

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN V. TIBBS and U.S. POSTAL SERVICE,
POST OFFICE, Rochester, NY

*Docket No. 99-1409; Submitted on the Record;
Issued July 26, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order¹ on April 24, 1998 in which it found that the Office did not abuse its discretion in denying appellant's request for an oral hearing and that the Office properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.² The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

After the Board's April 24, 1998 decision, appellant submitted additional evidence in support of her claim. By decision dated February 1, 1999, the Office denied appellant's reconsideration request on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

¹ Docket No. 96-1701.

² On October 16, 1989 appellant, then a 33-year-old distribution clerk, filed a claim alleging that she sustained an emotional condition due to various incidents and conditions at work. By decision dated September 11, 1990, the Office denied appellant's claims on the grounds that she did not establish any compensable employment factors. By decision dated July 15, 1995, the Office denied appellant's request for a hearing as untimely. By decision dated March 19, 1996, the Office denied appellant's request for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's February 1, 1999 decision denying appellant's request for a review on the merits of its September 11, 1990 decision.³

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁷ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁸

In its February 1, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on September 11, 1990 and appellant's request for reconsideration was dated November 1, 1998, more than one year after September 11, 1990.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁹ In accordance with Office regulations, 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

³ See 20 C.F.R. § 501.3(d)(2).

⁴ 5 U.S.C. §§ 8101-8193. 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." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. §§ 10.606(b)(2).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁹ *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ 20 C.F.R. § 10.607 (1999).

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 and explicit and must 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 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 accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform 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, notwithstanding the untimeliness of her application. 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.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of her application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

In the November 1, 1998 letter constituting her reconsideration request, appellant stated that she was submitting medical evidence which shows that she was suffering stress at the employing establishment since 1982. She also indicated that she was attempting to obtain copies of her medical records. In support of her reconsideration request, appellant submitted documents

¹¹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 8.

¹⁷ *Gregory Griffin*, 41 ECAB 186, *petition for recon. denied*, 41 ECAB 458, 466 (1990).

concerning her attempts to obtain medical records. She also submitted a July 31, 1998 report from an attending physician which detailed her orthopedic condition.

These documents, however, are of limited probative value in that they do not directly relate to the main issue of the present case, *i.e.*, whether appellant has established compensable employment factors which she claimed caused her to sustain an emotional condition. This issue is essentially factual in nature and the documents submitted by appellant do not clearly show that the Office erred when it determined that appellant did not establish that the claimed incidents and conditions at work constituted employment factors. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁸ Appellant also submitted evidence which had previously been submitted to the Office, including copies of medical evidence.¹⁹ The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²⁰

For these reasons, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

¹⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁹ Appellant submitted a copy of the Board's April 24, 1998 decision. She also submitted a copy of a Board decision concerning the proper standard for reviewing reconsideration requests when the Office reopens a case for further development of the medical evidence. Appellant did not explain how this case related to the circumstances of her case.

²⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

The decision of the Office of Workers' Compensation Programs dated February 1, 1999 is affirmed.

Dated, Washington, D.C.
July 26, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member