

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA K. BAUER and U.S. FOREST SERVICE,
PLACERVILLE NURSERY, Camino, Calif.

*Docket No. 96-1909; Submitted on the Record;
Issued December 11, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration of the Office's March 9, 1995 decision under 5 U.S.C. § 8128; and (2) whether the Office properly determined that appellant's request for reconsideration of a March 27, 1992 decision dated February 15, 1996 was untimely filed and did not demonstrate clear evidence of error.

On March 15, 1988 appellant, then a 28-year-old gardener, filed a claim alleging that she injured her back when she stepped in a hole while walking around a drainage ditch on March 14, 1988. The Office accepted the claim for back strain and she was placed on the periodic roll for temporary total disability effective October 10, 1988. In a letter dated December 13, 1988, the employing establishment noted that appellant was terminated with the rest of the temporaries due to a lack of work.

By decision dated March 31, 1992, the Office reduced appellant's compensation based upon a loss of wage-earning capacity determination that appellant was capable of performing the position of telephone answering machine operator.

By letter dated September 15, 1992, appellant requested a written review of the record which the Office denied as untimely in a letter dated November 22, 1992.

By letter dated February 5, 1993, appellant requested reconsideration of the Office's decision to reduce her wage-earning capacity and submitted evidence in support of her request.

By decision dated April 21, 1993, the Office denied appellant's request on the basis that the evidence submitted was repetitious, irrelevant and immaterial.

On January 30, 1995 the Office issued a notice of proposed termination of compensation on the grounds that the evidence established that appellant no longer suffered residuals of her

March 14, 1988 employment injury. The Office allowed appellant 30 days within which to respond to the proposed termination of compensation.

In a letter dated February 22, 1995, appellant responded to the Office's notice of proposed termination and submitted an undated report from Dr. David E. Carey, a chiropractor. In the undated letter, Dr. Carey opined that, based upon his review of her May 10, 1988 x-ray interpretations, appellant had L5 retrolisthesis and a decrease in lumbar lordosis. Dr. Carey stated that based upon his x-ray interpretations of November 25, 1992, appellant had "a degeneration of the L4-5 and L5-S1 disc spaces, and a furthering of the L5 retrolisthesis. This finding indicates your lumbar problems are ongoing and causing continuing degeneration."

By decision dated March 9, 1995, the Office finalized its proposed termination of compensation effective April 2, 1995. In the attached memorandum, the Office noted that the medical report from Dr. Carey was of no probative value as he had not diagnosed a spinal subluxation. The Office found that there were no objective findings to support appellant's subjective belief that she could not work more than four hours per day and that her condition had worsened since March 8, 1990.

By letter dated February 15, 1996, appellant requested reconsideration of the March 27, 1992 and March 9, 1995 decisions and submitted additional medical and factual information. The only new medical evidence submitted was a June 2, 1995 report from Dr. Gregory J. Dixon, a Board-certified orthopedic surgeon, who diagnosed severe degenerative disc disease and advised that appellant obtained relief from chiropractic treatment.

By letter decision dated March 12, 1996, the Office denied appellant's request for reconsideration of the Office's March 9, 1995 and March 31, 1992 decisions. The Office found the evidence submitted to be irrelevant, immaterial and insufficient to warrant review of the March 9, 1995 decision terminating her benefits. With regard to the March 31, 1992 loss of wage-earning capacity decision, the Office found appellant's application to be untimely as it was filed more than one year after the last merit decision on that issue and did not establish clear evidence of error.

The Board's jurisdiction to consider and decide appeals from the final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed her appeal with the Board on June 3, 1996, the only decision before the Board is the March 12, 1996 Office decision.²

The Board finds that the Office properly denied appellant's request for reconsideration of the Office's March 9, 1995 decision terminating her compensation benefits.

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 20 C.F.R. §§ 501.2(c), 501.3(d).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁴ 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.⁵ To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶

The Board has held that evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim.⁷ Evidence which does not address the relevant issue involved in the case does not constitute a basis for reopening a claim.⁸ Merit review is not required where the legal contention presented does not have a reasonable color of validity.⁹

With her reconsideration request appellant submitted a report dated June 2, 1995 from Dr. Gregory J. Dixon, a Board-certified orthopedic surgeon, who stated that appellant got relief from chiropractic treatment and diagnosed severe degenerative disc disease. In her February 15, 1996 reconsideration request, appellant did not show that the Office erroneously applied or interpreted a point of law nor did she advance a point of law or fact not previously considered by the Office. The evidence submitted by appellant also did not constitute relevant and pertinent evidence not previously considered by the Office. His report does not address the issue of whether appellant is totally disabled due to her accepted employment injury of back strain. Dr. Dixon diagnosed severe degenerative disc disease, but gave no opinion on the cause of the disease.

As the evidence submitted by appellant is not relevant to the March 9, 1995 termination, it does not constitute a basis for reopening her claim on the merits. The Board finds that the Office properly denied appellant's application for reconsideration of her claim.

The Board further finds that the Office properly determined that appellant's request for reconsideration of the March 31, 1992 decision on her wage-earning capacity was untimely filed and did not demonstrate clear evidence of error.

³ 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).

⁴ 20 C.F.R. § 10.138(b)(1) and (2).

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ See *Richard L. Ballard*, 44 ECAB 146 (1992); *Eugene F. Butler*, 36 ECAB 393 (1984).

⁸ See *Ernest J. LeBreux*, 42 ECAB 736 (1991).

⁹ See *Nora Favors*, 43 ECAB 403 (1992).

Section 8128(a) of the Federal Employees' Compensation Act¹⁰ does not entitle a claimant to a review of an Office decision as a matter of right.¹¹ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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 its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).¹² 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.¹³ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹⁴

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁵ The Office issued its last merit decision on appellant's wage-earning capacity on March 31, 1992. As appellant's February 15, 1996 reconsideration request was outside the one-year time limitation which began the day after March 31, 1992, the date of the last merit decision, appellant's request for reconsideration was untimely.¹⁶

¹⁰ 5 U.S.C. § 8128(a).

¹¹ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² 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 point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

¹³ 20 C.F.R. § 10.138(b)(2).

¹⁴ *See* cases cited *supra* note 6.

¹⁵ *Larry L. Lilton*, 44 ECAB 243 (1992).

¹⁶ The Board has previously held that a request for reconsideration unaccompanied by relevant new evidence or argument for error in fact of law is *prima facie* insufficient to warrant review of the case. *John B. Montoya*, 44 ECAB 11148 (1992).

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹⁷ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.²⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.²¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²² 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.²³ 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.²⁴ 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.²⁵

The Board has duly reviewed the case record and concludes that appellant has not established clear evidence of error in this case. The issue for purposes of establishing clear

¹⁷ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b) (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, proof of a miscalculation in a schedule award). Evidence such as a detailed, 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 a review of the case...."

¹⁹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

²⁰ *See Leona N. Travis*, 43 ECAB 227 (1991).

²¹ *See Jesus D. Sanchez*, *supra* note 11.

²² *See Leona N. Travis*, *supra* note 20.

²³ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

²⁴ *See Leon D. Faidley, Jr.*, *supra* note 11.

²⁵ *See Gregory Griffin*, *supra* note 17.

evidence of error is whether appellant has submitted evidence establishing that the loss of wage earning capacity determination was clearly erroneous. The only new evidence appellant submitted in support of her reconsideration were an undated letter from Dr. Carey, a chiropractor, and a June 2, 1995 report from Dr. Dixon. Neither report addresses the issue of disability or substantiates that the Office's March 27, 1992 wage-earning capacity decision was in error. The Office properly determined that appellant had not established clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated March 12, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 11, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member