

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ELIZABETH A. MOORE and U.S. POSTAL SERVICE,  
POST OFFICE, Elko, Nev.

*Docket No. 97-2311; Submitted on the Record;  
Issued May 7, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
WILLIE T.C. THOMAS

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.

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.

On May 12, 1994 appellant filed an occupational disease claim for severe lower back pain which she attributed to factors of her federal employment. By letter dated July 6, 1994, the Office informed appellant that she should submit factual information and a rationalized medical opinion in support of her claim. Appellant did not respond to the Office's request for information.

By decision dated January 10, 1995, the Office denied appellant's claim on the grounds that the evidence did not establish fact of injury. The Office explained that appellant failed to provide a description of the implicated employment activities she believed contributed to her claimed condition and also failed to submit rationalized medical evidence supporting causal relationship between the employment activities and her claimed condition.

By letter dated April 20, 1997, received by the Office on May 15, 1997, appellant requested reconsideration and submitted additional factual evidence. By decision dated June 6, 1997, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to establish clear evidence of error.

The only decision before the Board on this appeal is the Office's June 6, 1997 decision, denying appellant's request for a review on the merits of its January 10, 1995 decision, denying

her occupational disease claim. Because more than one year has elapsed between the issuance of the Office's January 10, 1995 decision and July 1, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the January 10, 1995 merit decision.<sup>1</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> 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.<sup>3</sup> To be entitled to a 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

In its June 6, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on January 10, 1995 and appellant's request for reconsideration was received by the Office on May 15, 1997 which was more than one year after January 10, 1995.

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."<sup>7</sup> 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.<sup>8</sup>

The Office's procedure manual discusses "clear evidence of error" as follows:

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 20 C.F.R. § 10.138(b)(1)(2).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>6</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>8</sup> *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

“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 a mistake (for example, proof that a schedule awards was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, 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 on the Director’s own motion.”<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>11</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>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</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>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

In the present case, appellant submitted a statement describing the factors of her employment to which she attributed her back condition. Appellant also included a statement dated April 29, 1997, from a coworker who indicated that he remembered her reporting an injury at an unknown date. Appellant further submitted a statement from a coworker who described her own problems claiming an on-the-job injury at the employing establishment. Such factual evidence is not positive, precise and explicit enough to demonstrate that the Office committed an

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>10</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>13</sup> See *Leona N. Travis*, *supra* note 11.

<sup>14</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>15</sup> See *Leon D. Faidley, Jr.*, *supra* note 6.

<sup>16</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *reaff’d on recon.*, 41 ECAB 458 (1990).

error in its January 10, 1995 decision, in finding that appellant had failed, at that time, to submit a description of the employment factors implicated in causing her condition.<sup>17</sup>

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's January 10, 1995 decision, she has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of her claim.

The decision of the Office of Workers' Compensation Programs dated June 6, 1997 is hereby affirmed.

Dated, Washington, D.C.  
May 7, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>17</sup> See *Thankamma Mathews*, 44 ECAB 765 (1993).