

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**CAROLYN D. CLARK, Appellant**

**and**

**DEPARTMENT OF THE NAVY, NORFOLK  
NAVAL SHIYARD, Portsmouth, VA, Employer**

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**Docket No. 04-551  
Issued: May 11, 2004**

*Appearances:*  
*Carolyn D. Clark, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On December 22, 2003 appellant filed an appeal of a decision of the Office of Workers' Compensation Programs dated September 25, 2003, denying her request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error. As the last decision on the merits of the claim is dated September 27, 1993, the Board's jurisdiction is limited to the September 25, 2003<sup>1</sup> decisions.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant's May 6, 2003 request for reconsideration was untimely; and (2) if so, whether the Office properly found that the request for reconsideration did not demonstrate clear evidence of error.

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<sup>1</sup> 20 C.F.R. § 501.3.

## **FACTUAL HISTORY**

On December 12, 1991 appellant filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury on December 6, 1991. Appellant stated that she injured her arms and shoulder while lifting and pulling a steel window.<sup>2</sup> By decision dated March 31, 1992, the Office denied the claim on the grounds that appellant had not established fact of injury. The Office found that the evidence was not sufficient to establish that an incident occurred as alleged and that the medical evidence was insufficient to establish an employment injury.

In a decision dated November 9, 1992, an Office hearing representative affirmed the March 31, 1992 decision. The hearing representative based his decision on the lack of probative medical evidence establishing causal relationship between a diagnosed condition and the employment incident. By decision dated September 27, 1993, the Office denied modification of the November 9, 1992 decision.

In a letter dated May 6, 2003, appellant requested reconsideration of her claim. Appellant stated that the lifting of the steel window on December 6, 1991 caused injury to her neck, arm and shoulders. She submitted medical evidence that included treatment notes from Dr. Atman Singh dated January 2 and March 24, 1992; reports from Dr. Edward Habeeb for the period February 3, 1993 to April 24, 1995; and reports dated April 26 and May 15, 1996 from Dr. David Swingle, a neurosurgeon. Appellant also submitted a report from a physical therapist and a cervical magnetic resonance imaging (MRI) scan dated April 20, 1995.

In a decision dated September 25, 2003, the Office determined that appellant's request for reconsideration was untimely. The Office denied the request for reconsideration on the grounds that it did not establish clear evidence of error by the Office.

## **LEGAL PRECEDENT -- ISSUE 1**

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> The Office, through regulation, has imposed limitations on the exercise of its

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<sup>2</sup> On March 16, 1992 appellant filed an occupational claim (Form CA-2) regarding her arms and shoulders. The claim was developed under File No. A25-420018 and was accepted for carpal tunnel syndrome. On July 26, 2002 the Board issued a decision with respect to an alleged recurrence of disability pursuant to this claim (Docket No. 01-2082).

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> 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."

discretionary authority under 5 U.S.C. § 8128(a).<sup>6</sup> 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.<sup>7</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Office issued its last decision on the merits of the claim on September 27, 1993 when it denied modification of the November 9, 1992 decision. Appellant's request for reconsideration was dated May 6, 2003. Since this is more than one year after the last merit decision, the Office properly determined that it was untimely.

### **LEGAL PRECEDENT -- ISSUE 2**

The Board has held that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.<sup>9</sup> In accordance with this holding, the Office has stated that in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing 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.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>11</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>12</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>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of

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<sup>6</sup> 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 specific point of law; (2) advancing a relevant legal argument 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).

<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> *See Leon D. Faidley, Jr., supra* note 4.

<sup>9</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>11</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>14</sup> *See Leona N. Travis, supra* note 12.

record and whether the new evidence demonstrates clear error on the part of the Office.<sup>15</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 decision.<sup>16</sup> 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 improperly denied merit review in the face of such evidence.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

The Office denied appellant's claim for a traumatic injury on December 6, 1991 because she failed to submit sufficient medical evidence to establish a diagnosed injury causally related to the lifting of a steel window. In order to reopen her claim appellant must submit evidence of such probative value that it establishes clear evidence of error in the denial of her claim. The evidence submitted, however, is not probative to the issues presented.

In an April 26, 1996 report, Dr. Swingle diagnosed chronic right C7 radiculopathy; he noted a work-related injury in 1991, without discussing a specific traumatic incident. With respect to causal relationship, Dr. Swingle indicated that from his review of the medical evidence "there are complaints of neck and radicular arm pain from her original injury dating back to December 1991 and in the [s]pring of 1992, so I feel this is a reasonable assumption." Dr. Swingle did not provide a complete history, a clear diagnosis, or a reasoned opinion establishing causal relationship between a diagnosed condition and the employment incident. His report does not establish clear evidence of error in the denial of the claim.

The remainder of the medical evidence submitted also failed to establish clear evidence of error. The reports from Dr. Habeeb diagnose a cervical radiculopathy, without providing an accurate medical history, description of the employment incident, or a reasoned medical opinion on causal relationship. The notes from Dr. Singh diagnose carpal tunnel syndrome without providing evidence relevant to the December 6, 1991 claim. The evidence from a physical therapist is of no probative medical value.<sup>18</sup>

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<sup>15</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>16</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>17</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

<sup>18</sup> Physical therapists are not physicians under the Act and their reports are of no probative value; see *Barbara J. Williams*, 40 ECAB 649 (1989); 5 U.S.C. § 8101(2).

**CONCLUSION**

As noted above, the standard for establishing clear evidence of error is a difficult one. The evidence submitted in this case is not of sufficient probative value to establish clear evidence of error and the Office properly denied the request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 25, 2003 is affirmed.

Issued: May 11, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member