

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of BARBARA J. BROOKS and U.S. POSTAL SERVICE,
POST OFFICE, Bell, Calif.

*Docket No. 97-45; Submitted on the Record;
Issued October 26, 1998*

DECISION and ORDER

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

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 was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's May 30, 1996 decision denying appellant's request for a review on the merits of the Office's decision dated December 31, 1991.¹ Because more than one year has elapsed between the issuance of the Office's December 31, 1991 decision and August 26, 1996, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the prior Office decisions.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation 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 fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision

¹ By this decision the Office denied modification of a September 19, 1991 decision denying modification of a May 29, 1991 decision which rescinded acceptance of appellant's claim based upon the fact that appellant's treating chiropractor failed to diagnose a subluxation as demonstrated by x-ray to exist.

² See 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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),(2).

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.⁵ 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.⁶ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁷

In its May 30, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on December 31, 1991, and appellant's request for reconsideration was dated April 25, 1996 which was clearly more than one year after December 31, 1991. Therefore, appellant's request for reconsideration of her case on its merits was untimely filed.

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."⁸ Office procedures provide 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ To

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁹ Federal (FECA) Procedure Manual, Part 2 – Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996).

¹⁰ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹³ *See Leona N. Travis*, *supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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.¹⁵ The Board makes an independent determination as to 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.¹⁶

In the present case, with her request for reconsideration of the December 31, 1991 decision, appellant submitted a copy of Dr. Bart DeCoro's February 18, 1992 report stating only that appellant had degenerative disc disease at L5-S1 with a moderate bulging disc. The report did not mention a traumatic work injury occurring on December 4, 1990. This report, therefore, did not demonstrate any clear evidence of error on its face on the part of the Office in its December 31, 1991 decision, as the Office properly ascertained. Consequently, the Board now finds that it is indeed insufficient to reopen appellant's case for further consideration on its merits.

As this evidence does not raise a substantial question as to the correctness of the prior December 31, 1991 Office decision or shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, 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.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.¹⁷ Appellant has made no such showing here.

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 7.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *aff'd on recon.*, 41 ECAB 458 (1990).

¹⁷ *Daniel J. Perea*, 42 ECAB 214 (1990).

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 30, 1996 is hereby affirmed.

Dated, Washington, D.C.
October 26, 1998

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member