

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARLENE BECK and DEPARTMENT OF THE ARMY,  
ROCK ISLAND ARSENAL, Rock Island, Ill.

*Docket No. 96-1462; Submitted on the Record;  
Issued April 20, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

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

On February 10, 1989 appellant, then a 57-year-old supply technician, tripped over a metal support for a partition and fell, fracturing her right upper arm. The Office accepted appellant's claim for an impacted fracture of the right humerus. Appellant received continuation of pay for the period February 27 through April 12, 1989.

On March 30, 1993 appellant filed a claim for a schedule award. In a November 5, 1992 note, Dr. Michael Gerdes, a Board-certified orthopedic surgeon, indicated that appellant had a full range of motion in the right shoulder, intact neurologic function and no functional weakness. He concluded that appellant had no permanent impairment as defined by the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>1</sup> In an October 15, 1993 decision, the Office rejected appellant's claim on the grounds that the evidence of record failed to demonstrate that appellant had any permanent impairment due to her February 10, 1989 employment injury. In a November 16, 1993 letter, appellant requested a hearing before an Office hearing representative. In a January 6, 1994 decision, the Office found that appellant's request for a hearing was untimely. The Office considered appellant's request and denied the request for a hearing on the grounds that any additional evidence on the issue of recurrent or continuing employment-related disability could be fully considered through a request for reconsideration.

In a January 11, 1995 letter, appellant requested reconsideration. In a January 9, 1996 decision, the Office denied appellant's request for reconsideration as untimely and lacking in clear evidence of error in the Office's October 15, 1993 decision.

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<sup>1</sup> (3rd ed. rev., 1990).

The Board finds the Office properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

Under section 8128(a) the Federal Employees' Compensation Act,<sup>2</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations<sup>3</sup> which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."<sup>4</sup> In *Leon D. Faidley, Jr.*,<sup>5</sup> the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's Procedure Manual provides:

"The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, and decision by the Employees' Compensation Appeals Board, but does not include precoupment hearing/review decisions."<sup>6</sup>

The Office issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on October 15, 1993. As the Office did not receive the application for review until January 11, 1995 the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.138(b).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> 41 ECAB 104 (1989).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (May 1991).

nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>9</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> 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.<sup>12</sup> To show clear evidence of error, however, 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 fundamental question as to the correctness of the Office decision.<sup>13</sup> 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.<sup>14</sup>

In her January 11, 1995 letter, appellant stated that when she saw Dr. Gerdes she complained of pain and numbness in the lower left side of the body, left leg and left foot which began two to three months after the employment injury and continued intermittent for two to three years. When she was examined by Dr. Gerdes, she noted that he concluded there was no connection between her symptoms and the employment injury. She stated that, in his November 5, 1992 examination, Dr. Gerdes informed her that x-rays showed her right shoulder had not healed the way he had hoped. Appellant stated that she had a low level pain occasionally in her shoulder, extending into her upper back and right arm, with sharper pain after repetitive movement. She also indicated that she had pain in the lower left hip with numbness of the left leg and foot. While appellant has given a description of her pain and her own opinion that it was related to the employment injury, she had not submitted any conclusive medical

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<sup>7</sup> *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which 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."

<sup>8</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>11</sup> *See Leona N. Travis*, *supra* note 9.

<sup>12</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon Faidley, Jr.*, *supra* note 5.

<sup>14</sup> *Gregory Griffin*, *supra* note 7.

evidence that would definitively show that her complaints were causally related to the employment injury that occurred six years previously and that she had a permanent impairment as a result of the employment injury. Appellant, therefore, has not shown clear evidence of error in the Office's denial of her untimely request for reconsideration.

The decision of the Office of Workers' Compensation Programs, dated January 9, 1996, is hereby affirmed.

Dated, Washington, D.C.  
April 20, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member