

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA HATCHER and U.S. POSTAL SERVICE, PROCESSING
& DISTRIBUTION CENTER, Detroit, MI

*Docket No. 03-95; Submitted on the Record;
Issued April 1, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

Appellant, then a 59-year-old distribution clerk, who retired on October 2, 1992, filed an occupational disease claim on October 28, 1999, alleging that her carpal tunnel syndrome was caused by her work duties. Appellant stated that she first became aware of her work-related condition in December 1978.

The Office denied appellant's claim on February 28, 2000 after she failed to submit the factual information and medical evidence requested in support of her claim. Appellant asked for a review of the written record but submitted no evidence. On July 24, 2000 the Office hearing representative denied appellant's claim as untimely filed. The hearing representative noted that appellant's previous claim filed in 1988 was accepted for shoulder and arm sprains, and was closed on December 5, 1989.

In a letter dated April 27, 2001, appellant explained that she had to become a manual distribution clerk after 16 years of automated work because of her carpal tunnel syndrome. She stated that she had filed in 1978 but was denied every time until her shoulder and arm sprains were accepted in 1989. Appellant alleged that these injuries resulted from her carpal tunnel syndrome, but provided no further evidence.

On November 20, 2001 appellant sought review from the Board, noting that she never received an answer to her April 27, 2001 letter and that an Office claims examiner told her by telephone that her request for reconsideration had been denied in October 2001.

On June 26, 2002 the Board dismissed appellant's appeal on jurisdictional grounds because her appeal was filed more than one year after the July 24, 2000 decision by the Office hearing representative.¹

On July 15, 2002 appellant requested reconsideration and asked the Office to reopen her case. Appellant also requested reconsideration from the Board, stating that she had responded timely to all letters that she received.²

On August 19, 2002 the Office denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error. The Office found that appellant's April 27, 2001 letter was not a request for reconsideration, that the Board's June 26, 2002 decision was not a merit decision, and that the November 20, 2001 letter was beyond the one-year limit for filing a request for reconsideration.

The Board finds that the Office acted within its discretion in denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The only Office decision before the Board on appeal is dated August 19, 2002, denying appellant's request for reconsideration. Because more than one year has elapsed between the last merit decision dated July 24, 2000 and the filing of this appeal on October 7, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.³

Section 8128(a) of the Federal Employees' Compensation Act⁴ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵

“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, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”⁶

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse

¹ Docket No. 02-302 (issued June 26, 2002).

² This July 15, 2002 letter was addressed to the “Appeals Board” but the record does not indicate whether the Board received this letter. The Board's case-tracking system shows no petition for reconsideration.

³ 20 C.F.R. §§ 501.2(c); 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8128(a).

⁶ *Id.*

of discretionary authority granted the Office under section 8128(a).⁷ This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁸

In this case, the Office construed appellant's November 20, 2001 letter, stating that she had received no answer to her April 27, 2001 letter, as a request for reconsideration of the July 24, 2000 merit decision denying her claim as untimely filed. The Board finds that the November letter, which refers to reconsideration, was filed more than one year after the July 24, 2000 merit decision and was, therefore, untimely.

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.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 manifest on its face that the Office committed an error.¹¹ Evidence that 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. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.¹³

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but

⁷ *Diane Matchem*, 48 ECAB 532, 533 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ 20 C.F.R. § 10.607(a).

⁹ 20 C.F.R. § 10.607(b).

¹⁰ *Nancy Marciano*, 50 ECAB 110, 114 (1998).

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹³ *Annie Billingsley*, 50 ECAB 210, 212, n. 12 (1998); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.a (June 2002).

also 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

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.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 a merit review in the face of such evidence.¹⁶

In this case, appellant submitted no new evidence with her November 2001 request for reconsideration. She simply stated that she had received no answer to her April 27, 2001 letter and, subsequently, was told by telephone that her request had been denied. The record reveals no evidence that the Office responded to appellant's April 27, 2001 letter or issued any decision denying reconsideration in October 2001. Therefore, appellant has failed to demonstrate clear error on the part of the Office.

The Board finds that appellant's April 27, 2001 letter did not constitute a request for reconsideration. Appellant discussed her work history, previous claims and her retirement in October 1992. However, she failed to state or even imply that she was requesting reconsideration of the July 24, 2000 decision. She neither contested the prior Office decisions denying her claim nor disagreed with the rationale of the hearing representative that she had failed to file her claim within the three-year limit of section 8122.¹⁷ Appellant provided no indication in this letter that she sought reconsideration and submitted no evidence in support of such action.¹⁸ Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review.

¹⁴ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

¹⁶ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁷ 5 U.S.C. § 8122. Section 8122(a) provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Section 8122(b) provides that in latent disability cases the time limitation does not begin to run until the claimant is aware, or through reasonable diligence, should have been aware, of the causal relationship between the compensable injury and work factors. In this case, appellant was first aware of a causal relationship between her carpal tunnel syndrome and her employment in 1978, retired in October 1992, and filed her claim in 1999, well beyond the three-year limit. She submitted no evidence that she had provided written notice of her condition or that her supervisor had actual knowledge of it. 5 U.S.C. § 8122(a)(1).

¹⁸ See *Theresa Johnson*, 50 ECAB 317, 318 (1999) (finding that appellant submitted no evidence addressing the timely filing of her request for reconsideration or showing clear evidence of error).

The August 19, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 1, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member