

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY J. HARTLEY and U.S. POSTAL SERVICE,
POST OFFICE, Savannah, GA

*Docket No. 03-1969; Submitted on the Record;
Issued November 10, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that her request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

This case has previously been before the Board. In its September 3, 1997 decision, the Board affirmed the Office's September 26, 1994 decision finding the evidence of record insufficient to establish that appellant sustained a recurrence of disability commencing November 11, 1993 causally related to her November 1, 1991 employment injury.¹ The Board also affirmed the Office's December 7, 1994 decision denying her request for reconsideration of the September 26, 1994 decision. The facts are accurately set forth in the Board's decision.²

By letter dated January 7, 2003, appellant requested reconsideration of the Board's decision. In a decision dated March 11, 2003, the Office denied her request for reconsideration on the grounds that it was not timely filed within the one-year time limitations and failed to demonstrate clear evidence of error.

The Board finds that the Office properly refused to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that her request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

¹ The Office accepted appellant's claim for a fracture of the cervical spine and right wrist, a contusion of the knee and hip, abrasions on the face and neck, a comminuted scapula fracture and post-traumatic stress disorder which resulted from an automobile accident while in the performance of duty on November 1, 1991.

² Docket No. 95-1766 (issued September 3, 1997).

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). 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.⁵

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, 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.⁶

The last merit decision in this case was issued by the Board on September 3, 1997, which affirmed the Office's denial of appellant's recurrence claim on the grounds that appellant failed to establish that she sustained a recurrence of disability commencing November 11, 1993 causally related to her November 1, 1991 employment injury. Appellant's January 7, 2003 request for reconsideration was made more than one year after the Board's September 3, 1997 decision. As her request was made outside the one-year limitation, the Board finds that it was untimely filed.

Section 10.607(a) of the Office's implementing regulations 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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by the Office of

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Larry L. Litton*, 44 ECAB 243 (1992).

⁷ 20 C.F.R. § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 EAB 259, 264 (1999).

¹¹ *Leon N. Travis*, *supra* note 9

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.¹²

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.¹³ 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 properly denied merit review in the face of such evidence.¹⁴

The issue for purposes of establishing clear evidence of error in this case is whether there was an error in the Board's determination that appellant failed to establish that she sustained a recurrence of disability beginning November 11, 1993 causally related to her November 1, 1991 employment injury.

Appellant did not submit any evidence along with her January 7, 2003 request for reconsideration. However, the record contains evidence submitted to the Office subsequent to the Board's September 3, 1997 decision and prior to the Office's March 11, 2003 decision. Medical treatment notes covering the period November 25, 1998 through April 5, 2002 are irrelevant in establishing clear evidence of error on the part of the Office as they did not address whether appellant sustained a recurrence of disability beginning November 11, 1993.

An October 16, 2001 report of Dr. John C. Whitley, Jr., a psychiatrist, revealed a history of the November 1, 1991 employment injury and his treatment of appellant's post-traumatic stress disorder secondary to this injury since July 8, 1993. Dr. Whitley provided his findings on mental examination and diagnosed post-traumatic stress disorder, continued pain in the back and extremities and chronic problems with the ears due to the employment injury. He opined that appellant was permanently and totally disabled for any and all work due to her post-traumatic stress disorder. Dr. Whitley's report fails to demonstrate clear evidence of error, as he did not provide any medical rationale explaining how or why appellant's disability was caused by the November 1, 1991 employment injury.

As no substantial question has been raised as to whether the Board properly determined that appellant did not sustain a recurrence of disability commencing November 11, 1993 causally related to the November 1, 1991 employment injury, the Board finds that the Office properly refused to reopen appellant's case for merit review under section 8128(a), in its March 11, 2003 decision, on the grounds that her application for review failed to demonstrate clear evidence of error.

¹² See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

The March 11, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 10, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member