

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA KENDRA and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Chicago, IL

*Docket No. 03-1287; Submitted on the Record;
Issued September 23, 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 determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

In this case, the Office accepted that appellant sustained a lumbosacral sprain in the performance of duty on August 16, 1996 while bending to unpack boxes and fill a supply cabinet. The Office also accepted that on January 14, 1997 appellant suffered a temporary aggravation of her preexisting spondylosis. On April 8, 1997 appellant filed a claim for recurrence of disability claiming that she had a sudden onset of disabling pain in her left hip, which was related to her previous injuries. By decision dated October 2, 1997, the Office denied appellant's claim for recurrence of disability beginning April 8, 1997 finding that the medical evidence did not show a causal connection between her disability and the accepted employment injuries. Appellant requested reconsideration and the Office denied modification of its previous decision on October 20, 1998. In a nonmerit decision dated February 8, 2000, the Office also denied appellant's request for reconsideration.

Appellant appealed to the Board. In a decision dated June 8, 2001, the Board found that the Office acted within its discretion in denying appellant's request for reconsideration. Appellant disagreed with the Board's decision and filed a petition for reconsideration before the Board. The Board denied this petition by decision dated October 12, 2001.

Following the Board's June 8, 2001 decision and October 12, 2001 decision denying her petition for reconsideration, appellant requested reconsideration from the Office by letter dated October 8, 2002. In support of her request, appellant submitted an x-ray report of the lumbar spine dated June 3, 2002, a magnetic resonance imaging (MRI) scan of the lumbar spine dated June 7, 2002, and a progress note from Dr. Anthony DiGianfilippo, a Board-certified neurological surgeon, dated July 19, 2002. By decision dated January 21, 2003, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that appellant's request was not timely filed and did not demonstrate 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.¹ Because more than one year has elapsed between the issuance of the last merit decision on October 20, 1998 and April 22, 2003, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the October 20, 1998 decision and any preceding decisions. Therefore, the only decision before the Board is the Office's January 21, 2003 nonmerit decision denying appellant's application for a review.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits.

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 compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.⁵ 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).⁶

Appellant requested reconsideration on October 8, 2002. Since appellant filed her reconsideration request more than one year from the last merit decision of record, *i.e.*, the Office's October 20, 1998 decision, the Board finds that the Office properly determined that said request was untimely.

According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including, *inter alia*, any merit decision by the Board.⁷

In those cases where requests for reconsideration are 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.⁸ Office procedures state that the

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁴ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁵ 20 C.F.R. § 10.607. The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (May 1991).

⁸ *Thankamma Mathews*, *supra* note 3 at 770.

Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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's decision.¹⁵ The Board must make 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 merit review in the face of such evidence.¹⁶

The evidence submitted by appellant does not establish clear evidence of error on the part of the Office since it does not raise a substantial question as to the correctness of the most recent Office merit decision on October 20, 1998, and is therefore of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The medical evidence appellant submitted dated June and July 2002 does not contain a physician's medical opinion that she sustained an employment-related recurrence of disability on or after April 8, 1997, causally related to the accepted employment injuries.

Appellant claimed that Dr. DiGianfilippo opined in his July 19, 2002 progress note that her work injury in 1996 aggravated her underlying back condition and resulted in her current symptomology. However, Dr. DiGianfilippo does not clearly state that appellant's current condition is the result of her 1996 employment injury. His report is very speculative regarding causal relationship between appellant's earlier employment injury in 1996 and her current

⁹ See Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹⁰ *Thankamma Mathews*, *supra* note 3 at 770.

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Jesus D. Sanchez*, *supra* note 4 at 968.

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁶ *Gregory Griffin*, *supra* note 5.

condition and symptomology. Since his report does not contain a clear opinion that appellant sustained an employment-related recurrence of disability on or after April 8, 1997, it is not relevant and does not show clear evidence of error on the part of the Office.

Appellant also implied that the June 2002 MRI and x-ray of the lumbar spine established that her condition had worsened when compared to earlier tests. These tests by themselves without a physician's supporting opinion that appellant sustained a recurrence of disability causally related to the accepted employment injuries, are insufficient to show clear evidence of error.

Appellant did not submit any other evidence which contained a physician's opinion that she sustained a recurrence of disability on or after April 8, 1997, causally related to her accepted employment injuries. She also did not raise any new legal contentions with respect to the Office's October 20, 1998 merit decision.

As appellant failed to establish clear evidence of error on the part of the Office the Board finds that the Office properly denied her request for reconsideration.

Accordingly, the January 21, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 23, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member