

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILDRED E. KOCH and DEPARTMENT OF DEFENSE,
CONTRACT ADMINISTRATION SERVICES, Philadelphia, PA

*Docket No. 03-113; Submitted on the Record;
Issued February 25, 2003*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

Appellant's claim, filed on August 26, 1969 after she lost her footing on a ramp, fell to her knees and was then struck by a metal coat rack on October 11, 1967, was accepted for right sciatica due to a probably mild herniated disc on April 5, 1972. She continued working but received intermittent wage-loss compensation and medical benefits.

Appellant retired on disability effective April 13, 1979 and claimed wage-loss compensation. The Office denied her claim on March 14, 1984 on the grounds that the medical evidence was insufficient to establish a causal relationship between the 1967 injury and any subsequent disability. The Office noted that appellant had sustained two intervening incidents, a mugging and an escalator fall that had resulted in back injuries.

Appellant requested reconsideration, which the Office denied on March 6, 1990. On July 3, 1991 appellant requested reconsideration and submitted a report from a licensed psychologist and other additional medical evidence. On October 4, 1991 the Office denied modification of its prior decision, finding the medical evidence insufficiently probative to establish a causal relationship between the 1967 injury and appellant's current back condition.

Appellant appealed and the Board affirmed the denial of benefits.¹

On May 3, 2002 appellant requested reconsideration and submitted a June 12, 1993 letter from Drs. David M. Pudles, Geoffrey Temple and Joan Grzybowski, all osteopathic practitioners. They stated that, based on appellant's history and review of her records, her

¹ Docket No. 92-361 (issued December 4, 1992).

degenerative disc disease and right lower extremity sciatica was causally related to the 1967 work injury.

On July 22, 2002 the Office denied appellant's request as untimely filed and lacking 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.

Section 8128(a) of the Federal Employees' Compensation Act² vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³

"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."⁴

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).⁶ This section does not mandate that the Office review a final decision simply upon request by a claimant.

In this case, appellant's letter requesting reconsideration of the last merit decision dated October 4, 1991 was dated May 3, 2002, many years beyond the one-year deadline and was, therefore, untimely.

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8128(a).

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Diane Matchem*, 48 ECAB 532, 533 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁸ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report, that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.¹¹

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also 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

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 The Board makes 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 a merit review in the face of such evidence.¹⁴

In this case, appellant submitted a June 12, 1993 report from three osteopaths with her request that the Office reconsider the denial of compensation. While these physicians found a causal relationship between appellant's sciatica and the 1967 employment incident, this report is insufficient to show that the Office erred in determining that appellant had failed to meet her burden of proof to establish that her back condition was causally related to work factors. In fact, these physicians previously treated appellant and diagnosed lumbar radiculopathy but failed to address the issue of causal relationship.

⁷ 20 C.F.R. § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Annie Billingsley*, 50 ECAB 210, 212, n. 12 (1998); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.a. (June 2002).

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

The Board finds that a later report rectifying this omission does not meet the clear evidence of error standard.¹⁵ Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review.

The July 22, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
February 25, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁵ See *Fidel E. Perez*, 48 ECAB 663, 665 (1997) (finding that medical evidence sufficient to create a conflict of opinion on whether appellant's work-related disc disease had resolved was insufficient to establish clear evidence of error).