

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA A. LYNCH and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, El Monte, CA

*Docket No. 03-936; Submitted on the Record;
Issued June 6, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly declined 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 July 2, 2001 appellant, a 43-year-old tax auditor, filed a traumatic injury claim alleging that on June 22, 2001 she sustained physical and emotional injuries while in the performance of duty. She described her injuries as neck strain and stress. Appellant explained that due to stress from work her blood pressure rose, which caused her to suddenly faint in the hallway. Appellant also stated she injured her neck. She stopped work on June 22, 2001.

In support of her claim, appellant submitted June 25 and July 2, 2002 treatment records from Kaiser Permanente, which included diagnoses of neck strain, low back strain and job-related stress. The treatment records identified June 22, 2002 as the date of injury. Appellant also submitted a July 2, 2001 physical therapy referral slip with a reported diagnosis of low back strain and a June 27, 2001 date of onset.

On July 31, 2001 the Office requested additional factual and medical information. In response, the Office received another form report from Kaiser Permanente that was largely illegible.

In a decision dated September 20, 2001, the Office denied appellant's claim for compensation as she did not establish fact of injury. The Office explained that appellant failed to identify and provide any evidence of any specific work-related events or incidents that purportedly caused her condition.

On October 21, 2002 appellant requested reconsideration. Appellant stated that she felt the denial was basically made due to the fact that she could not prove "job stress." Appellant also stated that stress was not the main issue and the key factor was that she fell at work and

suffered an injury. Appellant noted that the first diagnosis was a neck strain and stress and it was also determined that she suffered a lumbar strain related to the fall. Additionally, appellant submitted a December 7, 2001 report from Dr. Ken Honsik, a Board-certified family practitioner, who indicated that based on a review of the medical records, appellant “sustained a back injury at work on June 22nd and was out until August 12th. Her diagnosis was lumbar strain.”

By decision dated December 13, 2002, the Office denied appellant’s request for reconsideration on the basis that the request was untimely and appellant failed to present clear evidence of error.

The Board finds that the Office properly declined to reopen appellant’s case for merit review under 5 U.S.C. § 8128(a).¹

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 payment of compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.⁶ Appellant failed to meet this particular requirement in that the Office issued its last merit decision on September 20, 2001 and appellant’s request for reconsideration was dated October 21, 2002.

In those instances where a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office in its “most recent merit decision.”⁷ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁸

¹ The only decision before the Board on appeal is the Office’s December 13, 2002 decision denying appellant’s request for reconsideration. Because more than one year has elapsed between the Office’s last merit decision dated September 20, 2001 and the filing of this appeal on February 20, 2003 the Board lacks jurisdiction to review the merits of appellant’s claim. 20 C.F.R. §§ 501.2(c); 501.3(d)(2); *see John Reese*, 49 ECAB 397, 399 (1998).

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607 (1999).

⁶ 20 C.F.R. § 10.607(a) (1999).

⁷ 20 C.F.R. § 10.607(b) (1999).

⁸ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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 it must be apparent on 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 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.¹³

The issue for purposes of establishing clear evidence of error in this case is whether there was an error in the Office's determination that appellant did not meet her burden of proof to establish that she was injured in the performance of duty. On reconsideration, appellant stated that she felt her claim was denied because she could not prove job stress. She explained that the key factor was that she fell at work and her first diagnosis was neck strain and stress, adding that lumbar strain was subsequently diagnosed. The information in the record indicates appellant alleged that she sustained an injury at work when she suddenly fainted due to stress from work and sustained a neck injury. Although appellant added an additional detail that she suffered a lumbar strain as a result of her on-the-job injury, this information does not raise a substantial question as to the correctness of the Office's decision.

In the instant case, the Office denied appellant's claim as she did not establish fact of injury. The Office determined that appellant failed to identify and provide any evidence of any specific work-related events or incidents that purportedly caused her condition. Appellant also failed to provide a comprehensive medical report demonstrating a causal relationship between her diagnosed conditions and her employment. Appellant's additional information in her request is, therefore, insufficient to establish clear evidence of error.

Appellant also submitted a December 7, 2001 report from Dr. Honsik who indicated that appellant suffered a back injury at work on June 22, 2001. However, Dr. Honsik's report is of little probative value as he provided no medical rationale explaining the reasons for his conclusion.¹⁴ Additionally, the physician failed to describe how appellant sustained her injury.

The Board finds that the evidence submitted on reconsideration did not raise a substantial question as to the correctness of the Office's September 20, 2001 decision and was insufficient

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

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

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954).

to establish clear evidence of error. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

The December 13, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 6, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member