

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REMEDIOS E. HERNANDEZ claiming as widow of JOHN D. HERNANDEZ
and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION
MEDICAL CENTER, Sepulveda, CA

*Docket No. 03-1554; Submitted on the Record;
Issued September 5, 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 denied appellant's July 16, 2002 request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error.

The Board has duly reviewed the case record and finds that the Office properly denied appellant's request for reconsideration on the grounds that appellant failed to file a timely application for review and did not present clear evidence of error.

This case has been before the Board previously. In a decision issued May 2, 2001, the Board affirmed a March 9, 2000 decision of the Office which found that the evidence was insufficient to establish a causal relationship between the employee's medical condition on September 12, 1990 or subsequent death on September 16, 1993 and his federal employment.¹ The law and the facts as set forth in the prior decision and order are incorporated by reference.

Subsequent to the Board's May 2, 2001 decision, by letter dated July 16, 2002 appellant, requested reconsideration and submitted arguments which she contended established error by the Board. By decision dated March 12, 2003, the Office denied appellant's request on the grounds that it had not been filed within one year of the May 2, 2001 Board decision and did not show clear evidence of error. The instant appeal follows.

The only decision before the Board is the March 12, 2003 decision in which the Office denied appellant's request for reconsideration because more than one year had elapsed between

¹ Docket No. 00-1836 (issued May 2, 2001). Appellant alleged that on September 12, 1990 the employee, then a 65-year-old housekeeper, sustained a work-related stroke and that this injury contributed to his death on September 16, 1993.

the issuance of the last merit decision of record² and June 4, 2003, the date appellant filed the instant appeal with the Board.³

Appellant argued in her reconsideration request that the Board erred when affirming the denial of the claim for compensation on the grounds that she did not submit rationalized medical evidence establishing causal relationship between the claimed condition or death and employment factors. She argued that the Board contradicted itself in the thirteenth and fourteenth paragraphs of the May 2, 2001 decision regarding fact of injury and causal relationship and that, in this case, fact of injury had been established so rationalized medical opinion evidence was not necessary. Appellant outlined that, because her husband, the employee, reported the employment incident with written notice of traumatic injury and the record contains a medical diagnosis of subcortical infarction or stroke, fact of injury was established and that there was no requirement to provide rationalized medical opinion evidence linking the diagnosed condition and death to the employment. Appellant also asserted that the attending physician's report of record (Form CA-20) further established fact of injury in that it noted the date and hour and history of injury and provided a diagnosis, and therefore such evidence was not required to be medically rationalized. Appellant also argued that the record contained sufficient evidence pertaining to the second day of injury and also a death certificate which listed the date and cause of death, thus the medical evidence submitted met the guidelines for establishing injury. She finally argued that the Board members failed to sign the May 2, 2001 decision, which constituted error because the decision could not be preserved or cited to as legal precedent.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.⁴ 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 When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁶

The Board finds that, as more than one year had elapsed from the date of issuance of the May 2, 2001 decision and appellant's request for reconsideration dated July 16, 2002, her request for reconsideration was untimely. The Board further finds that the evidence submitted by appellant in support of this request is insufficient to establish clear evidence of error.

² The Board's May 2, 2001 decision is the last merit decision of the present case. According to Office procedure, the one-year period for requesting reconsideration begins on the date of original Office decision, but that 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (June 2002).

³ See 20 C.F.R. § 501.3(d)(2).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.607(b) (1999); see *Gladys Mercado*, 52 ECAB 255 (2001).

⁶ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. 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.⁷

In this case, appellant argued that fact of injury had been established therefore the Board erred when it affirmed the denial of the claim based on a lack of causal relationship evidence. Appellant further argued that the Board members failed to sign the May 2, 2001 decision which constitutes error.

The Board finds that such arguments are of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant or to raise a substantial question as to the correctness of the prior decision. To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁸ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁹ The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁰ The Board affirmed the Office's denial of appellant's claim because appellant did not provide rationalized medical opinion evidence to describe or explain how the September 12, 1990 work incident caused the claimed injury. Appellant has not established error

⁷ *Nancy Marcano*, 50 ECAB 110 (1998).

⁸ *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *Id.*

¹⁰ *Id.*

with her reconsideration request in that regard. With respect to appellant's argument that the Board members erred by failing to sign the May 2, 2001 decision, the Office properly determined that such argument has no relevance to the merits of the decision which has been made and is not error on the part of the Board.

Therefore, appellant failed to establish clear evidence of error and the Office properly denied a merit review of her claim.

The decision of the Office of Workers' Compensation Programs dated March 12, 2003 is hereby affirmed.

Dated, Washington, DC
September 5, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member