

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SARAH J. SIMS and U.S. POSTAL SERVICE,
POST OFFICE, Hephzibah, GA

*Docket No. 02-1497; Submitted on the Record;
Issued October 28, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

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 Office accepted that on January 21, 1993 appellant then a 38-year-old rural mail carrier, sustained a cervical strain while picking up letter trays at work. On November 23, 1993 appellant filed a recurrence of disability claim alleging that she developed a shoulder condition on or after June 5, 1993 causally related to the accepted injury. Appellant asserted with medical documentation that she sustained tendinitis/impingement syndrome in the left shoulder related to factors of her employment.

By decision dated March 24, 1994, the Office denied the claim on the grounds that the evidence of record failed to demonstrate that the claimed condition on or after June 5, 1993 was causally related to the January 21, 1993 injury.

In a letter dated January 17, 2002, appellant requested reconsideration and submitted evidence in support of the request.

By decision dated February 1, 2002, the Office denied appellant's request for reconsideration of the March 24, 1994 decision, on the grounds that it was untimely filed and failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.¹ 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).²

The Office properly found in its February 1, 2002 decision, that the one-year time limit for filing a request for reconsideration of the Office's March 24, 1994 decision, expired on March 24, 1995 and that the request for reconsideration dated January 17, 2002 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.³ Office procedures state that 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹

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.¹⁰ The Board makes an independent determination of whether a claimant has submitted clear evidence

¹ 20 C.F.R. § 10.607(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁵ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ *Leona N. Travis*, 43 ECAB 227 (1991).

⁷ *Jesus D. Sanchez*, *supra* note 2.

⁸ *Leona N. Travis*, *supra* note 6.

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Leon D. Faidley, Jr.*, *supra* note 2.

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.¹¹

In support of her January 17, 2002 request for reconsideration, appellant submitted various documents, which she argued established her recurrence claim for a shoulder condition. The Board notes that the nonmedical information submitted by appellant is irrelevant since the underlying issue in this case is medical. Appellant's recurrence claim was denied on March 24, 1994 because appellant did not submit any rationalized medical evidence establishing causal relationship between her alleged increase in shoulder symptoms on or about June 5, 1993 and factors of her federal employment. Appellant submitted a March 3, 1994 report from Dr. Robert Brand, a Board-certified orthopedic surgeon, who related the history of appellant's original injury and that he first saw appellant on February 5, 1993. Dr. Brand noted that appellant's problem was centered in the shoulder and he diagnosed impingement syndrome and tendinitis. This report does not provide any medical reasoning to suggest that the condition on or after June 5, 1993 resulted from the original work injury or employment factors. Appellant further submitted a report from a physical therapist dated August 15, 1997, in support of the request, however, a physical therapist is not a physician within the meaning of the Federal Employees' Compensation Act and, therefore, a physical therapist's opinion is not probative.¹²

Appellant also submitted reports dated June 3 and August 7, 1997 from Dr. Gregory Oetting, a Board-certified neurologist, who noted that appellant underwent surgery for a C5-6 degenerative disc condition with cervical radiculopathy on April 21, 1997 and stated that appellant's repetitive movements of lifting, squatting, kneeling and standing while delivering mail for many years, or a traumatic incident contributed to her neck condition and to the acceleration of the degenerative disc condition. In his February 5, 2001 report, Dr. Oetting stated that he felt with reasonable medical certainty that appellant's neck pain and symptomatology, arm pain and disc problem in her neck were related to her employment duties in a lifting incident in 1993.

Appellant further submitted a May 25, 2001 and January 9, 2002 report, from Dr. John Downey, an osteopath, who noted that he initially saw appellant on September 5, 1997 and noted that his findings of persistent neck and arm pain, status post cervical spinal surgery in April 1997, status post carpal tunnel release in May 1994, persistent cervical and upper thoracic myofascial pain. Dr. Downey also noted that electrodiagnostics and magnetic resonance imaging scan studies of the upper extremities showed chronic right cervical radiculopathy and tendinitis of the rotator cuff respectively. Dr. Downey indicated that in the May 25, 2001 report, "In my opinion, her condition is directly related to the work she performs, including lifting heavy objects, repetitive overhead work and sustained shoulder-level work." Dr. Downey stated in the January 9, 2002 report: "It appears upon review of the record that [appellant's] upper thoracic, cervical and left shoulder region symptoms are related to her work-related injury of January 21, 1993." While Drs. Oetting and Downey found that appellant's arm condition alleged in the recurrence claim was related to repetitive duties of her federal employment and the injury

¹¹ *Gregory Griffin, supra* note 3.

¹² *Thomas R. Horsfall*, 48 ECAB 180, 182 n.3 (1996).

of January 21, 1993, their conclusions are not supported by any medical rationale in their reports to raise a substantial question as to the correctness of the denial of appellant's claim.

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.¹³ As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's March 24, 1994 merit decision denying her recurrence claim for a shoulder condition, 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 on February 1, 2002.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the prior decision.

The February 1, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 28, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).