

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RUBY N. GAINES and U.S. POSTAL SERVICE,  
POST OFFICE, Houston, TX

*Docket No. 03-1559; Submitted on the Record;  
Issued September 17, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

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 Office accepted appellant's claim for a trapezius muscle contusion resulting from an employment injury on May 8, 1958 and for a low back strain resulting from an employment injury on November 12, 1958. Appellant's case was closed on September 12, 1961. The employing establishment terminated appellant on October 30, 1964. On March 6, 1975 appellant requested that her case be reopened. On June 11, 1984 appellant filed a claim for an "ongoing" recurrence of disability due to the May 8 and November 11, 1958 employment injuries. By decision dated September 11, 1998, the Office denied appellant's claim, stating that the evidence of record failed to support that appellant's current medical conditions were causally related to the 1958 employment injuries.

On October 2, 1998 appellant requested an oral hearing before an Office hearing representative, which was held on February 22, 1999. At the hearing appellant described how the May 1958 employment injury happened and indicated that eventually she was dismissed. Appellant's son, Dr. Nolon W. Jones Jr., a Board-certified family practitioner, testified that appellant had "a lot of" ongoing problems with her right arm and opined that she had post-traumatic myofascial syndrome. Dr. Jones stated that for years his mother would not use the arm and she developed no mobility and that it was typical in the 1950s for patients to be immobilized. Her son stated that the diagnosis of "contusion" was inadequate to describe the damage done to appellant's arm. Appellant also began having pain in her left hip.

By decision dated May 7, 1999 and finalized May 11, 1999, the Office hearing representative affirmed the Office's September 11, 1998 decision.

By letter dated April 3, 2003, appellant requested reconsideration of the Office's decision and submitted additional evidence including a medical report dated May 26, 1999 from

Dr. Louis M. Train, a Board-certified family practitioner, the first page of a report dated April 2, 1961 from Dr. J.D. Bowles<sup>1</sup> and a disability note dated September 28, 1964 from Dr. Arthur L. Glassman, a Board-certified orthopedic surgeon.

By decision dated May 7, 2003, the Office denied appellant's request for reconsideration, stating that appellant's April 3, 2003 letter requesting reconsideration, which was filed more than a year after the last merit decision on May 7, 1999 was untimely and that appellant failed to show clear evidence of error.

The Board finds that the Office properly found that appellant's request for reconsideration was not timely filed and that appellant did not establish clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant filed the appeal with the Board on May 27, 2003 the only decision before the Board is the Office's May 7, 2003 decision denying appellant's request for reconsideration.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>3</sup> The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.<sup>4</sup> The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>5</sup>

To show clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>6</sup> The evidence must be positive, precise and explicit and must be manifest on its face<sup>7</sup> that the Office committed an error.<sup>7</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>8</sup> It is not enough merely to show that the evidence could be construed to as to produce a contrary conclusion.<sup>9</sup> This entails a limited review by the Office of how the

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<sup>1</sup> Dr. Bowles is not listed in the directories of physician's specialties.

<sup>2</sup> *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>5</sup> 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>6</sup> *Willie J. Hamilton*, Docket No. 00-1468 (issued June 5, 2001); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> *Willie J. Hamilton*, *supra* note 6; *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> *See Jesus D. Sanchez*, *supra* note 5.

<sup>9</sup> *Leona N. Travis*, *supra* note 7.

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.<sup>10</sup>

In her request for reconsideration, appellant stated that the employing establishment was not delivering her mail and otherwise made it difficult for her to proceed with her claim. Appellant submitted a May 26, 1999 report, in which Dr. Train, a treating Board-certified family practitioner, stated that the “jolting” of her back in 1958 caused right femoral trochanteric bursitis, which tended to recur off and on due to hip contractures. He also stated that appellant had recurring contracture of her right shoulder, which was “quite painful” and “[i]n all medical probability” was due to the falling sack injury at work. Dr. Train did not, however, provide a clear description of appellant’s injury or a clear opinion that she sustained continuing disability due to it. Appellant resubmitted the first page of an April 2, 1961 report of Dr. Bowle. The full three-page report had previously been submitted, but this report provides no support for appellant’s claim because Dr. Bowles concluded that it was “impossible to state with any degree of certainty” whether her medical condition was related to her 1958 employment injury.

A September 28, 1964 disability note from Dr. Glassman, an attending Board-certified orthopedic surgeon, stated that appellant had been treated for a ligamentous sprain and myositis and was unable to work indefinitely because of headaches and lightheadedness. Dr. Glassman did not, however, provide any opinion on the cause of appellant’s condition. Appellant also submitted a report from her son, Dr. Jones, a Board-certified family practitioner, dated May 13, 1999. He stated that appellant had been “so severely limited by the incapacity of the right upper extremity that she could not physically challenge her back or her hip.” His report is not probative, however, because there is no indication that he had examined appellant. Neither appellant’s statements in her request for reconsideration nor the medical evidence appellant submitted identified any error in the Office’s May 7, 1999 decision, in which the Office found that appellant did not establish a causal relationship between her current medical condition and the 1958 employment injuries. The evidence appellant submitted does not raise a substantial question as to the correctness of the Office’s May 7, 2003 decision and, therefore, appellant has failed to demonstrate clear evidence of error.

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<sup>10</sup> *Willie J. Hamilton, supra* note 6.

The May 7, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
September 17, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member