

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAMELA K. BRASBY and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, La Junta, CO

*Docket No. 03-1905; Submitted on the Record;  
Issued December 3, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On February 5, 1991 appellant, a 36-year-old claims representative, filed an occupational disease claim alleging that her carpal tunnel syndrome was due to employment factors.<sup>1</sup> The Office accepted the claim for right carpal tunnel syndrome in a June 28, 1991 decision and authorized surgery.

On April 15, 1996 appellant filed an occupational disease claim alleging that her chronic right tendinitis and bilateral carpal tunnel syndrome were employment related.<sup>2</sup> By decision dated September 29, 1998, the Office accepted appellant's claim for left carpal tunnel syndrome with surgical intervention.<sup>3</sup> On May 12, 1999 the Office placed appellant on the automatic rolls for temporary total disability effective April 25, 1999.

In a report dated February 29, 2000, Dr. Jeffrey M. Hrutkay, a second opinion Board-certified orthopedic surgeon, concluded that appellant had no disability or residuals due to her accepted bilateral carpal tunnel syndrome. He noted that appellant had a negative Phalen's and Tinel's test and that there were no physical findings of residual carpal tunnel syndrome. Any

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<sup>1</sup> This was assigned claim number A12-121160.

<sup>2</sup> This was assigned claim number A12-166575. On May 10, 1999 the Office combined claim number A12-121160 and A12-166575 with A12-166575 listed as the master claim number.

<sup>3</sup> Appellant retired on medical disability retirement effective February 24, 1998. Appellant filed an election form dated February 23, 1999 electing to receive benefits under the Federal Employees' Compensation Act instead of under the Civil Service Retirement System.

disability appellant currently had was due to nonemployment conditions of fibromyalgia and multiple sclerosis in Dr. Hrutkay's opinion.

On May 19, 2000 the Office issued a notice of proposed decision to terminate benefits based upon Dr. Hrutkay's February 29, 2000 report in which he concluded that appellant did not have any disability or residuals due to her accepted bilateral carpal tunnel condition. By decision dated June 21, 2000, the Office finalized the termination of appellant's benefits effective July 15, 2000 on the basis that the evidence established that she no longer had any disability or residuals due to her accepted employment injury.

In a January 30, 2003 letter, appellant's counsel requested reconsideration of the June 21, 2000 decision. Appellant alleged that there was clear evidence of error as the Office failed to address her request to accept bilateral tendinitis as an accepted condition, conflicts in the evidence were not resolved by referral to an impartial medical specialist and Dr. Hrutkay's physical examination notes contained errors. Appellant requested that the Office to accept chronic pain syndrome, fibromyalgia, cumulative trauma disorder, myofascial pain disorder, muscular skeletal disorder and musculogenic pain in the shoulders and neck as accepted conditions based upon medical evidence in the record. In support of her request for reconsideration, appellant submitted a July 13, 1998 report by Dr. Robert J. Foster, a second opinion Board-certified orthopedic surgeon with a subspecialty in hand surgery. The report of Dr. Foster was previously of record.

In a letter dated April 1, 2003, appellant's counsel submitted a February 19, 2003 nerve conduction study by Dr. James A. Farrier, a Board-certified neurologist, who noted normal values for the ulnar and median nerves. He diagnosed paresthesias in both upper extremities.

By decision dated July 3, 2003, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

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.<sup>4</sup> As appellant filed her appeal on July 28, 2003 the only decision properly before the Board is the July 3, 2003 decision denying appellant's request for reconsideration.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her request for reconsideration was untimely filed and failed to present clear evidence of error.

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<sup>4</sup> *Oel Noel Lovell*, 42 ECAB 537 (1991).

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.”<sup>5</sup>

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 the Office will not review a decision unless the application for review is filed within one year of the date of that decision.<sup>6</sup>

In its July 3, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision terminating compensation benefits on June 21, 2000 and appellant’s request for reconsideration was dated January 30, 2003, which was more than one year after June 21, 2000. Accordingly, appellant’s petition for reconsideration was not timely filed.

However, the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review establishes clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>7</sup> The evidence submitted must not only be of sufficient probative value to create a conflicting 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.<sup>8</sup>

Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.<sup>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</sup> This entails a limited review by the Office of the evidence previously of record and whether the new

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>7</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>8</sup> *Annie L. Billingsley*, *supra* note 4.

<sup>9</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>10</sup> *Id.*

evidence demonstrates clear error on the part of the Office.<sup>11</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.<sup>12</sup>

The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to establish clear evidence of error.

The Board has reviewed the evidence submitted with appellant's reconsideration request and concludes that appellant has not established clear evidence of error in this case. The threshold consideration for determining whether evidence presents clear evidence of error by the Office is whether it is relevant to the critical issue in the claim. In this case, the critical issue at the time the Office issued its last merit decision was whether appellant continued to have any residuals or disability due to her accepted bilateral carpal tunnel syndrome.

Appellant submitted three documents pursuant to her January 30, 2003 request for reconsideration: her January 30, 2003 letter; a July 13, 1998 report by Dr. Foster; and a February 19, 2003 nerve conduction study by Dr. Farrier. Each of these submissions must first be evaluated for relevance.

Appellant's January 30, 2003 letter stated that she was requesting reconsideration and alleged errors by the Office in relying on Dr. Hrutkay's report and failing to accept various conditions as employment related. The letter itself does not provide new, relevant, pertinent evidence on the issue of whether appellant continued to have any disability or residuals due to her accepted bilateral carpal tunnel syndrome.

Dr. Foster's report was contained in the record at the time the Office terminated appellant's compensation benefits. Moreover, the Office had referred appellant to Dr. Foster for a second opinion and he issued his report on July 13, 1998, almost two years prior to the Office terminating appellant's benefits. As Dr. Foster's report was in the record at the time of the decision and considered by the Office, it is irrelevant to the critical issue in the case and it does not establish clear evidence of error by the Office.

Similarly, the February 19, 2003 nerve conduction study shows normal values for the ulnar and median nerve and diagnosed paresthesias in both upper extremities. This report does not address appellant's disability on or after June 21, 2000 the date benefits were terminated. Moreover, the medical evidence does not address any cause for this condition or mention any work factors. Thus, the nerve conduction study is not relevant to the critical issue in the claim and does not establish clear evidence of error.

Thus, the January 30, 2003 letter and accompanying evidence does not establish clear evidence of error. The Office's July 3, 2003 decision finding that appellant's January 30, 2003

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<sup>11</sup> *Id.*

<sup>12</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

request for reconsideration was untimely and did not establish clear evidence of error was correct.

The decision of the Office of Workers' Compensation Programs dated July 3, 2003 is hereby affirmed.

Dated, Washington, DC  
December 3, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member