 1999, the Office requested that appellant clarify whether she was requesting an appeal or reconsideration. By letter dated June 10, 2000 and received August 4, 2000, appellant requested reconsideration before the Office and submitted additional medical evidence in support of her request.²

In a decision dated November 1, 2000, the Office denied appellant’s request for reconsideration on the grounds that appellant’s request neither raised substantive legal questions nor included new and relevant evidence and, therefore, was insufficient to warrant review of the prior decision.

By letter received March 12, 2001, appellant requested reconsideration of the Office’s October 1, 1999 decision denying her claim for a traumatic injury. In support of her request, appellant submitted statements from her treating physicians, Dr. Wolinsky and Dr. Pawan Grover, a Board-certified anesthesiologist.

In a decision dated March 22, 2001, the Office found that appellant’s request for reconsideration was not filed within one year of its October 1, 1999 merit decision and that appellant had not established clear evidence of error with respect to her untimely request for reconsideration.

The only decision before the Board on this appeal is the Office’s March 22, 2001 decision which denied appellant’s request for a review of the merits of her case because her request for review was not timely and because it did not establish any evidence of error. As more than one year elapsed from the Office’s October 1, 1999 merit decision and November 1, 2000 decision denying reconsideration and the date of the filing of appellant’s appeal on November 19, 2001, the Board lacks jurisdiction to review the prior decisions.³

The Board finds that the Office properly refused to reopen appellant’s claim for further consideration of the merits of her claim under 5 U.S.C. § 8128(a) of the Federal Employees’ Compensation Act, on the basis that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607(a) and did not show clear evidence of error.

² In a report dated September 22, 1999, Dr. Joel S. Wolinsky, a Board-certified neurologist, diagnosed cervical and lumbosacral radiculopathy and discussed his treatment plan, but did not discuss the cause of the diagnosed conditions. Similarly, in treatment notes dating from August 5, 1999 through May 30, 2000, Dr. Wolinsky noted the history of injury as related to him by appellant, including her job duties and discussed his diagnoses and treatment plan, but did not discuss the relationship, if any, between appellant’s employment and her diagnosed conditions.

³ See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁴

In the present case, the most recent merit decision by the Office was October 1, 1999. As appellant’s March 12, 2001 request for reconsideration was not filed within one year from the date of the most recent merit decision, the Office properly determined that appellant’s application for review was not timely filed pursuant to 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows “clear evidence of error” on the part of the Office.⁵ Office procedures state that the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ 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.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996), states:

(1) Decisions Issued on or After June 1, 1987. The Office's regulations establish a one-year time limit for requesting a reconsideration (20 C.F.R. § 10.138). The one-year period begins on the date of the Original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Board and any merit decision following action by the Board, but does not include preresumption hearing/revision decisions.

The claims examiner should review the file to determine whether the application for reconsideration was filed within one year of the contested decision. As 20 C.F.R. § 10.138 does not state a method of establishing timeliness, it has been administratively determined that the test stated at 28 C.F.R. § 10.131(a) for assessing the timeliness of hearing requests should be used.

(2) Decisions Issued Before June 1, 1987. No time limit applies to requests for reconsideration of these decisions. Therefore, a request for reconsideration may not be denied as untimely unless the claimant was advised of the one-year filing requirement in a later decision denying modification of the contested decision. In these cases, the one-year time limit begins on the date of the later decision which includes the notice of time limitation

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 4.

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

In support of her request for reconsideration, appellant submitted statements from her treating physicians. In a letter dated December 13, 2000, Dr. Wolinsky, a Board-certified neurologist, stated: “Please be informed that [appellant] is a patient under my care for lumbosacral radiculopathy, cervical radiculopathy and carpal tunnel syndrome. It is my professional opinion that these medical conditions are work related.” In a note dated March 7, 2001, Dr. Grover, a Board-certified anesthesiologist, stated simply that he concurred with Dr. Wolinsky’s assessment of appellant’s work-related injury. While both Drs. Wolinsky and Grover conclude that appellant suffers from employment-related medical conditions, a physician’s opinion is not dispositive simply because it is offered by a physician.¹⁴ Medical reports which are not rationalized on the issue of causal relationship are entitled to little probative value and are generally insufficient to meet an employee’s burden of proof.¹⁵ Rationalized medical opinion evidence is medical evidence that includes a physician’s reasoned opinion on whether there is a causal relationship between the claimant’s diagnosed condition and the established incident or factor of employment. 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 explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.¹⁶ As neither Dr. Wolinsky nor Dr. Grover offered any discussion as to why they felt appellant’s medical conditions were related to her employment, the Board finds that their reports do not raise a substantial question as to the correctness of the Office’s October 1, 1999 merit decision and are of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant’s claim. As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office’s October 1, 1999 decision, she has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of her claim.

¹³ *Gregory Griffin, supra* note 5.

¹⁴ *Patricia M. Mitchell*, 48 ECAB 371 (1997).

¹⁵ *Judith J. Montage*, 48 ECAB 292 (1997).

¹⁶ *Charles E. Evans*, 48 ECAB 692 (1997); *Earl D. Smith*, 48 ECAB 615 (1997).

The decision of the Office of Workers' Compensation Programs dated March 22, 2001 is hereby affirmed.¹⁷

Dated, Washington, DC
June 25, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁷ Subsequent to the issuance of the Office's March 22, 2001 decision, appellant submitted additional medical evidence into the record, including a May 31, 2001 report from Dr. Raymond A. Martin, a June 30, 2001 report from Dr. Ulysses W. Watkins, an October 29, 2001 report from Dr. Suhail S. Al-Sahli and additional treatment notes from Drs. Wolinsky and Grover. The Board cannot review this evidence on appeal, as the Board's jurisdiction is limited to reviewing the evidence and arguments that were before the Office at the time of its final decision; *see Lloyd E. Griffin, Jr.*, 46 ECAB 979 (1995); *Carroll R. Davis*, 46 ECAB 361 (1994).