

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA HAYDON and GENERAL SERVICE ADMINISTRATION,
Fort Worth, TX

*Docket No. 03-2078; Submitted on the Record;
Issued November 4, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On November 7, 1999 appellant, then a 44-year-old position classifier specialist, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she sustained an emotional condition as a result of her performance of her federal duties. In a March 8, 2001 decision, the Office denied appellant's claim finding that her condition did not arise from or in the course of performing her federal duties. The Office letter was postmarked March 12, 2001. In a letter dated April 9, 2001, appellant requested a review of the written record by the Branch of Hearings and Review. Appellant alleged that her request was within 30 days as she mailed her request less than 30 days after the March 12, 2001 postmark. Appellant alleges that she sent her request via certified mail and the record contains a postal certification stamped April 13, 2001.

In a June 4, 2001 decision, the Office denied the request for a review of the written record finding that appellant's request was untimely as it was postmarked April 10, 2001 more than 30 days after the March 8, 2001 decision. The Office further found that appellant's request can be equally well addressed through a request for reconsideration.

In a February 19, 2003 letter from a congressional representative, appellant requested reconsideration. In a May 20, 2003 decision, the Office denied reconsideration finding that appellant had not submitted evidence establishing clear evidence of error.

The Board finds that the Office properly refused to reopen appellant's case for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's May 20, 2003 decision denying appellant's request for a review on the merits of its March 8, 2001 decision. Because more than one year has elapsed between the issuance of the Office's March 8, 2001 decision and August 20, 2003, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the March 8, 2001 decision.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² 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) constitute relevant and pertinent new evidence not previously considered by the Office.³ 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.⁴ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁵

In its decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on March 8, 2001 and appellant's request for reconsideration was dated February 19, 2003, more than one year after the March 8, 2001 decision.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁶ Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁷

¹ See 20 C.F.R. § 501.3(d)(2).

² 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).

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

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 manifest on its face that the Office committed an error.⁹ Evidence which 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 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

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. In support of her request, appellant submitted a copy of her April 9, 2001 letter requesting a review of the record. As the letter was dated April 9, 2001 and the mail certification was stamped April 13, 2001, this evidence does not rise to the high standard of clear evidence of error.

⁸ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 5.

The May 20, 2003 decision by the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 4, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member