

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHELE M. CHURCHILL and DEPARTMENT OF THE ARMY,
U.S. ARMY HEALTH SERVICES, FORT SHAFTER, HI

*Docket No. 00-2042; Submitted on the Record;
Issued May 8, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's application for review was not timely filed and failed to present clear evidence of error.

On August 9, 1996 appellant filed a traumatic injury claim for a lower back injury allegedly sustained at work on May 1, 1996. The Office, in a December 26, 1996 decision, denied the claim on the grounds that fact of injury was not established, as appellant had not submitted sufficient medical evidence to establish her claim. In a March 28, 1997 decision, the Office denied appellant's reconsideration request without reviewing the merits of the claim. In an August 21, 1997 decision, the Office denied modification of its prior decision after conducting a merit review. On March 16, 1998 the Office received documents and an inquiry from appellant's representative about the status of appellant's claim. Included in these documents were an October 17, 1997 report from Dr. Ronald H. Gackle, Board-certified in preventive medicine, which indicated that he had erroneously listed May 3, 1996 as the injury date in prior reports instead of the correct date of May 1, 1996. In a June 1, 1998 letter, the Office advised appellant that, if she disputed the Office's decision in her claim, she should follow the appeal rights that accompanied her decision. In February 12 and April 19, 1999 letters, appellant requested reconsideration, contending that her claim had been erroneously denied. By decision dated June 3, 1999, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office

¹ 5 U.S.C. § 8128(a).

with discretionary authority to determine whether it will review an award for or against compensation.³ 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.⁴ 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).⁵

Appellant filed a request for reconsideration on February 12, 1999. Since appellant filed the reconsideration request more than one year after the Office's August 21, 1997 merit decision, the Board finds that the Office properly determined that said request was untimely.⁶

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.⁷ Office procedures 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 regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ To

² *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

³ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁴ 20 C.F.R. § 10.607 (1999). 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).

⁵ *Thankamma Mathews*, *supra* note 2 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

⁶ Although appellant contended that she submitted prior reconsideration requests, the record does not contain any such requests that were received by the Office within one year of August 21, 1997.

⁷ *Thankamma Mathews*, *supra* note 2 at 770.

⁸ *See* 20 C.F.R. § 10.607(b) (1999).

⁹ *Thankamma Mathews*, *supra* note 2 at 770.

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Jesus D. Sanchez*, *supra* note 3 at 968.

¹² *Leona N. Travis*, *supra* note 10.

¹³ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.¹⁴ 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.¹⁵

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in the case is primarily medical in nature. Dr. Gackle's October 17, 1997 report primarily corrects an erroneous date of injury provided by him in previous reports. Dr. Gackle did not otherwise address how specific employment factors would have caused or aggravated appellant's claimed low back condition. He provided no medical reasoning to explain why specific employment activities would have resulted in such a condition.¹⁶ Appellant did not submit any other new medical evidence that specifically explained how any claimed condition would have been caused or aggravated by specific employment factors. Thus, the medical evidence submitted on reconsideration was insufficient to establish clear evidence of error.

As appellant has failed to establish clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The June 3, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 8, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458, 466 (1990).

¹⁶ *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

Alternate Member