

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BELINDA F. BURKE and U.S. POSTAL SERVICE,
POST OFFICE, Mobile, Ala.

*Docket No. 96-1848; Submitted on the Record;
Issued August 24, 1998*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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

On September 22, 1985 appellant, then a 33-year-old distribution clerk, injured her right wrist as she lifted a tray of mail. The Office initially accepted the claim for sprain of the right wrist, but later expanded the claim to include a right carpal tunnel syndrome.

On June 20, 1990, appellant was offered a job as a change of address clerk, working limited duty, four hours per day. Appellant accepted this job and worked it until April 12, 1991 when she assumed the duties of a modified training technician, working six hours per day with limited use of hands and lifting not to exceed five pounds. By decision dated December 29, 1992, the Office found that appellant had a 75 percent wage-earning capacity (6 hours per day).

On March 15, 1993, appellant was notified that, due to the restructuring of the employing establishment, the technician position was no longer available and she was being reassigned to a position in the main mail room with the same restrictions as cited above. Appellant remained in receipt of compensation for partial wage loss of 2 hours per day or 10 hours per week. Appellant signed the main mail room job on March 17, 1993 "under duress" stating that she felt that the job was detrimental to her health and safety. Appellant reported for work on April 28, 1993, worked two hours, and left.

Appellant requested that the Office pay compensation for the remaining hours, or 30 hours per week.

In a letter dated August 9, 1993, the Office advised appellant that the new job she was offered accommodated her work restrictions and was suitable to her capabilities. Appellant was given 30 days to provide an adequate reason for not accepting or performing the work.

Appellant did not respond so the Office issued a second notification letter dated September 17, 1993 advising appellant that she had 15 days to accept the limited-duty job. Appellant was further advised that her compensation would be terminated under 5 U.S.C. § 8106(c) if she refused to accept the job.

By decision dated November 29, 1993, the Office denied appellant's claim for lost wages, which covered the difference between appellant's loss of wage-earning capacity (25 percent loss) and the 6 hours she last worked on April 28, 1993.

Appellant retired from the employing establishment on medical disability effective February 5, 1994.¹

By letter dated October 22, 1995, which the Office received on February 5, 1996, appellant requested reconsideration of her claim. Appellant wrote that following her retirement from the postal service, she has been unable to find employment as a result of her carpal tunnel syndrome condition. Appellant also submitted an August 29, 1995 medical progress report from Dr. William A. Crotwell, a Board-certified orthopedic surgeon, who noted that appellant is status postoperative carpal tunnel syndrome on the right and has a possible cyst or triangular fiber-cartilage thickening.

By decision dated March 26, 1996, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). The Office 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.² When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence of error that the Office's final merit decision was in error.³ Since more than one year elapsed from the November 29, 1993 merit decision of the Office to appellant's October 22, 1995 reconsideration request, which the Office received February 5, 1996, the request for reconsideration 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.⁴ In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set

¹ Effective May 28, 1994, appellant, at her own request, was no longer in receipt of a loss of wage-earning capacity.

² 20 C.F.R. § 10.138(b)(2). *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

³ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ *Leonard E. Redway*, 28 ECAB 242 (1977).

forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁵

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

In this case, the evidence submitted by appellant 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. The Board notes that once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.

⁵ Federal (FECA) Procedure Manual, Part 2 – Claims, *Reconsiderations*, Chapter 2.1602.3 (May 1991). The Office therein states:

"The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, a proof of miscalculation in a schedule award). Evidence such as a well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case...."

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

¹¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² *Gregory Griffin*, *supra* note 2.

Moreover, the burden of proof is on the party attempting to show modification of the award.¹³ In the instant case, Dr. Crotwell's progress report fails to provide an opinion regarding appellant's work capacity to perform the main mail room position. Moreover, although appellant argues that she is unable to find employment as a result of her carpal tunnel syndrome condition, following her retirement from the employing establishment this does not establish that the Office made an error in its original determination. Thus, the evidence submitted by appellant is insufficient to establish clear evidence of error.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The March 26, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
August 24, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ *Don J. Mazurek*, 46 ECAB 447 (1995); *Odessa C. Moore*, 46 ECAB 681 (1995).