

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORIA L. RIDEAUX and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 01-855; Submitted on the Record;
Issued January 23, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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

This case has previously been on appeal before the Board. By decision dated February 27, 1997, the Board found that the weight of the medical evidence, represented by the report of an impartial medical specialist resolving a conflict of medical opinion, established that appellant's degenerative arthritis of the left acromioclavicular joint and the surgery she underwent for this condition were not causally related to factors of her employment.¹

By letter dated April 14, 1997, the Office advised appellant that it needed medical documentation that her claimed intermittent periods of disability from October 1, 1992 to April 5, 1994 were causally related to her accepted employment-related condition of left shoulder myositis.

By decision dated January 8, 1998, the Office found that the medical evidence failed to establish that appellant was totally disabled during the periods October 1 to 11, 1992; May 14 to 25, May 27 to June 1 and June 3 to 7, 1993; and June 10, 1993 to April 4, 1994, except for the dates she underwent medical examinations or treatment: June 30, July 7, 27 and 28 and August 3, 9, 14, 16, 18 and 31, 1993.

By letter dated July 28, 1998, appellant requested reconsideration. By decision dated October 7, 1998, the Office found that the additional evidence was immaterial and not sufficient to warrant review of its prior decision.

¹ Docket No. 95-651.

By letter dated December 23, 1998, appellant again requested reconsideration. By decision dated February 24, 1999, the Office found that the additional evidence was immaterial and not sufficient to warrant review of its prior decision. By order dated October 2, 1999, the Board dismissed appellant's appeal docketed as No. 99-982 on the grounds that the Office, rather than the Board, had jurisdiction over the case with regard to appellant's December 23, 1998 letter, which was the basis of the Board docketing the appeal.

By letter dated October 17, 2000, appellant requested that her case again be reviewed. By decision dated November 6, 2000, the Office found that appellant's October 17, 2000 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the Office's November 6, 2000 decision denying appellant's request for reconsideration on the basis that it was not filed with the one-year time limit set forth by 20 C.F.R. § 10.607(a) and that it did not present clear evidence of error.² Since more than one year elapsed between the date of the Office's most recent merit decision on January 8, 1998 and the filing of appellant's appeal on February 9, 2001 the Board lacks jurisdiction to review the merits of appellant's claim.³

The Board finds that appellant's October 17, 2000 request for reconsideration was not timely filed.

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.”

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: “An application for reconsideration must be sent within one year of the date of the Office's decision for which review is sought.” The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁴

² The Board notes that the Office issued a decision on November 16, 2000 denying appellant's claim for a recurrence of her medical condition on August 2, 2000, that appellant requested a hearing regarding this decision by letter dated December 15, 2000 and that appellant specifically requested, in her notice of appeal, that the Board review the Office's November 6, 2000 decision.

³ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

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

In the present case, the most recent merit decision by the Office on the issue before the Board was issued on January 8, 1998. Appellant had one year from the date of this decision to request reconsideration. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.⁵ 20 C.F.R. § 607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which 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 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.¹⁰ 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.¹¹ 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.¹²

The Board finds that appellant's October 17, 2000 request for reconsideration did not demonstrate clear error in the Office's January 8, 1998 decision.

⁵ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁹ *See Leona N. Travis*, *supra* note 7.

¹⁰ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 4.

¹² *Gregory Griffin*, *supra* note 5.

Most of the evidence appellant submitted with the October 17, 2000 request for reconsideration, such as copies of Board and Office decisions, was irrelevant to the finding in the Office's January 8, 1998 decision, that appellant had not established that she was totally disabled by an employment-related condition during intermittent periods from October 1, 1992 to April 4, 1994. Letters from supervisory personnel at the employing establishment stating they were aware of appellant's shoulder complaints have little bearing on the question, which is medical in nature, of whether appellant was totally disabled for the periods claimed. The reports of appellant's attending physician represent one side of a conflict of medical opinion resolved by an impartial medical specialist. The other medical reports appellant submitted either do not address the periods denied by the Office or do not indicate that appellant was disabled during these periods. She submitted no evidence that demonstrates clear error in the Office's January 8, 1998 decision denying compensation for total disability for intermittent periods from October 1, 1992 to April 4, 1994.

The decision of the Office of Workers' Compensation Programs dated November 6, 2000 is affirmed.

Dated, Washington, DC
January 23, 2002

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member