

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CANDY WELBAUM and U.S. POSTAL SERVICE,
POST OFFICE, Carol Stream, IL

*Docket No. 00-608; Submitted on the Record;
Issued March 1, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for further review on the merits under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On February 18, 1993 appellant, a 42-year-old distribution clerk, filed a claim for benefits alleging that she developed right and left shoulder conditions due to repetitive casing of mail. She became aware that this condition was related to her employment on February 9, 1993. The Office accepted her claim for right shoulder strain, bilateral shoulder impingement syndrome and decompression arthroscopic surgery of both shoulders. The Office paid compensation for intermittent periods of temporary total disability.

By decision dated September 13, 1996, the Office denied further compensation and medical treatment, finding that appellant no longer had any residuals from the 1993 employment injury.

By letter dated October 2, 1996, appellant's attorney requested a hearing, which was held on July 2, 1997.

On October 3, 1996 appellant filed a Form CA-2 claim for benefits, alleging that she sustained a recurrence of disability which was caused or aggravated by her February 9, 1993 employment injury.

By decision dated October 9, 1997, an Office hearing representative affirmed the September 13, 1996 decision.

By decision dated November 5, 1997, the Office denied appellant's claim for a recurrence of disability due to her accepted bilateral shoulder condition. The Office found that

appellant failed to submit medical evidence sufficient to establish that the claimed condition or disability was caused or aggravated by the February 9, 1993 employment injury.

By letter dated October 5, 1998, appellant's representative requested reconsideration of the November 5, 1997 decision. In support of her request, appellant submitted a September 22, 1998 report from Dr. Hilliard E. Slavick, Board-certified in psychiatry and neurology and appellant's treating physician. Dr. Slavick stated:

“[Appellant] has been under my care for several years. It is my opinion that she is suffering from a repetitive stress syndrome, affecting both upper limbs and shoulder girdle regions. This was caused by repetitive work performed on her job [with the employing establishment]. Her pain is greatest in the cervical paraspinal muscles, shoulder girdles and ribs bilaterally. Repetitive lifting at work caused this condition and aggravates the condition. She is currently only able to work about two hours a day and has pain with repetitive motion.”

By decision dated January 5, 1999, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

By letter dated April 20, 1999, appellant's representative requested reconsideration. In support of her claim, appellant submitted a February 10, 1999 report from Dr. Slavick and an April 16, 1999 report from Dr. Muhammed B. Yunus, Board-certified in internal medicine. In his February 10, 1999 report, Dr. Slavick essentially reiterated his earlier findings and conclusions, stating:

“Related to [her employment] injury, she developed diffuse pain across the shoulder girdles bilaterally, neck and upper extremities, more so proximally. Gradually over time, because of changes in her posture and continued work involving sorting of mail, she developed a form of repetitive stress syndrome, diffusely affecting both upper limbs, with the development of chronic pain. She has attempted to continue working, but in a limited role of three hours per day, four days per week.”

In his April 16, 1992 report, Dr. Yunus stated that appellant's history of repetitive injury initially produced a regional pain which subsequently spread incrementally to other parts of her body, in accordance with current medical knowledge and literature which he cited in his report. He opined that appellant's current chronic pain and suffering from fibromyalgia was induced by the repetitive injury she sustained in her distribution clerk job with the employing establishment.

By decision dated July 13, 1999, the Office denied reconsideration without a merit review, finding appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office noted 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 its final merit decision was in error. The Office therefore denied appellant's request for reconsideration 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 did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.607, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.¹ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. Appellant submitted the September 22, 1998 report from Dr. Slavick. However, Dr. Slavick's report is cumulative and repetitive of previous reports he submitted and which were considered by the Office. Appellant's reconsideration request did not contain any new and relevant medical evidence for the Office to review. Additionally, the October 8, 1999 letter failed to show the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Although appellant generally contended that his claimed current condition was causally related to his employment, he failed to submit new and relevant medical evidence in support of this contention. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits. The Board therefore affirms the Office's January 5, 1999 decision.

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 Act³ 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 --

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

¹ 20 C.F.R. § 10.607(b)(1). *See generally* 5 U.S.C. § 8128(a).

² *Howard A. Williams*, 45 ECAB 853 (1994).

³ 5 U.S.C. § 8128(a).

⁴ *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).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).

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 5, 1997. Appellant requested reconsideration on April 20, 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.⁷ 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.⁸

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit, and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ To show clear evidence of error, the evidence submitted must not only be of sufficient probative

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) 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).

⁶ 20 C.F.R. § 10.607(b).

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *See Jesus D. Sanchez*, *supra* note 4.

¹² *See Leona N. Travis*, *supra* note 10.

¹³ *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.¹⁴ 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.¹⁵

The Board finds that appellant's April 20, 1999 request for reconsideration fails to show clear evidence of error. The Office reviewed the February 10, 1999 report of Dr. Slavick and the April 16, 1999 report of Dr. Yunus. While the reports from Drs. Slavick and Yunus are generally relevant to the issue of whether appellant's current condition is causally related to her February 9, 1993 employment injury, the reports are not sufficient to *prima facie* shift the weight of the evidence in favor of appellant. The medical opinion evidence 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 the Office abused its discretion in denying merit review.

The January 5 and July 13, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 1, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

¹⁴ *Leon D. Faidley supra* note 4.

¹⁵ *Gregory Griffin*, 41 ECAB 458 (1990).