

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LANIE B. WILLIAMS and DEPARTMENT OF VETERANS AFFAIRS,
PALO ALTO VETERANS HOSPITAL, Palo Alto, CA

*Docket No. 98-672; Submitted on the Record;
Issued February 4, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for further merit review on the grounds that her request for reconsideration was untimely and failed to show clear evidence of error.

On March 21, 1994 appellant, then a 49-year-old licensed vocational nurse, sustained a lumbosacral strain in the performance of duty.

By decision dated July 6, 1994, the Office denied appellant's claim on the grounds that she had no continuing disability after May 10, 1994 causally related to her March 21, 1994 employment injury.

By decisions dated August 30, 1994, January 13 and October 17, 1995, the Office denied modification of its July 6, 1994 decision.

By decisions dated January 19 and March 27, 1996,¹ the Office denied appellant's requests for reconsideration.

By letter dated May 29, 1997, appellant requested reconsideration of the denial of her claim and submitted additional evidence.

By decision dated July 23, 1997, the Office denied appellant's request for reconsideration dated October 17, 1995 on the grounds that her request was not timely filed within one year of the Office's last merit decision and failed to show clear evidence of error.

¹ On February 13, 1996 appellant filed an appeal with the Board. On March 10, 1997 she requested reconsideration from the Office. By decision dated June 18, 1997, the Board dismissed the appeal docketed as 96-1163, upon the request of appellant, as she wished to file a reconsideration request with the Office and submit additional evidence.

By letter dated September 18, 1997, appellant requested reconsideration and submitted additional evidence.

In a report dated August 20, 1997, Dr. Ernest A. Bates stated his opinion that appellant was disabled due to her March 21, 1994 employment injury. He indicated that causal relationship was established by a May 18, 1994 magnetic resonance imaging (MRI) scan report which was interpreted as showing degenerative disc disease, a disc protrusion and small annular tears.² He stated his opinion that the tears were not caused by the degenerative disc disease and were “most likely” related to the 1994 employment injury.

The Board finds that the Office did not abuse its discretion, in its November 19, 1997 decision, in refusing to reopen appellant’s case for further consideration of the merits of her claim, on the grounds that her untimely request did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees’ Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.⁶ 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).⁷

The Board has held, however, 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.⁸ In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set

² Dr. Bates noted that he had not reviewed the actual MRI studies himself, only the report concerning the MRI.

³ 5 U.S.C. § 8128(a).

⁴ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *Leon D. Faidley, Jr.*, *supra* note 4. Compare 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ See *Gregory Griffin* and *Leon D. Faidley, Jr.*, *supra* note 4.

⁸ *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁹

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

In this case, appellant filed her request for reconsideration by letter dated September 18, 1997. This was clearly more than one year after the Office's last merit decision issued on October 17, 1995 and thus the application for review was not timely filed. In accordance with its internal guidelines and with Board precedent, the Office properly found that the request was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error which would warrant reopening appellant's case for merit review under 5 U.S.C. § 8128(a) notwithstanding the untimeliness of her application.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application for review was sufficient to show clear evidence of error.

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

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996). The Office therein states:

"The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that [the Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed well-rationalized medical report which, if submitted before the Office's denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case...."

¹⁰ See *Jeanette Butler*, 47 ECAB 128, 131 (1995).

¹¹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ See *Leona N. Travis*, *supra* note 11 at 241.

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

and raise a substantial question as to the correctness of the Office decision.¹⁵ 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 abused its discretion in denying merit review in the face of such evidence.

In support of her untimely request for reconsideration, appellant submitted an August 20, 1997 report from Dr. Bates who stated his opinion that appellant was disabled due to her March 21, 1994 employment injury. He indicated that causal relationship was established by a May 18, 1994 MRI scan report which was interpreted as showing degenerative disc disease, a disc protrusion and small annular tears. He stated his opinion that the tears were not caused by the degenerative disc disease and were “most likely” related to the 1994 employment injury. This report is substantially similar to other reports from Dr. Bates which were previously considered by the Office. The May 18, 1994 MRI report mentioned in his August 20, 1997 report was also previously considered by the Office. Therefore, the evidence submitted by appellant in support of her untimely request for reconsideration failed to show clear evidence of error in the Office’s last merit decision dated October 17, 1995 in which the Office denied appellant’s claim for compensation benefits for disability after May 10, 1994.

The November 19, 1997 decision of the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, D.C.
February 4, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁵ See *Jeanette Butler*, *supra* note 10.