

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARGARET B. ADAMS and U. S. POSTAL SERVICE,  
POST OFFICE, Chicago, Ill.

*Docket No. 98-103; Submitted on the Record;  
Issued June 24, 1999*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

This case has been before the Board on three prior occasions. By decision and order dated April 24, 1981, the Board affirmed the Office's January 23, 1981 decision that appellant's employment-related disability had ceased by September 14, 1978.<sup>1</sup> By decision and order dated January 11, 1985, the Board found that the refusal of the Office to reopen appellant's case for review on the merits pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.<sup>2</sup> By decision and order dated November 27, 1985, the Board found that the refusal of the Office to reopen appellant's case for review on the merits pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.<sup>3</sup>

In decisions dated April 12, 1993 and January 26, 1994, the Office denied appellant's requests for reconsideration, finding that the evidence submitted was not sufficient to establish that her degenerative back condition was causally related to her employment injuries.<sup>4</sup>

By letter dated January 10, 1997, appellant requested reconsideration of her claim. In support of her request, appellant submitted a January 10, 1997 medical report from Dr. Carlton A. West, a Board-certified orthopedic surgeon. Dr. West stated findings on

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<sup>1</sup> Docket No. 81-911.

<sup>2</sup> Docket No. 85-38.

<sup>3</sup> Docket No. 85-2060.

<sup>4</sup> The Office also denied appellant's request for reconsideration in a nonmerit decision dated October 17, 1991.

examination and diagnosed degenerative disc disease at C5-6 and C6-7 with radiculopathy, in addition to a probable rotator cuff of the right shoulder secondary to degenerative changes in the right shoulder. Dr. West opined that appellant remained totally disabled, “as she had been for the last several years.” Appellant also submitted a January 28, 1997 treatment note which indicated that a January 22, 1997 magnetic resonance imaging scan had revealed a complete tear of the rotator cuff.

By decision dated March 25, 1997, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which, on its face, showed that the Office made an error, and that there was no evidence submitted that showed the prior decision was in error. The Office therefore denied appellant’s request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.138(b)(2).

The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>5</sup> As appellant filed her appeal with the Board on September 24, 1997, the only decision properly before the Board is the March 25, 1997 decision.

The Board finds that the Office properly determined that appellant’s request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees’ Compensation Act<sup>6</sup> does not entitle an employee to a review of an Office decision as a matter of right.<sup>7</sup> 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, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

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<sup>5</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>8</sup> 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.<sup>9</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted to the Office under 5 U.S.C. § 8128(a).<sup>10</sup>

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on January 26, 1994. Appellant requested reconsideration on January 10, 1997; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had 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.<sup>11</sup> Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the appellant's application for review shows "clear evidence of error" on the part of the Office.<sup>12</sup>

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.<sup>13</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>14</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</sup> 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.<sup>17</sup> To

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<sup>8</sup> 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 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).

<sup>9</sup> 20 C.F.R. § 10.138(b)(2).

<sup>10</sup> See cases cited *supra* note 7.

<sup>11</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>13</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>14</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>15</sup> See *Jesus D. Sanchez*, *supra* note 7.

<sup>16</sup> See *Leona N. Travis*, *supra* note 14.

<sup>17</sup> 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's decision.<sup>18</sup> The Board makes an independent determination of whether an appellant 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.<sup>19</sup>

The Board finds that appellant's January 10, 1997 request for reconsideration fails to show clear evidence of error. Neither Dr. West's January 10, 1997 report nor the January 28, 1997 treatment note contained a rationalized, probative opinion indicating that appellant's current condition and/or disability was causally related to her November 4, 1971 employment injury, and, more importantly, was sufficient to *prima facie* shift the weight of the evidence in favor of appellant. The Office reviewed the evidence and properly found it to be insufficient. In addition, appellant did not present any evidence of error on the part of the Office in her request letter. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The March 25, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.  
June 24, 1999

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>18</sup> *Leon D. Faidley, Jr., supra* note 7.

<sup>19</sup> *Gregory Griffin*, 41 ECAB 458 (1990).