U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of NORA MARTIN and U.S. POSTAL SERVICE,
POST OFFICE, Grosse Ile, MI

*Docket No. 99-1603; Submitted on the Record;*
*Issued March 17, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

On September 21, 1988 appellant, a 34-year-old distribution clerk, injured her neck and right shoulder while sorting and lifting mail. She filed a claim for benefits on January 13, 1989, which the Office accepted for cervical strain. Appellant returned to work in a part-time, limited capacity on February 3, 1989. She was subsequently paid appropriate, continuing compensation for partial disability by the Office. In addition, appellant missed work for intermittent periods: January 16 to February 23, 199l; February 8 through 11, 1992 and February 22 through August 3, 1992. The Office accepted appellant's February 10, 1992 claim for recurrence of disability for these periods, based on the expanded, accepted condition of cervical strain with radiculitis. Appellant again stopped working on July 9, 1994 and returned to work for four hours per day on October 18, 1994.

By letter dated August 19, 1994, appellant filed a claim for recurrence of disability.

By decision dated December 20, 1994, the Office denied appellant's claim for recurrence of disability.

By letter dated December 24, 1994, appellant requested reconsideration. In a report dated December 30, 1994, Dr. Phillip F. Krogol, an osteopath and appellant's treating physician, stated:

> "[Appellant] was totally disabled from work from July 1 [through] September 1994. She was undergoing a physical therapy program three times per week. She continued to have arm and neck pain with numbness while working and going to physical therapy. Due to this [appellant] was taken off of work. Her neck and

arm pain improved while being off of work during her physical therapy course of treatment."

Appellant stopped working on January 23, 1995 and has not returned to gainful employment since that time.

By decision dated March 7, 1995, the Office denied reconsideration of its December 20, 1995 decision, finding that appellant failed to submit evidence sufficient to warrant modification.

Appellant filed another claim for recurrence of disability on February 6, 1995, seeking continuing compensation as of January 23, 1995 and continuing. In a report dated March 22, 1995, Dr. Krogol stated that appellant's most recent computerized axial tomography (CAT) scan showed persistent herniation at the C5-6 area, and advised that she continued to have neck and arm radicular pain with numbness. He stated that he had recommended surgery to alleviate appellant's condition, as he believed that this was the only other alternative that could offer her relief of her symptoms. Dr. Krogol stated, however, that appellant had refused to undergo such surgery.

By decision dated June 16, 1995, the Office denied appellant's recurrence claim, finding that she failed to submit medical evidence sufficient to establish that a change occurred in the nature and extent of the injury-related condition or that there was a change in the nature and extent of appellant's limited-duty assignment such that she no longer was physically able to perform the requirements of her light-duty job as a sedentary clerical worker.

By letter dated July 5, 1995, appellant requested reconsideration.

By decision dated August 2, 1995, the Office denied reconsideration, finding that appellant failed to submit medical evidence sufficient to warrant modification of the previous decision.

By letter dated September 28, 1995, appellant requested reconsideration. In support of her claim, appellant submitted a September 18, 1995 report from Dr. Krogol, who reiterated his earlier findings and conclusions and stated that "[since] she has been unable to work on a restricted basis over a lengthy period of time she was taken off of work. She may be able to perform a sedentary type of job, such as [tele]phone work or light clerical work."

By decision dated November 15, 1995, the Office denied appellant's claim, finding that she failed to submit medical evidence sufficient to warrant modification of the previous decision.

By letter dated January 5, 1996, appellant requested reconsideration. In support of her claim, appellant submitted a March 14, 1996 report from Dr. Krogol, in which he stated:

"[Appellant] was again off work in January 1995 after having returned to work on a part-time basis, restricted duties, with increased neck and arm pain with numbness and weakness of the arm. [Appellant] stated that she was unable to work on a restricted basis over a period of time she was taken off work. At that time she would have been able to perform a sedentary type of job, such as [tele]phone work or clerical work. She stated that this was not the type of job her employer had her doing."

By decision dated May 8, 1996, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

By letter dated October 17, 1996, appellant requested reconsideration. In support of her claim, appellant submitted reports dated July 16 and September 23, 1996 from Dr. Krogol, in which he essentially reiterated his previous findings and conclusions.

By decision dated November 22, 1996, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

By letter dated September 2, 1997, appellant requested reconsideration of the Office's November 11, 1995 decision denying compensation for a recurrence of her disability for the period July 8 through October 17, 1994, and as of January 23, 1995 and continuing. In support of her claim, appellant submitted a June 11, 1997 deposition from Dr. Krogol and a March 14, 1996 report from Dr. Arek L. Sarkissian, a Board-certified neurosurgeon. In his deposition, Dr. Krogol reiterated his earlier findings of neck complaints and right arm radicular pain compatible with C5-6 radiculopathy, as noted in his previous reports. He stated that these symptoms had been aggravated by whatever she had been doing at work. Dr. Krogol noted that he had returned appellant to restricted, four-hour per day work on October 11, 1994, but that as of January 28, 1995, his office had recommended that appellant remain off from all types of work, including restricted work. He stated that this finding was based on findings of a herniated disc at C5-6, although her pain intensity was increasing to the point where she was unable to perform any type of manual labor. Dr. Krogol related that the results of a CAT scan appellant underwent on February 8, 1995 were positive for C5-6 nerve root dysfunction secondary to the herniated disc. He further advised that appellant had obtained a second opinion from a neurosurgeon in January 1996, who had agreed that she required surgery to repair the herniated disc at C5-6. Dr. Krogol indicated that appellant's herniated disc would not subside unless it was removed and that increased physical activity from manual labor would aggravate the nerve and increase the pain. Dr. Krogol concluded that appellant's herniated disc had been confirmed by CAT scan, myelograms, magnetic resonance imaging (MRI) scans and by the clinical findings. In his March 14, 1996 report, Dr. Sarkissian discussed whether appellant should undergo surgery to remedy her condition, but did not render an opinion regarding whether appellant's current condition or disability was causally related to the September 21, 1988 employment injury.

By decision dated September 5, 1997, the Office denied appellant's request for reconsideration pursuant to 20 C.F.R. § 10.138(b)(2) because it had not been made within one year of the Office's most recent merit review, on November 15, 1995, and because the evidence submitted did not present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

appellant filed her appeal with the Board on September 23, 1997, the only decision properly before the Board is the September 5, 1997 Office decision.[2]

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle an employee to a review of an Office decision as a matter of right.[4] 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 --
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> (1) end, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] 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.[6] 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 under 5 U.S.C. § 8128(a).[7]

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 November 15, 1995. Appellant requested reconsideration on September 2, 1997; 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 has held however that the Office must nevertheless undertake a limited review of the case to determine

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[2] The record also contains a March 11, 1997 Office decision which terminated appellant's entitlement to all compensation, finding that she had no residuals from her 1988 employment injury. Appellant has not appealed this decision, merely requesting compensation for a recurrence of her work-related disability for the periods indicated.

[3] 5 U.S.C. § 8128(a).

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

[5] 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 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).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *See* cases cited *supra* note 4.

whether there is clear evidence of error pursuant to the untimely request.[8] 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. § 10.138(b)(2), if appellant's application for review shows "clear evidence of error" on the part of the Office.[9]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] 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 fact of such evidence.[16]

In the instant case, appellant's September 2, 1997 request for reconsideration fails to show clear evidence of error with regard to the Office's finding in its November 15, 1995 decision that appellant failed to submit sufficient medical evidence to establish that her underlying diabetic condition had been aggravated by her accepted employment injuries. Appellant did submit a new deposition from Dr. Krogol, in which he summarized the medical evidence of record, commented on appellant's current condition, and reiterated his earlier findings that appellant was unable to perform her light-duty job and that heavy physical labor would aggravate the nerve and increase the pain from her accepted cervical condition. These statements, while relevant to the issue of whether appellant's September 21, 1988 employment injury could have contributed to her condition or disability, failed to establish clear evidence of error with respect to the Office's November 15, 1995 decision. Dr. Sarkissian's report also did not establish clear evidence of error with respect to the Office's November 15, 1995 decision.

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[8] *Rex L. Weaver,* 44 ECAB 535 (1993).

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

[10] *See Dean D. Beets,* 43 ECAB 1153 (1992).

[11] *See Leona N. Travis,* 43 ECAB 227 (1991).

[12] *See Jesus D. Sanchez, supra* note 4.

[13] *See Leona N. Travis, supra* note 11.

[14] *See Nelson T. Thompson,* 43 ECAB 919 (1992).

[15] *Leon D. Faidley, Jr., supra* note 4.

[16] *Gregory Griffin,* 41 ECAB 458 (1990).

The Board finds that appellant's September 2, 1997 request for reconsideration fails to show clear evidence of error. The Office reviewed the evidence appellant submitted and properly found it to be insufficient; thus, the evidence submitted by appellant on reconsideration is 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 his 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 it abused its discretion in denying a merit review.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated September 5, 1997 is hereby affirmed.

Dated, Washington, D.C.
March 17, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member