

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN CASIANA and DEPARTMENT OF THE ARMY,
SIERRA ARMY DEPOT, Herlong, CA

*Docket No. 98-2409; Submitted on the Record;
Issued March 10, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act on the grounds that the application for review was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and that the application failed to present clear evidence of error.

On February 17, 1993 appellant, then a 47-year-old clerk, filed a notice of occupational disease and claim for compensation alleging that she developed a stress condition due to discrimination against her because she was deaf. Appellant specifically alleged that the employing establishment discriminated against her by failing to provide her with an adequate interpreter. She submitted notices of reprimand, suspension and a proposed removal order dated December 9, 1992 citing that appellant left her work area without prior approval and failed to follow orders. According to appellant, the lack of a qualified interpreter resulted in miscommunication with the employing establishment on the administrative matters cited above.

In a decision dated September 9, 1993, the Office denied compensation on the grounds that appellant failed to establish that she sustained an emotional condition in the performance of duty.

On October 3, 1994 appellant requested reconsideration.

The Office denied appellant's reconsideration request on October 25, 1994, finding that the evidence submitted was not sufficient to warrant modification of the September 9, 1993 decision.

On October 25, 1995 appellant, by counsel, filed a motion for reconsideration and submitted a three-page letter from the NORCAL Center on Deafness explaining why appellant required a more qualified interpreter in her employment.

In a decision dated January 4, 1996, the Office denied modification of its prior decision.

In a fax transmission received by the Office on January 7, 1997, appellant's counsel filed another request for reconsideration and submitted additional evidence.

In a decision dated February 13, 1997, the Office denied appellant's reconsideration request on the grounds that it was untimely filed. The Office further noted that the evidence submitted with appellant's application for review did not establish clear evidence of error in the original decision.

On May 14, 1998 appellant filed a fourth reconsideration request.

In conjunction with her reconsideration request, appellant submitted the following documents: a July 2, 1998 Privacy Act release; a March 16, 1994 Equal Employment Opportunity (EEO) counselor report indicating that the employing establishment would honor appellant's request for interpreters; an unsigned and undated document entitled "Theory;" a copy of the Office's February 13, 1997 nonmerit decision; a copy of the May 14, 1998 request for reconsideration; an October 8, 1991 Federal Labor Relation Authority Charge against the employing establishment by the Union that it was not provided requested information concerning equity workload on computers; a February 16, 1993 medical consultation sheet indicating that appellant was being treated for stress; a December 8, 1992 letter to Colonel Germaine, discussing interpreting services, awareness seminars concerning disabled individuals, counseling services and appellant's training courses; and a copy of the Office's January 4, 1996 decision.

In a decision dated July 16, 1998, the Office denied appellant's reconsideration request on the grounds that it was untimely filed. The Office further found that the evidence submitted with appellant's application for review did not demonstrate clear evidence of error in the original decision.

The Board finds that the Office properly found that appellant's reconsideration request was not timely filed and that such request did not present clear evidence of error.

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.¹ As appellant filed her appeal with the Board on August 3, 1998 the only decision properly before the Board is the July 16, 1998 decision denying appellant's request for reconsideration.

Section 8128(a) of the Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ 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 a decision which reviewed the merits of the claim.⁶ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

In this case, appellant's request for reconsideration was dated May 14, 1998. Since this is more than one year after the Office's January 4, 1996 merit review decision, the request was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.⁸ In accordance with Office procedures, 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 that 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

⁴ 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 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).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *See Leon D. Faidley, Jr., supra* note 3.

⁸ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (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, supra* note 3.

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

record and whether the new evidence demonstrates clear error on the part of the Office.¹⁴ 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.¹⁵ 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.¹⁶

In the instant case, the Office denied appellant's claim for a stress condition because the evidence was insufficient to establish that appellant sustained her emotional condition in the performance of duty.¹⁷ In support of her reconsideration request, appellant submitted copies of two Office decisions, a December 8, 1992 letter and a motion for reconsideration that was already contained in the file. She submitted an EEO counselor's report, a Federal Relations Authority Charge pertaining to computer usage that has no relevance to this case and a medical consultation sheet.¹⁸ With respect to the EEO counselor's report, the Board notes that the document fails to establish abuse or error on behalf of the employing establishment in the administrative matter alleged in this case, which was the assignment of an interpreter for appellant. The EEO counselor specifically stated that the employing establishment would attempt to honor appellant's request for a more qualified interpreter. The remaining evidence is either repetitive or not relevant to establish that appellant developed her emotional condition in the performance of duty.

The Board finds that the evidence submitted by appellant in support of her reconsideration request does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. Because appellant did not submit evidence substantiating clear evidence of error, the Office did not abuse its discretion in denying merit review of the case.

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

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁶ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

¹⁷ To establish that an injury was sustained in the performance of duty, a claimant must submit the following: (1) medical evidence establishing the presence or existence of a disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant; see *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁸ Because appellant was unable to allege a compensable factor of employment, the medical evidence submitted on reconsideration is, therefore, moot with regard to the issue of clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated July 16, 1998 is hereby affirmed.

Dated, Washington, D.C.
March 10, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member