

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANETTE MOSLEY and DEPARTMENT OF JUSTICE,
METROPOLITAN CORRECTIONAL CENTER, New York, NY

*Docket No. 03-27; Submitted on the Record;
Issued May 14, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's April 19, 2002 request for a merit review on the grounds that it was untimely filed and failed to establish clear evidence of error.

This is the second appeal before the Board in this case. By decision dated November 30, 1981,¹ the Board affirmed an April 21, 1981 decision of the Office² finding that appellant submitted insufficient evidence to establish disability for work on and after July 31, 1978. The law and facts of the case as set forth in the Board's November 30, 1981 decision and order are hereby incorporated by reference.

In February 26, 1982 and March 14, 1983 letters, appellant requested reconsideration. She asserted that she continued to have periods of disability, headaches, left upper extremity pain and paresthesias, pain throughout the entire left side of her body and psychiatric symptoms attributable to the June 14, 1978 injury. She submitted additional evidence.

In reports from October 1981 to May 1982, Dr. Arthur M. Meisel, an attending Board-certified psychiatrist and neurologist, stated that appellant continued to complain of subjective left-upper extremity symptoms, headaches and anxiety. Dr. Meisel diagnosed a somatic preoccupation.

¹ Docket No. 81-1764 (issued November 30, 1981).

² The April 21, 1981 decision found that appellant was disabled for work from June 14 to July 31, 1978 due to an electrocution injury to the left upper extremity and right foot, caused by live wires from office equipment coming in contact with a metal door which appellant was holding open. The Office based this opinion on the October 1980 report of Dr. Max Helfand, a Board-certified psychiatrist, neurologist and impartial medical examiner, who found that appellant showed no evidence of a localized neurologic lesion and that her varied and inconsistent symptoms were not consistent with any known pathology. Appellant submitted treatment notes from June 15, 1978 through 1980, diagnosing cervical radiculopathy, headaches, depression, anxiety and postelectric shock psychosis. The Office accepted that appellant sustained "tender muscle tiss[ue] of arms, electrical shock left hand."

By decision dated May 18, 1983, the Office denied modification on the grounds that the medical evidence submitted did not contain sufficient rationale explaining how and why the June 14, 1978 injury would continue to cause any medical condition.

Appellant disagreed with this decision and in a January 7, 1985 letter again requested reconsideration.

By letter decision dated January 15, 1985 and reissued June 14 and September 23, 1985, the Office denied appellant's request for reconsideration on the grounds that her January 7, 1985 letter did not contain new, relevant legal arguments sufficient to warrant a merit review of the May 18, 1983 decision.

On June 20, 1985 appellant filed a claim alleging that she sustained a March 6, 1985 recurrence of disability.³ She described pain and a burning sensation in both eyes and all extremities. Appellant submitted additional medical evidence.⁴

Dr. John P. Liu, an attending Board-certified neurologist, submitted reports and chart notes from May through November 1985 describing appellant's symptoms and finding no objective abnormalities on neurologic tests. Dr. Liu diagnosed post-traumatic stress disorder and chronic pain syndrome.

In an April 6, 1983 report, Dr. Earl, an emergency room physician, diagnosed edema of the left lower extremity. Dr. Earl did not attribute this edema to any particular cause.

By decision dated January 8, 1986, the Office denied modification on the grounds that appellant submitted insufficient rationalized medical evidence addressing causal relationship.

Appellant disagreed with this decision and in a January 27, 1986 letter again requested reconsideration. She submitted additional medical evidence.

Appellant submitted physical therapy notes and reports from a social worker dated throughout 1985. A July 30, 1985 electromyogram (EMG) and nerve conduction velocity (NCV) tests of the median nerves bilaterally showed no abnormalities.

In an August 1, 1985 report, Dr. Howard L. Rosner, an attending Board-certified anesthesiologist specializing in pain management, provided a history of injury and treatment. On examination Dr. Rosner observed an abnormal gait, decreased balance, decreased cold sensation in the left arm, exquisite hypesthesia over the entire left side of the body and a mild spasm of the left trapezius. He also noted that appellant was depressed, but responding well to weekly psychotherapy. Dr. Rosen diagnosed a chronic pain syndrome secondary to the injury from alternating current on June 14, 1978, cervical disc disease and rule out organic disease. He explained that alternating "current travels along the path of least resistance along nerves and blood vessels and could cause damage without tissue damage apparent.... Paralysis lasting a

³ At the time appellant filed her claim for recurrence of disability, she was employed by the Environmental Protection Agency in Manhattan.

⁴ On October 9, 1985 appellant filed a claim for wage-loss compensation from March 6, 1985 onward.

month does indicate nervous involvement, relieved by rubbing. Decreased sensitivity of the skin indicates possible afferent fiber damage.”

By decision dated May 13, 1986, the Office denied appellant’s claim for a March 6, 1985 recurrence of disability, on the grounds that appellant submitted insufficient rationalized medical evidence to establish a causal relationship between the June 14, 1978 injury and her medical condition on and after March 6, 1985.

Appellant disagreed with this decision and in a June 9, 1986 letter, requested an oral hearing before a representative of the Office’s Branch of Hearings and Review. She submitted a February 20, 1986 report from Dr. Rosner diagnosing post-traumatic stress disorder and a chronic pain syndrome.

By decision dated September 8, 1986 and finalized September 10, 1986, an Office hearing representative set aside the Office’s May 13, 1986 decision. The hearing representative found that Dr. Rosner’s reports required further development and directed that they be referred to Dr. Max Helfand, a Board-certified psychiatrist and neurologist, who served as impartial medical examiner in October 1980. The hearing representative directed Dr. Helfand to perform a complete psychiatric and neurologic examination.

On February 16, 1987 the Office referred appellant, a statement of accepted facts and a copy of the medical record to Dr. Arnold E. Merriam, a Board-certified psychiatrist and neurologist of professorial rank, to obtain an impartial medical opinion regarding whether appellant continued to be disabled for work due to the June 14, 1987 injury.

In a March 20, 1987 report, Dr. Merriam stated that appellant had no work limitations. Dr. Merriam opined that appellant did not have post-traumatic stress disorder and that there was no objective evidence on examination or by history of nerve injury, neurologic disease, anterior horn cell degeneration or myelopathy that are indicative of electrical nerve injury. Dr. Merriam also submitted a medical textbook excerpt addressing “electrical lesions of the nervous system.”

Appellant submitted a November 6, 1986 report from Dr. Rosner and Dr. Robert H. Dworkin, a Board-certified psychiatrist. The physicians opined that hypnosis, psychotherapy and medication had been effective in ameliorating appellant’s post-traumatic stress disorder. Appellant was able to return to full duty as of September 29, 1986, with significant reduction of both her physical and psychiatric symptoms and chronic pain syndrome.

By decision dated May 5, 1987, the Office again denied appellant’s claim for a March 6, 1985 recurrence of disability on the grounds that she submitted insufficient evidence to establish causal relationship, based on Dr. Merriam’s report as the weight of the medical evidence. The Office further found that appellant no longer had any disability related to the June 14, 1978 injury.

Appellant disagreed with this decision and in June 1 and August 18, 1988 letters requested reconsideration.

By decision dated March 24, 1989, the Office denied appellant's June 1, 1988 request for reconsideration of the May 5, 1987 decision on the grounds that it was untimely filed more than one year following issuance of the decision.

Appellant disagreed with this decision and again requested reconsideration in a July 12, 1989 letter. She submitted additional evidence.

In a May 23, 1989 report, Dr. Thomas F. Scott, an attending Board-certified anesthesiologist, provided a history of injury and treatment. On examination Dr. Scott noted tenderness in the left bicep, triceps and paracervical muscles. He diagnosed "[p]robable depression with sleep disturbance and some vegetative symptoms," and a chronic pain syndrome likely a recurrence of a myofascial pain syndrome caused by the 1978 electric shock. Dr. Scott stated that he found no objective neurologic dysfunction, noted that appellant attributed her pain beginning to stress at work. He prescribed medication.⁵

In a July 31, 1989 report, Dr. R. Norman Harden, an attending Board-certified anesthesiologist, provided a history of injury and treatment. Dr. Harden diagnosed "probable RSD [reflex sympathetic dystrophy syndrome] of the left arm and shoulder," "question" myofascial pain syndrome and "question neurogenic damage from electrocution."

In an August 28, 1989 report, Dr. William G. Kee, an attending Board-certified anesthesiologist, noted that appellant reported stress due to work issues, living with and caring for her grandmother who had Alzheimer's disease. Dr. Kee stated that appellant attributed her recent exacerbation of left arm and neck pain to these stresses and was nearly pain free when she was able to relax.

By decision dated October 25, 1989, the Office denied appellant's request for reconsideration on the grounds that appellant's letters and the medical evidence submitted were insufficient to warrant reopening appellant's claim on the merits. The Office found that none of the evidence submitted established that the Office erred in issuing the prior decision. The Office further found that the medical reports submitted were speculative on the issue of causal relationship or related appellant's condition to current job and home life stresses.

In an April 19, 2002 letter, appellant again requested reconsideration of the Office's May 5, 1987 decision. Appellant asserted that she experienced constant pain for 24 years since the June 14, 1978 injury, which now required physical therapy and anesthetic injections. Appellant also attributed headaches, depression, anxiety, hypersensitivity over the entire left side of her body, altered temperature in the left arm, transient paralysis in the left arm and neck pain, to the accepted injury. She submitted additional evidence.

In reports from January 1997 to October 1999, Dr. Davis-Seagle, an attending family practitioner, noted appellant's complaints of neck and left upper extremity pain. Dr. Davis-Seagle diagnosed rhinitis, sinusitis, allergies, borderline hypertension, epigastric pain and iron deficiency anemia.

⁵ Appellant also submitted unsigned chart notes from March 18 to May 12, 1989 regarding treatment for cervical spasm.

In a December 15, 2001 report, Dr. “KSA” diagnosed “[p]ain secondary to trauma of electrical shock,” prescribed anti-anxiety medication and referred appellant to a pain management clinic.

In a report dated January 12, 2002, Dr. “ANG” noted chronic left arm pain since the 1978 accident and a normal examination of the left arm. The physician diagnosed a “[p]robable complex regional pain syndrome,” hypertension, dysthymia and anxiety. He prescribed medication and referred her to a pain management clinic.

In a January 22, 2002 report, Dr. Thomas A. Duc, an attending Board-certified neurologist, diagnosed extremity and myofascial pain, noting that appellant had a questionable allodynia which was not apparent when appellant was distracted.

A January 25, 2002 cervical magnetic resonance imaging (MRI) report showed degenerative disc disease from C3 to C6 without herniation or significant foraminal stenosis.⁶

By decision dated July 11, 2002, the Office denied appellant’s request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error. The Office found that appellant’s April 19, 2002 request was not filed within one year of the Office’s May 5, 1987 decision. The Office conducted a limited review of appellant’s April 19, 2002 letter and the accompanying medical evidence and found that it did not present new, relevant evidence or argument establishing that the Office erred in issuing its May 5, 1987 decision. The Office noted that the new medical evidence submitted was also irrelevant to establishing continuing disability, as it did not contain medical rationale addressing “the issue of any causal connection between [her] present pain complaints and [the] June 14, 1978 work injury....”

Appellant filed her appeal with the Board on September 30, 2002.⁷ She asserted that she continued to experience symptoms attributable to the June 14, 1978 injury.

The Board finds that the Office properly denied appellant’s April 19, 2002 request for a merit review.

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 September 30, 2002, the Board has jurisdiction only over the July 11, 2002 denial of merit review. Thus, the Board does not have jurisdiction over

⁶ Appellant also submitted October 1997 to January 2001 prescription records for analgesics, anti-inflammatories and anti-depressants, a November 11, 1998 normal thyroid ultrasound report, February 12, 1999 lab results showing a low white cell count and February and March 2002 physical therapy notes. These reports are not signed by a physician and do not address causal relationship.

⁷ Following issuance of the Office’s July 11, 2002 decision, appellant submitted additional medical evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

the May 5, 1987 decision denying appellant's claim for a March 6, 1985 recurrence of disability, or the March 24 and October 25, 1989 denials of reconsideration.⁸

Section 8128(a) of the Federal Employees' Compensation Act⁹ does not entitle a claimant to review of an Office decision as a matter of right.¹⁰ 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).¹¹ 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.¹² 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).¹³

The Board finds that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on May 5, 1987. As appellant's April 19, 2002 reconsideration request was outside the one-year time limit which began the day after May 5, 1987, 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.¹⁴ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing

⁸ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁹ 5 U.S.C. § 8128(a).

¹⁰ *Jesus D. Sanchez*, 41 ECAB 964 (1900); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ 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; or (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).

¹² 20 C.F.R. § 10.607(a).

¹³ *See* cases cited *supra* note 10.

¹⁴ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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.¹⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁹ 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.²⁰ 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.²¹ 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.²²

The Board finds that appellant's April 19, 2002 letter requesting reconsideration failed to show clear evidence of error. This letter merely repeats appellant's previous descriptions of her subjective symptoms of pain and paresthesias throughout the left side of her body, mental status changes, headaches, attacks of pain and other neurologic symptoms. Appellant reiterated her belief that her condition continued to be related to the June 14, 1978 injury. This letter does not contain new, relevant, pertinent evidence or legal argument. The letter is essentially the same as appellant's previous requests for reconsideration. Thus, the April 19, 2002 letter does not establish that the Office's May 5, 1987 decision was clearly in error or raise a substantial question as to the correctness of that decision.

Accompanying the April 19, 2002 letter, appellant also submitted additional medical evidence from her attending physicians, including reports from Dr. Davis-Seagle, Dr. Duc, two family practitioners and a January 25, 2002 cervical MRI report. These reports are new

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

¹⁶ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁷ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁸ See *Jesus D. Sanchez*, *supra* note 10.

¹⁹ See *Leona N. Travis*, *supra* note 17.

²⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

²¹ *Leon D. Faidley, Jr.*, *supra* note 10.

²² *Gregory Griffin*, *supra* note 14.

evidence. Therefore, they must be evaluated to determine if they are also relevant to the critical issue in the case.

At the time the Office issued its May 5, 1987 decision, the last merit decision of record, the critical issue was whether the effects of appellant's June 14, 1978 injury had ceased by July 31, 1978, the day she returned to work and whether she sustained a recurrence of disability beginning March 6, 1985. Therefore, to be considered relevant, the new medical evidence must contain definite diagnoses of injury-related conditions, as well as the physician's explanation of how and why the June 14, 1978 injury would cause or aggravate any medical condition on and after July 31, 1978. The new medical reports diagnose rhinitis, sinusitis, allergies, borderline hypertension, epigastric pain, iron deficiency anemia, dysthymia, anxiety, a probable complex regional pain syndrome, myofascial pain and degenerative disc disease from C3 to C6. However, appellant's physicians did not set forth their medical reasoning explaining how the June 14, 1978 electrocution incident would cause any of the above conditions on and after July 31, 1978, including the period from March 6, 1985 onward. Therefore, the medical evidence appellant submitted accompanying her April 19, 2002 request for reconsideration is of diminished probative value in establishing clear evidence of error. Thus, the Office's July 11, 2002 decision finding that appellant's April 19, 2002 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 11, 2002 is hereby affirmed.

Dated, Washington, DC
May 14, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member