

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA L. PETERSON and U.S. POSTAL SERVICE,
POST OFFICE, Tucson, AZ

*Docket No. 01-1229; Submitted on the Record;
Issued February 5, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated February 13, 2001 was not timely filed and failed to present clear evidence of error.

This is the second appeal in this case. In a November 13, 2000 decision, the Board vacated the Office's decision dated June 29, 1999 and remanded the case. The Board found that the Office failed to follow its procedures to determine if appellant, in her letter dated March 26, 1999, was requesting a review of her award or additional compensation subsequent to the prior award. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.¹

In a letter dated December 6, 2000, the Office notified appellant that if she claimed increased impairment over the schedule award granted April 17, 1997, she must submit additional medical evidence indicating the basis for the increased impairment; or if her employment duties which she had performed since the original injury aggravated her condition, she must file a new claim.

In response to the Office's letter appellant indicated that she had since retired and had experienced additional discomfort in her elbows, shoulders and neck. She sought treatment from an orthopedic specialist as well as a chiropractor and had undergone physical therapy. Appellant indicated that she still experienced all the problems she noted in her March 26, 1999 letter and believed she was entitled to additional compensation. She stated that she was confused as to whether she should request a review of the previous award or additional compensation.

In a letter dated January 11, 2001, the Office provided appellant with an explanation of the difference between requesting a review of a previous award and requesting an increased

¹ Docket No. 99-2394 (issued November 13, 2000).

award. The Office indicated that in either case, appellant must submit medical evidence to substantiate her claim if she was disputing the original award or if she believed she was entitled to an increased award.

By letter dated February 13, 2001, appellant requested reconsideration of her claim. She noted that her condition had worsened and that the only medical evidence she possessed was from a chiropractor and physical therapist. Appellant did not submit any additional evidence.

In a decision dated February 21, 2001, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that she did not present clear evidence of error by the Office.

The only decision before the Board on this appeal is that of the Office dated February 21, 2001. Since more than one year elapsed from the date of issuance of the Office's April 17, 1997 merit decision to the date of the filing of appellant's appeal, March 28, 2001 the Board lacks jurisdiction to review this decision.²

The Board finds that the Office properly determined that appellant's request for reconsideration dated February 13, 2001 was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"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, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."³

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁴

In its February 21, 2001 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on April 17, 1997

² See 20 C.F.R. § 501.3(d).

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

and appellant's request for reconsideration was dated February 13, 2001,⁵ which was more than one year after April 17, 1997. Accordingly, appellant's petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁶ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁷

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.¹¹

The Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board notes that appellant did not submit any additional medical evidence with her reconsideration request and finds that she has not established clear evidence of error in this case.

⁵ The Board notes that even if appellant's letter dated March 26, 1999 was considered her reconsideration request, it would still be untimely as the last merit decision by the Office was April 27, 1999. However, this does not preclude appellant from submitting relevant medical evidence in support of a request for an additional schedule award.

⁶ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L Billingsley*, *supra* note 4.

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB ____ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

Appellant's reconsideration request indicated that her condition had worsened and she noted that the only medical evidence she possessed was from a chiropractor and physical therapist, which she did not submit. This statement does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.¹² She submitted no new medical evidence to support her contentions.

Consequently, appellant has not established clear evidence of error on the part of the Office.

The decision of the Office of Workers' Compensation Programs dated February 21, 2001 is hereby affirmed.

Dated, Washington, DC
February 5, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² See *Jesus D. Sanchez*, 41 ECAB 964 (1990).