

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN J. BROWN and DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE, OK

*Docket No. 02-702; Submitted on the Record;
Issued September 4, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's untimely request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

On June 16, 1995 the Office accepted that appellant, then a 46-year-old supply technician, developed bilateral carpal tunnel syndrome and required release surgeries as a result of repetitive computer work and writing duties. Appellant received total disability beginning June 23, 1995 and was placed on the periodic rolls.

On July 3, 1996 appellant was medically released to return to limited-duty work, for eight hours per day. The employing establishment offered appellant a rehabilitative clerical position, in accordance with the outlined medical restrictions, which she accepted, however, appellant did not report to work on the agreed upon date.

By decision dated October 10, 1996, the Office terminated appellant's compensation benefits on the grounds that she had failed to accept an offer of suitable work as a modified clerk. In a letter postmarked November 22, 1997, appellant requested an oral hearing.

By decision dated January 6, 1998, the Office denied appellant's request for a hearing as untimely. On January 21, 1998 the Office reinstated appellant's benefits following a review of her case since the Office had failed to advise appellant that her reasons for refusing to return to work were not justified.

Appellant was subsequently offered a secretarial position by the employing establishment after Dr. Charles Funderburk, a Board-certified orthopedic surgeon, released her to limited-duty work on April 29, 1998. Appellant declined the offer on July 29, 1998 after the Office advised that the position was suitable to her work capabilities. The Office informed appellant by letter dated September 1, 1998, that her reasons for refusing the position were not justified and that

appellant had 15 days to accept the position. In a letter dated September 9, 1998, she again declined the job offer.

By decision dated November 6, 1998, the Office terminated appellant's compensation finding that she refused an offer of suitable light duty. On December 7, 1998 appellant, requested a review of the written record. Appellant argued that she refused the position because she had arthritis in her arms and hands since surgery and a permanent back injury due to an automobile accident, which had required restrictions since 1987. Appellant further argued that she was advised that the position which she was offered was not permanent.

By decision dated March 11, 1999, an Office hearing representative affirmed the prior decision. The Office hearing representative found that appellant was offered a light-duty position within the work restrictions imposed by Dr. Funderburk and that her reasons for refusing such work were unacceptable. The Office hearing representative determined that the record was devoid of evidence to indicate that the offered position was temporary and that appellant had further work restrictions for a back injury, which might prevent her from performing the modified duties of the offered position.

Appellant requested reconsideration in a letter received by the Office on August 10, 2000. By decision dated October 19, 2001, the Office denied appellant's reconsideration request as untimely filed and found that the evidence submitted presented no clear evidence of error on the part of the Office.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly denied appellant's request for reconsideration as it was untimely filed and failed to present clear evidence of error.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.¹ As appellant filed her appeal on February 5, 2000 the only decision over which the Board has jurisdiction on this appeal is the October 19, 2001 decision, denying appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its

¹ See 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

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 limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

In this case, appellant's letter requesting reconsideration is postmarked August 10, 2000.⁸ The merit decision of the hearing representative is dated March 11, 1999. Since appellant's request for reconsideration was made more than one year after the Office decision, it is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision, upon presentation of new evidence that the decision was erroneous.⁹ In accordance with this holding the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹⁰

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

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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606.

⁶ 20 C.F.R. § 10.607(a).

⁷ *See Leon D. Faidley, Jr., supra* note 3.

⁸ Although appellant claims in her appeal that she had mailed the original request for reconsideration in March 2000, which she alleges was lost by the Office, her hand written note on her appeal states that the original request was mailed on March 21, 2000. Even if the appeal had been mailed on that date it would still have been untimely filed.

⁹ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.3(c) (May 1996); *see also* 20 C.F.R. § 10.607(b).

¹¹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *See Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁴ *See Leona N. Travis, supra* note 12.

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.¹⁵

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.¹⁶ 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.¹⁷

In this case, appellant's August 10, 2000 letter, requesting reconsideration reiterates her allegation that the position offered was temporary, without providing any new evidence relevant to this allegation. She indicated in her letter that she was submitting additional evidence, but the evidence referenced in her letter had been previously submitted and considered by the Office. The record contains two medical reports submitted just prior to the October 19, 2001 decision. Results of electromyography and nerve conduction studies dated November 10, 1999, showed no abnormalities of appellant's arms or evidence of radiculopathy, neuropathy or myopathy. A medical note from Dr. Funderburk dated November 18, 1999, confirmed that appellant had undergone nerve conduction studies, which were completely normal. These reports do not demonstrate that appellant was incapable of performing the light-duty job that was offered and medically approved, but offer contrary implications. In the absence of evidence that is of such probative value that it shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of the Office decision, the Board finds that the Office properly denied the request for reconsideration in this case.¹⁸

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁷ *Gregory Griffin*, 41 ECAB 186 (1986), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁸ Appellant did submit additional evidence on appeal, however, the Board's jurisdiction is limited to evidence that was before the Office at the time of its decision. 20 C.F.R. § 501.2(c).

The October 19, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 4, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member