

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTHA CASABLANCA and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 99-1674; Submitted on the Record;
Issued August 3, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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.

Appellant, then a 41-year-old distribution clerk, filed an occupational disease claim on February 26, 1987 alleging that she developed carpal tunnel syndrome as a result of her federal employment. The Office accepted appellant's claim for bilateral wrist tendinitis on September 16, 1987. Appellant did not stop work but was restricted to limited work duties as a result of her accepted condition.

Appellant filed a recurrence claim on April 20, 1988 alleging that her original injury caused her additional disability on April 5, 1988. Appellant continued modified duties with intermittent periods of disability until she was placed on total disability in April 1990.

On December 7, 1992 the Office informed appellant that it proposed to terminate her compensation, as she no longer suffered from residuals of the industrial injury. The Office allotted appellant 30 days to submit additional evidence related to her industrial injury and resulting disability.

By decision dated March 31, 1993, the Office terminated appellant's compensation benefits effective April 4, 1993 on the grounds that her disability and need for medical care resulting from the industrial injury ceased by that date. The Office found the weight of the medical evidence established that appellant no longer suffered from residuals of her industrial injury and appellant submitted insufficient evidence to overcome the weight of the medical evidence.

Appellant requested reconsideration of the March 31, 1993 decision in a letter dated August 17, 1998, received by the Office on September 18, 1998. Appellant argued that the Office erred in finding that the weight of the evidence rested with Dr. Philip Chan, a Board-certified orthopedic surgeon, contending his report lacked sufficient rationale and, therefore, the Office had not discharged its burden of proof to terminate her compensation benefits.

By decision dated December 1, 1998, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not 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 and presented no clear evidence of error.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; or (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." To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.² 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.³

In its December 1, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the March 31, 1993 decision terminating benefits, which stated that if she requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. The Office issued its merit decision in this case on March 31, 1993 and as appellant's August 17, 1998 reconsideration request was outside the one-year time limit, which began the day after March 31, 1993, appellant's request for reconsideration was untimely.

The Office, however, may not deny an application for review solely on the ground 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 of the case to determine whether the application establishes "clear evidence of error."⁴ The Office will reopen a claimant's case for merit review

¹ 5 U.S.C. §§ 8101-8193. 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 application." 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.138 (b)(2).

³ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁴ *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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.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 manifested 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 by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹²

In support of appellant's August 17, 1998 request for reconsideration, the Office considered her argument that it erred in determining that the weight of the evidence rested with Dr. Chan. Appellant contended his report lacked sufficient rationale regarding the conflicting medical evidence of record and, therefore, the Office had not discharged its burden of proof to terminate her compensation benefits. The Office determined, however, that the evidence of record at the time of the March 31, 1993 decision demonstrated that it had followed proper procedures in effect at that time regarding referee referrals, to resolve a conflict of medical opinion as required under the Act. Appellant has not established that the Office's March 31, 1993 decision was in error, or raised a substantial question as to the correctness of that decision.¹³ Therefore, as appellant has not raised a substantial question as to the correctness of the merit decision or presented evidence which on its face shows that the Office made an error,

⁵ See *Jeanette Butler*, 47 ECAB 128 (1995).

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*, 41 ECAB 458 (1990).

¹³ See *Leon D. Faidley, Jr.*, *supra* note 11.

she has failed to establish clear evidence of error on the part of the Office with respect to its March 31, 1993 decision.

For the foregoing reasons, the decision of the Office of Workers' Compensation Programs dated December 1, 1998 is affirmed.

Dated, Washington, D.C.
August 3, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member