

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GENEVIEVE ALEXIS and SOCIAL SECURITY ADMINISTRATION,
DEPARTMENT OF HEALTH & HUMAN SERVICES, Jamaica, NY

*Docket No. 00-2166; Submitted on the Record;
Issued May 13, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
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.¹

The Board has duly reviewed the case record in the present appeal and finds the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On January 21, 1992 appellant, then a 50-year-old claims authorizer filed a notice of traumatic injury and claim for continuation of pay (Form CA-2), stating that, as she went to sit down at her desk on January 16, 1992, the wheel from her chair snapped off, causing her to brace herself from falling. In doing so, appellant felt a pulling sensation in her right thigh and hip.

Appellant's claim for low back derangement was accepted March 17, 1992.

On July 22, 1998 appellant filed a notice of recurrence (Form CA-2a), alleging that starting on October 27, 1995 and continuing on November 14 through November 27, 1995, July 16 through July 30, 1996 and May 26 through June 13, 1997, she experienced severe back and right hip and thigh pain if she sat too long.

¹ In her letter requesting appeal, dated May 22, 2000, appellant requested that the Board review all decisions made in her case. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filings of the appeal. See 20 C.F.R. §§ 501.2(c), 501.3(d)(2). As appellant's request for appeal was filed on May 31, 2000, the only decision before the Board is the February 25, 2000 decision denying appellant's request for reconsideration as untimely filed.

On October 27, 1998 the Office denied appellant's claim for recurrence of disability, on the basis that appellant's current disability or condition was not causally related to the initial injury of January 16, 1992.

By letter dated December 1, 1999, appellant requested reconsideration of the Office's October 27, 1998 decision. She also forwarded treatment notes from Dr. A.P. Tambakis, a Board-certified orthopedic surgeon, dated March 24, 1998, which had previously been submitted to the record.

In a decision dated February 25, 2000, the Office denied the request for reconsideration as untimely and found that the statements appellant made in support of her request and the evidence submitted presented no clear evidence of error on the part of the Office.

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

The Board finds that since more than one year has elapsed from the date of issuance of the Office's October 27, 1998 merit decision, to the date that appellant's request for reconsideration was filed, December 1, 1999, appellant's request for reconsideration is untimely.

In those cases where 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

² 5 U.S.C. § 8128(a).

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

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

⁵ 20 C.F.R. § 10.607(a) (1999). 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 *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 that was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest its face that the Office committed an error.¹⁰ Evidence that 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 substantive question as to the correctness of the Office 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 Board further finds that the evidence submitted by appellant in support of such request does not raise a substantial question as to the correctness of the Office's October 27, 1998 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In this regard, appellant submitted treatment notes from Dr. Tambakis dated March 24 and July 27, 1998.¹⁶ On the July 27, 1998 notes he noted that a March 10, 1998 magnetic resonance imaging (MRI) scan of appellant's right knee shows that appellant has developed multiple effusions to the knee and an arthroscopy is necessary. Dr. Tambakis also noted that appellant has pain in her back, which causes spasms down both legs. He also noted that, with regard to appellant's back, she has a moderate disability, causally related to her accident on January 16, 1992. Dr. Tambakis also noted that appellant's knee condition was also related to the same accident. However, his report is of little probative value as he failed to offer a diagnosis in regard to appellant's back condition to show that a condition had recurred. The Board finds that the evidence submitted on reconsideration did not raise a

⁹ *Mathews, supra* note 3 at 770.

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

¹¹ *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, supra* note 5.

¹⁶ The March 24, 1998 treatment note was previously of record and had been considered by the Office in the issuance of its October 27, 1998 decision. Since this evidence was repetitious and duplicative of that already contained in the case record, it is not a basis for reopening the claim. *Merlind K. Cannon*, 46 ECAB 581 (1995); *Eugene F. Butler*, 36 ECAB 393 (1984).

substantial question as to the correctness of the Office's October 27, 1998 decision and was insufficient to establish clear evidence of error.

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 27, 1998 decision, she has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

The decision of the Office of Workers' Compensation Programs dated February 25, 2000 is hereby affirmed.

Dated, Washington, DC
May 13, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member