

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA GAIL CHASTAIN and TENNESSEE VALLEY AUTHORITY,
WIDOWS CREEK FOSSIL PLANT, Stevenson, AL

*Docket No. 02-142; Submitted on the Record;
Issued October 3, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's June 11, 2001, request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error.

This is the second appeal in this case. By decision and order issued February 8, 1999,¹ the Board affirmed the August 9 and November 26, 1996 decisions denying appellant's requests for a merit review on the grounds that the evidence submitted was cumulative and repetitious and, therefore, insufficient to warrant a merit review. The law and the facts as set forth in the prior decision and order are incorporated by reference.²

In a June 11, 2001 letter and legal brief, appellant requested reconsideration of the Office's June 1, 1992 decision, terminating her compensation benefits as of June 28, 1992, on the grounds that any disability related to an accepted November 1, 1989 left wrist strain had ceased on or before that date. Appellant asserted that the Office had committed legal error by failing to update the statement of accepted facts since 1992, referring the outdated statement of

¹ Docket No. 97-956.

² The Board notes that appellant filed two occupational disease claims. The claim currently before the Board is Claim No. A06-477953, relating to an accepted left wrist strain sustained during multiple work shifts from November 1 to 7, 1989. At the time, appellant was a 36-year-old boilermaker and welder. She filed a second occupational disease claim on December 22, 1989, assigned Claim No. A06-482683, relating to an alleged "chest strain" sustained on or before November 20, 1989. The Office did not accept this claim or pay any benefits related to it. Also, the Office did not double the two claims. Thus, any decisions or evidence related to Claim No. A06-482683 is not before the Board on the present appeal. The Board notes, however, that, following issuance of the Board's decision and order, appellant made a January 7, 2000, request for reconsideration of the Office's December 5, 1990 decision in Claim No. 06-48263. By decision dated May 30, 2000, for the chest strain, Claim No. 06-482683, the Office denied appellant's January 7, 2000 request for reconsideration of the December 5, 1990 decision, on the grounds that it was not timely filed and failed to present clear evidence of error. The May 30, 2000 decision, is not before the Board on the present appeal as it does not pertain to Claim No. A06-477953.

accepted facts to a second opinion physician and an impartial medical examiner and then relying on their medical opinions although based on an incomplete statement of accepted facts. She also asserted that the Office gave insufficient weight to her attending physicians, who diagnosed thoracic outlet syndrome attributable to work factors. Additionally, appellant argued that the Office erred by not doubling her December 22, 1989 claim for a chest strain with the claim for a left wrist strain, as she believed the two conditions related to the same work factors of working with pneumatic, vibrating drills and grinders.

Accompanying her brief, appellant submitted 22 numbered, tabbed exhibits, including new medical evidence.³

In a January 11, 1999 note, Dr. Stephen D. Spalding, an attending psychiatrist, opined that the Office's handling of appellant's claim was causing her "an undue amount of distress."

In an August 19, 1999 report, Dr. Joseph I. Miller, an attending Board-certified orthopedic surgeon, opined that appellant's bilateral thoracic outlet syndrome was due to "her original accumulative injury in October and November 1989."

In a November 5, 1999 report, Dr. Charles Mathews, an attending Board-certified orthopedic surgeon, reviewed his treatment of appellant since December 1989. Dr. Mathews opined that the accepted left wrist strain, along with nonaccepted left upper extremity pain and bilateral thoracic outlet syndrome, were all due to working with heavy, vibrating grinders and other tools at work.

By decision dated August 13, 2001, the Office denied appellant's June 11, 2001 request for reconsideration, on the grounds that it was not timely filed within one year of the June 1, 1992 decision. The Office conducted a limited review of appellant's request and further denied it on the grounds that it did not present clear evidence of error. The Office noted that the new medical evidence submitted regarding thoracic outlet syndrome was insufficient to establish that the condition was work related, or that she had been disabled for work since June 28, 1992, when her compensation benefits related to the accepted November 1, 1989 left wrist strain were terminated.⁴

The Board finds that the Office properly denied appellant's June 11, 2001 request for a merit review.

³ Many of the documents appellant submitted were copies of evidence previously of record: Exhibits 40, 43, 44, 45, 48, 49 and 51 are copies of prior decisions or Office correspondence; exhibits 41 and 42 are copies of claim forms; Exhibits 46, 47, 50, 57 and 58 are copies of medical evidence previously of record. Also, Exhibits 52, 53, 61 and 62 related to a February 1990 Equal Employment Opportunity complaint, including correspondence, a November 1989 work assignment form and coworker affidavits. These documents are irrelevant to the issue of whether appellant was disabled for work on and after June 28, 1992, due to the accepted November 1, 1989 left wrist strain. Therefore, they are also irrelevant in determining whether the Office committed error regarding this issue.

⁴ The record contains appellant's December 27, 2001 request for reconsideration, submitted to the Office after she filed her appeal with the Board on October 11, 2001. The Office noted that the request for reconsideration was "not logged" due to the Board's request for the file.

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 filing of the appeal. As appellant filed her appeal with the Board on October 11, 2001, the Board has jurisdiction only over the August 13, 2001 denial of merit review.⁵

Section 8128(a) of the Federal Employees' Compensation Act⁶ does not entitle a claimant to review of an Office decision as a matter of right.⁷ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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 its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁸ As one such limitation the Office has stated that it 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.⁹ 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).¹⁰

The Board finds that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on October 10, 1995. As appellant's June 11, 2001 reconsideration request was outside the one-year time limit, which began the day after October 10, 1995, appellant's request for reconsideration was 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.¹¹ Office procedures state that

⁵ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. See 20 C.F.R. § 10.606(b)(2).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ See cases cited *supra* note 7.

¹¹ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 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.¹²

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹³ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷ 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.¹⁸ The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁹

The Board finds that appellant's June 11, 2001 brief requesting reconsideration and the accompanying evidence failed to show clear evidence of error.

The critical issue in the case at the time the Office issued its November 26, 1996 decision, was whether appellant had established that her medical condition and any related disability for work on and after June 28, 1992 was related to an accepted November 1, 1989 left wrist strain. Appellant's June 11, 2001 brief does not provide new, relevant, pertinent evidence on this issue.

Appellant asserts that the Office committed legal error by failing to consider jointly her two occupational disease claims. On November 27, 1989 appellant then a 36-year-old boilermaker and welder, filed a claim for a left wrist strain sustained between November 1 and 7, 1989, attributable to using heavy drills and grinders in the performance of duty. The Office accepted this claim and paid appropriate compensation benefits through June 28, 1992, when it

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

¹³ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ See *Jesus D. Sanchez*, *supra* note 7.

¹⁶ See *Leona N. Travis*, *supra* note 14.

¹⁷ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁸ *Leon D. Faidley, Jr.*, *supra* note 7.

¹⁹ *Gregory Griffin*, *supra* note 11.

terminated appellant's compensation as the work-related disability had ceased as of that date. Appellant filed a second occupational disease claim on December 22, 1989 for "indigestion and heartburn and a pain in [her] chest -- a strain" sustained on or before November 20, 1989. Appellant was later diagnosed with thoracic outlet syndrome. The Office denied this claim and did not combine it with the accepted wrist claim.

The nexus of appellant's arguments on appeal pertain to her belief in the interrelationship of the accepted left wrist strain and what she described as a "chest strain." On appeal, she asserts that these injuries occurred simultaneously. However, appellant filed two separate occupational disease claims for two distinct anatomic regions and did not state explicitly that she believed that the wrist and chest strains occurred at the same time.

Appellant also alleges that the Office committed legal error by failing to mention the diagnosis of thoracic outlet syndrome on a 1992 statement of accepted facts regarding the left wrist strain. The Board notes that what appears to shape appellant's arguments is hindsight. As appellant considered the events of 1989, as time went on, she began to believe that the wrist and chest conditions were part of one large musculoskeletal condition and not two separate conditions as she had claimed. However, in November 1989, appellant did file two separate claims concerning two distinct regions of the body, alleging that the left wrist strain occurred between November 1 and 7, 1989 and the chest strain at an unspecified time prior to November 20, 1989. Thus, the Board finds that the Office was well within its discretion to develop, consider and adjudicate these claims separately and distinctly, in the same manner as appellant presented them to the Office. Therefore, the Board finds appellant's argument that the Office erred by not including various aspects of the chest strain claim on the statement of accepted facts relating to the wrist claim does not establish clear evidence of error.

Accompanying the June 11, 2001 brief, appellant submitted new medical evidence. Dr. Miller, an attending Board-certified orthopedic surgeon, submitted an August 19, 1999 report opining that appellant's bilateral thoracic outlet syndrome was due to "her original accumulative injury in October and November 1989." Similarly, in a November 5, 1999 report, Dr. Mathews, an attending Board-certified orthopedic surgeon, opined that the bilateral thoracic outlet syndrome and the accepted left wrist strain were both due to using heavy grinders at work. However, the chest strain claim and the related allegation concerning thoracic outlet syndrome are not before the Board on the present appeal. Therefore, these reports have no relevance in establishing clear evidence of error in adjudicating the left wrist strain claim.

Appellant also submitted a January 11, 1999 note from Dr. Spalding, an attending psychiatrist, opining that the Office's handling of appellant's claim caused her stress. As this report is completely irrelevant to the issue of the left wrist strain, it cannot demonstrate clear evidence of error.

Thus, the June 11, 2001 brief and accompanying evidence are of no probative value in establishing clear evidence of error and the Office's August 13, 2001 decision finding that appellant's June 11, 2001 request for reconsideration was untimely and did not establish clear evidence of error was correct.

The August 13, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 3, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member