

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HENRY J. COLLINS and DEPARTMENT OF THE AIR FORCE,  
STRATEGIC AIR COMMAND, PLATTSBURG AIR FORCE BASE, NY

*Docket No. 03-1785; Submitted on the Record;  
Issued September 26, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not contain clear evidence of error.

This case has previously been before the Board on appeal. In its January 23, 1998 decision,<sup>1</sup> the Board found that appellant had failed to establish that he sustained a recurrence of disability on or after March 8, 1992 due to his November 11, 1988 employment injury of cervical radiculitis. The facts and the circumstance of the case as set forth in the Board's prior decision are adopted herein by reference.

Following the Board's January 23, 1998 merit decision, appellant through his attorney, requested reconsideration on August 30, 2001 alleging that the medical evidence established clear evidence of error on the part of the Office. In support of his untimely request for reconsideration, appellant resubmitted medical evidence already considered by the Board as well as new medical evidence. By decision dated March 27, 2003, the Office declined to reopen appellant's claim for consideration of the merits noting that his request for reconsideration was not timely filed and finding that the evidence submitted in support of his request did not establish clear evidence of error in the prior merit decisions.

The Board finds that the Office properly refused to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not contain clear evidence of error.

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<sup>1</sup> Docket No. 96-1002 (issued January 23, 1998).

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> 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.<sup>5</sup> 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).<sup>6</sup>

Appellant requested reconsideration on August 30, 2001. Since appellant filed his reconsideration request more than one year from the Board's January 23, 1998 merit decision, the Board finds that the Office properly determined that said request was untimely.

In those cases where requests for reconsideration are not timely filed, 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 in accordance with section 10.607(b) of its regulations.<sup>7</sup> Office regulations state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

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

<sup>5</sup> 20 C.F.R. §§ 10.607; 10.608(b). 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).

<sup>6</sup> 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

<sup>7</sup> *Thankamma Mathews*, *supra* note 3 at 770.

<sup>8</sup> 20 C.F.R. § 10.607(b).

<sup>9</sup> *Thankamma Mathews*, *supra* note 3 at 770.

<sup>10</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>11</sup> *Jesus D. Sanchez*, *supra* note 4 at 968.

<sup>12</sup> *Leona N. Travis*, *supra* note 10.

and whether the new evidence demonstrates clear error on the part of the Office.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

The underlying issue in this case is whether appellant has established that his accepted employment injury of cervical radiculitis resulted in his C6-7 anterior discectomy and anterior bone interbody cloward fusion in February 1990 which allegedly resulted in his total disability for work on and after March 8, 1992. In support of his claim, appellant resubmitted a report from Dr. Soham S. Patel, a neurologist and appellant's attending physician, dated November 11, 1992. The Board considered this report in its January 23, 1998 merit decision noting that Dr. Patel opined that appellant's recurrent cervical disc herniation was the result of his November 1, 1998 work injury. This report does not establish clear evidence of error. Dr. Patel did not offer any medical reasoning in support of his opinion that appellant experienced recurrent cervical disc herniation was the result of his employment injury. Without medical reasoning explaining how appellant's accepted employment injury of cervical radiculitis caused or contributed to recurrent cervical disc herniation which resulted in appellant's disability for work, this report is not of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of the Office's decision.

Appellant also resubmitted a May 12, 1993 report from Dr. Patel which was also considered by the Board in its prior decision. The Board previously found that this report was speculative in that Dr. Patel stated that appellant's work-related injury "could have been caused" by injury to the intervertebral disc which subsequently led to herniation. The Board also noted that Dr. Patel failed to explain the physiological processes by which the accepted employment injury of cervical radiculitis could have led to a disc herniation. This report does not provide any physical findings, objective diagnostic test results nor clear medical reasoning explaining why Dr. Patel believed that appellant's accepted C6 radiculitis was caused by an injury to a cervical disc, why and how he believed that this cervical disc injury resulted in a C6-7 disc herniation which required surgical repair and consequentially resulted in additional disc herniations. This report is not sufficient to shift the weight of the evidence in favor of appellant and establish clear evidence of error in the prior decisions.

Dr. Ronald Hargraves, a Board-certified neurosurgeon, completed a note dated October 27, 1998 which included the history of appellant's accepted employment injury and listed his medical history of cervical surgeries. Dr. Hargraves noted that appellant experienced

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<sup>13</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>14</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>15</sup> *Gregory Griffin*, *supra* note 5.

current neck pain and recommended a magnetic resonance imaging (MRI) scan. Appellant also submitted a November 5, 1998 MRI report diagnosing bony degenerative changes at multiple levels, mild central spinal stenosis at C5-6 and C4-5, as well as multilevel neural foraminal narrowing at C5-6. These report do not provide an opinion on the causal relationship between appellant's current conditions and his accepted employment injury. Therefore these reports do not have sufficient probative value to shift the weight of the medical evidence in favor of appellant and cannot establish clear evidence of error on the part of the Office.

In a note dated January 19, 1999, Dr. Hargraves diagnosed herniated nucleus pulposus and stenosis at C4-5 with cord impingement. He stated, "It should be noted that there is a definite and distinct relationship between having a prior anterior cervical fusion (especially a cloward) and the subsequent development of a stenosis at a higher level. Therefore this current condition at C4-5 is definitely related to the prior procedure at C6-7." This report is not sufficient to establish clear evidence of error on the part of the Office. Dr. Hargraves did not provide any opinion on the underlying issue in this case, whether appellant's initial employment injury, accepted by the Office as cervical radiculitis, caused or contributed to the diagnosed disc herniation which resulted in the cervical surgery which employed the cloward procedure which Dr. Hargraves opines resulted in appellant's current disc herniation. Without medical evidence establishing that appellant's initially diagnosed disc herniation was causally related to his accepted employment injury, and that his surgery was necessary to repair such an employment-related disc herniation, the consequential injuries of the cloward surgery cannot be accepted as employment related and further medical opinion regarding the causal relationship between appellant's current medical diagnoses and his unapproved back surgery cannot establish clear evidence of error on the part of the Office.

The March 27, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
September 26, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member