

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY BAILEY-JOHNSON and DEPARTMENT OF THE ARMY,
Fort Benning, GA

*Docket No. 98-779; Submitted on the Record;
Issued November 3, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

In the present case, the Office of Workers' Compensation Programs accepted that appellant, then a 38-year-old forklift operator, sustained a left thumb sprain as a result of a fall in the performance of duty on September 25, 1989. The Office denied appellant's notice of recurrence of disability dated January 22, 1990, on July 18, 1991 as appellant had not established that the cervical condition which allegedly caused her recurrence of disability was causally related to the accepted employment injury. On September 19, 1997 appellant requested that the Office reconsider her claim. The Office denied appellant's request for reconsideration on November 25, 1997 on the grounds that the request was untimely filed and did not present clear evidence of error.

The Board finds that the Office did not abuse its discretion in this case.

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 The Office, through its 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

¹ 5 U.S.C. § 8128(a).

² 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 point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office. *See* 20 C.F.R. § 10.138(b)(1).

that decision.³ 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).⁴

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁵ The Office issued its last merit decision in this case on July 18, 1991 wherein it denied appellant's notice of recurrence of disability. As appellant's September 19, 1997 reconsideration request was outside the one-year time limit, the request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held however 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.⁶ The Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set 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.

In support of her request for reconsideration, appellant submitted many medical reports which were previously of record and one new report, dated February 19, 1997, from Dr. Gilbert O. Maulsby which documented that a magnetic resonance imaging scan performed on that day revealed appellant had a tear of the left shoulder rotator cuff. Appellant also submitted a lengthy narrative wherein she described the evidence previously of record and disagreed with prior actions taken in her case.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of

³ 20 C.F.R. § 10.138(b)(2).

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *Larry L. Lilton*, 44 ECAB 243 (1992).

⁶ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁷ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ *See Leona N. Travis*, *supra* note 8.

record and whether the new evidence demonstrates clear error on the part of the Office.¹¹ 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.¹² 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.¹³

In denying appellant's recurrence claim in July 1991, the Office found that appellant had not established that her cervical condition was causally related to the accepted employment injury, which the Office had accepted for left thumb strain. Appellant's claim was denied on medical grounds. The only new medical evidence appellant submitted in support of her 1997 request for reconsideration was the MRI report which evidenced a rotator cuff tear of the left shoulder. Neither this report, nor appellant's own narrative statement were positive, precise and explicit evidence sufficient to establish that the Office clearly erred in finding that appellant's cervical condition was not causally related to the September 1989 employment injury. The Office did not abuse its discretion in finding that appellant had not established clear evidence of error in this case.¹⁴

¹¹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 4.

¹³ *Gregory Griffin*, *supra* note 6.

¹⁴ The Board notes that appellant filed a notice of recurrence of disability on April 9, 1997. The Office has not issued a formal decision regarding this claim.

The decision of the Office of Workers' Compensation Programs dated November 25, 1997 is hereby affirmed.

Dated, Washington, D.C.
November 3, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member