

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOU E. BURRELL and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 99-1738; Submitted on the Record;
Issued December 19, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On March 17, 1997 appellant, a 40-year-old flatsorter, filed a traumatic injury claim for benefits, alleging that she injured her back lifting heavy tubs of mail. The Office accepted her claim for lumbar strain on May 1, 1997 and paid her appropriate compensation for continuation of pay. The Office began paying her compensation for temporary total disability on May 24, 1997 and placed her on the periodic rolls on July 20, 1997. Appellant returned to full-time limited duty on July 8, 1997.

By letter dated September 4, 1997, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$2,548.86, covering the period from July 8 through August 16, 1997. The Office indicated that appellant had been paid compensation for total disability during this period, although she had returned to work on July 8, 1997. The Office also stated that, although she had been advised in letters dated July 30 and August 18, 1997 to return any checks she received containing temporary total disability compensation, she had not returned the check which was the subject of the overpayment. The Office found that appellant was at fault in creating the overpayment because she accepted a payment which she knew or should have reasonably known to be incorrect. The Office informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office, or request a precoupment hearing with the Branch of Hearings and Review. The Office also noted that, pursuant to section 10.324¹ of its regulations, the failure to furnish the financial information requested on the questionnaire within 30 days would result in a denial of waiver of the overpayment and that no further request for waiver would be considered until the requested information was furnished.

¹ 20 C.F.R. § 10.324.

In a letter received by the Office on September 22, 1997, appellant informed the Office that she had been on sick leave for several days during July and August 1997. Accompanying her letter were calendars of July and August 1997, which charted the days on which she used sick leave. Appellant did not submit a completed overpayment questionnaire.

By decision dated October 14, 1997, the Office found that appellant was at fault in creating the overpayment of compensation for the period from July 8 through August 16, 1997, which amounted to a total overpayment of \$2,548.86.

By letter dated March 4, 1999, appellant requested reconsideration of the October 14, 1997 decision. In support of her request, appellant submitted medical reports, treatment notes and disability slips, most of which had been previously considered by the Office.

By decision dated March 30, 1999, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that the Office's final merit decision was in error. The Office therefore denied appellant's request for reconsideration as untimely and did not demonstrate clear evidence of error because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle an employee to a review of an Office decision as a matter of right.³ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --

- (1) end, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ 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.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on October 14, 1997. Appellant requested reconsideration on March 4, 1999; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had 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 Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.⁷

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit, and must be manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² To show clear evidence of error, the evidence submitted must not only be of sufficient probative

⁴ 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) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.607(b).

⁶ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁸ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *See Jesus D. Sanchez*, *supra* note 3.

¹¹ *See Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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.¹³ The Board makes an independent determination of whether an appellant 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.¹⁴

The Board finds that appellant's March 4, 1999 request for reconsideration fails to show clear evidence of error. The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. In addition, appellant did not present any evidence of error on the part of the Office in her request letter. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The March 30, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 19, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member

¹³ *Leon D. Faidley, Jr., supra* note 3.

¹⁴ *Gregory Griffin*, 41 ECAB 458 (1990).