

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHYLLIS B. CANNARSA and DEPARTMENT OF VETERANS
AFFAIRS, ALTOONA VETERANS HOSPITAL, Altoona, Pa.

*Docket No. 96-1326; Submitted on the Record;
Issued March 24, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

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.

The Board has duly reviewed the case, with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case, for merit review as the request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's February 27, 1996 decision, denying appellant's request for a review on the merits of its September 13, 1993 decision. Because more than one year has elapsed between the issuance of the Office's September 13, 1993 decision and March 18, 1996, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the September 13, 1993 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 point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent 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

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

³ 20 C.F.R. §§ 10.138(b)(1), (2).

review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

In its February 27, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on September 13, 1993 and appellant's request for reconsideration was dated December 18, 1995, which was clearly more than one year after September 13, 1993. Therefore, appellant's request for reconsideration of her case on its merits was untimely filed.

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 "clear evidence of error."⁷ 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.⁸

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

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (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 of Workers' Compensation Programs made a mistake (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 on the Director's own motion."

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ The Board makes an independent determination as to 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.¹⁵

In the present case, with her request for reconsideration, appellant submitted a new medical report from Dr. George H. Wheeling, which reported her present condition, speculated upon possible causal relation, but did not address residuals of her accepted lumbosacral strain and herniated L5 disc condition or her ability to work on August 12, 1992, the date the Office terminated her benefits. Therefore, this report did not demonstrate any clear evidence of error on its face in the September 13, 1993 decision, as the Office properly found. As this evidence does not raise a substantial question as to the correctness of the prior September 13, 1993 Office decision or shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for further consideration on its merits.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, 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.

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 27, 1996 is hereby affirmed.

Dated, Washington, D.C.
March 24, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member