

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN J. HOLLEY-ROSS and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION, Seal Beach, Calif.

*Docket No. 96-565; Submitted on the Record;
Issued January 20, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On October 23, 1990 appellant, then a 44-year-old computer assistant, filed a claim for compensation alleging that she injured her back while in the performance of duty.¹

In support of her claim, appellant submitted a July 13, 1990 medical report from Dr. Gerald R. Goodlow, appellant's treating physician who is Board-certified in physical medicine and rehabilitation. He noted that he had been treating appellant for low back pain since 1989, and that she had mild disc bulging at L3-4 and L4-5 levels and moderate disc bulging at L4-5.² Dr. Goodlow noted further that a magnetic resonance imaging (MRI) scan revealed degenerative disc disease at L4-5.³ Dr. Goodlow stated that activities associated with heavy lifting, repetitive bending and twisting could make appellant's back stiffer and more uncomfortable.

On April 1, 1991 the Office, in a decision, denied appellant's claim on the grounds that she failed to submit medical evidence to support a causal relationship between her medical condition and her injury.

¹ Appellant's CA-2 and CA-7 were dated July 30, 1990.

² The Board notes that an August 30, 1989 computerized tomography scan revealed bulging discs at L3-4 and L5-S1 with moderate diffuse bulging at L4-5.

³ Although Dr. Goodlow did not indicate when the MRI was taken, the record reveals an April 9, 1990 report of an MRI by Dr. Arvind K. Kumra, a Board-certified radiologist. In that report, Dr. Kumra stated that the MRI revealed degenerative disc disease at L4-5.

On April 9, 1992 appellant submitted a request for reconsideration of the Office's April 1, 1991 decision denying benefits. Appellant stated that her request for reconsideration was based on a medical report dated March 26, 1992 and an April 1990 MRI which revealed a herniated disc. In her August 8, 1995 submission, appellant stated that she had received epidural injections for three years every six months and on April 6, 1994 had back surgery to help relieve pain. She noted that she returned to work from July 11, 1994 to June 30, 1995, at which time she remained home due to pain based on a recommendation of her treating physician.

On November 21, 1995 the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that appellant had not submitted a rationalized medical opinion to establish that her claimed condition was causally related to her employment.⁴

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) 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 November 21, 1995 decision denying appellant's request for reconsideration of its April 1, 1991 decision. Because more than one year has elapsed between April 1, 1991, the date of the Office's decision, and December 4, 1995, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the April 1, 1991 decision.⁵

In its November 21, 1995 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on April 1, 1991 and appellant's request for reconsideration was dated April 9, 1992 and received by the Office on April 22, 1992, more than one year after April 1, 1991.

The Office, however, may not deny an application for review 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 for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes

⁴ In a November 16, 1995 letter, the Office advised a congressional office that it had mistakenly misfiled appellant's April 9, 1992 request for reconsideration. The Office noted that appellant had filed a petition for reconsideration on April 9, 1992, but that the Office failed to take appropriate action and the file was forwarded top storage at the Federal Records Center. Upon receipt of the congressional letter, the Office retrieved appellant's case and proceeded to process her petition for reconsideration.

⁵ See 20 C.F.R. § 501.3(d)(2).

“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. § 10.138(b)(2), if the claimant’s application for review shows “clear evidence of error” on the part of the Office.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 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 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.¹⁴

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 Federal Employees’ Compensation Act, notwithstanding the untimeliness of her application. The Office noted 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.

⁶ Federal (FECA) Procedure Manual, Chapter 2.1602.3(b), which indicates: “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.”

⁷ *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *See Dean 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.*, 41 ECAB 104 (1989)

¹⁴ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of her application for review was sufficient to show clear evidence of error. The Board finds that the evidence 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 April 9, 1992 request for reconsideration appellant noted a medical report dated March 26, 1992. However, appellant did not submit a medical report in support of her request for reconsideration. Although she noted on August 8, 1995 a history of her back pain including her April 1994 surgery and alleged June 1995 bed rest ordered by her treating physician, appellant failed to submit an opinion on the cause of appellant's condition.¹⁵ Given the limited probative value and relevance of the evidence submitted by appellant in support of her untimely reconsideration request, it does not clearly show that the Office erred in its November 21, 1995 decision. Appellant's statements are of limited probative value in that they do not relate to the relevant issue of the present case, *i.e.*, whether appellant has submitted sufficient rationalized medical evidence to establish that her medical condition is based on employment factors. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. Given the limited probative value and relevance of the evidence submitted by appellant in support of her untimely reconsideration request, this evidence does not clearly show that the Office erred in its November 25, 1995 decision.

For these reasons, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

¹⁵ See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

The decision of the Office of Workers' Compensation Programs dated November 21, 1995 is affirmed.

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

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member