

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIE RUSSELL and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Des Moines, IA

*Docket No. 02-912; Submitted on the Record;
Issued September 10, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error; and (2) whether the Office abused its discretion in refusing to reopen appellant's claim for a further review of the merits of her claim under 5 U.S.C. § 8128(a).

On April 1, 1999 appellant, then a 53-year-old mail processor, filed an occupational claim alleging that on February 1, 1999 she first realized that her carpal tunnel syndrome was caused or aggravated by factors of her employment.

On April 19, 1999 appellant accepted an offer of limited-duty work at the employing establishment.

By letter dated July 6, 1999, the Office accepted appellant's claim for carpal tunnel syndrome of the left hand. Subsequently, the Office approved her request for left carpal tunnel release, which was performed on February 11, 2000.

On August 29, 1999 appellant filed a claim alleging that she sustained a recurrence of disability on August 20, 1999. She stopped work on August 20, 1999. By decision dated October 21, 1999, the Office denied appellant's recurrence of disability claim.

On February 8, 2000 appellant filed a claim for compensation for the period August 20, 1999 through February 8, 2000.

By decision dated April 6, 2000, the Office found the evidence of record insufficient to establish that appellant was entitled to compensation during the period August 20, 1999 through February 8, 2000.

In an October 23, 2001 letter, appellant, through her counsel, requested reconsideration of the Office's decision.

In a November 26, 2001 decision, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed within the one-year time limitation and failed to present clear evidence of error.

The Office issued an amended decision on December 3, 2001, denying appellant's request for reconsideration on the grounds that it was not timely filed within the one-year time limitation and failed to present clear evidence of error. In a December 5, 2001 letter, appellant, through her counsel, requested reconsideration of the Office's November 26, 2001 decision.

By decision dated December 18, 2001, the Office denied appellant's request for a merit review of her claim on the grounds that it neither raised substantive legal questions nor included new and relevant evidence and was insufficient to warrant further review of its prior decision.

The Board finds that the Office did not abuse its discretion in the November 26, 2001 decision by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.³ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁴

In denying appellant's October 23, 2001 request for reconsideration, the Office properly determined that appellant failed to file a timely application for review in its April 6, 2000 decision. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁵ The last merit decision in this case was issued by the Office on April 6, 2000 denying appellant's claim for compensation for the period August 20, 1999 through February 8, 2000. Appellant's October 23, 2001 request for reconsideration was made more than one year later. Thus, the Board finds that appellant's request for reconsideration was untimely filed.

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 20 C.F.R. § 10.607(a).

⁴ *See* cases cited *supra* note 3.

⁵ *Larry L. Lilton*, 44 ECAB 243 (1992).

In his October 23, 2001 request for reconsideration, appellant's counsel argued that he did not receive the Office's April 6, 2000 decision. The record indicates that the Office forwarded a copy of the April 6, 2000 decision to appellant's counsel. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁶ This presumption, commonly referred to as the "mailbox" rule, arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee. The Office considered appellant's counsel's allegation that he did not receive the April 6, 2000 decision and found that, as a copy of the decision was mailed, he received notification of the decision.

The Board finds that counsel has not submitted sufficient evidence to rebut the presumption that he received the April 6, 2000 decision. Section 10.607(a) is unequivocal in setting forth the time limitation period and does not indicate that late filing may be excused by extenuating circumstances. The Office properly determined that appellant failed to file a timely application for review.

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 a clear evidence of error pursuant to the untimely request.⁷ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607(a), if the claimant's application for review establishes shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ To

⁶ *Mike C. Geffre*, 44 ECAB 942 (1993).

⁷ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(d) (May 1996); *see also*, 20 C.F.R. § 10.607(b).

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *Jesus D. Sanchez*, *supra* note 2.

¹² *Leona N. Travis*, *supra* note 10.

¹³ *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.¹⁴ 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.¹⁵

The issue for purposes of establishing clear evidence of error in this case is whether there was an error in the Office's determination that appellant was not entitled to compensation for the period August 20, 1999 through February 10, 2000.

In support of her untimely request for reconsideration, appellant submitted the January 3, 2000 report of Dr. Sinesio Misol, a Board-certified orthopedic surgeon and the July 20 and August 20, 1999 disability certificates of Dr. Man Gil Seo, a general surgeon. The Office previously considered this medical evidence in its April 6, 2000 decision. Material that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.¹⁶ Accordingly, the Board finds that the medical evidence submitted by appellant is insufficient to establish clear evidence of error on the part of the Office. Appellant has not submitted any evidence raising a substantial question as to the correctness of the Office's April 6, 2000 decision. The evidence submitted does not establish clear evidence of error such that the Office abused its discretion in denying further merit review of the claim.

The Board also finds that the Office did not abuse its discretion in its December 18, 2001 decision in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,¹⁷ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.¹⁸ 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.¹⁹ When a claimant fails to

¹⁴ *Leon D. Faidley, Jr. supra* note 2.

¹⁵ *Gregory Griffin, supra* note 7.

¹⁶ *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

¹⁷ 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 her own motion or on application." 5 U.S.C. § 8128(a).

¹⁸ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁹ *Id.* at § 10.607(a).

meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

In the December 5, 2001 request for reconsideration, appellant's counsel contended that the Office committed a bad act of faith by indicating that appellant's request for reconsideration had been granted in a November 6, 2001 letter to appellant's senator while denying her request in its November 26, 2001 decision. Appellant's counsel did not submit any additional evidence in support of appellant's claim that she sustained a recurrence of disability causally related to her February 1, 1999 employment injury during the period August 20, 1999 through February 10, 2000.

Accordingly, the Board finds that the reconsideration request failed to raise any substantive legal questions or submit any new relevant and pertinent evidence not previously reviewed by the Office. The Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The December 18 and November 26, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 10, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member