

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERRY L. PATE and U.S. POSTAL SERVICE,
POST OFFICE, Dayton, Ohio

*Docket No. 97-75; Submitted on the Record;
Issued March 16, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's May 31, 1996 request for reconsideration.

The last merit decision issued in this case was the July 20, 1993 decision of the Office denying appellant's claim of recurrence on the grounds that the medical evidence failed to demonstrate a causal relationship between the injury and the claimed work stoppages for periods beginning March 19, 1992. On the attached statement of review rights, the Office notified appellant that any request for reconsideration must be made within one year of the date of the decision.

On May 31, 1996 appellant requested reconsideration and submitted in support thereof a statement that her attorney's representation was inadequate and unjust, that she would be sending a package of new information, that she was hurt on the job on October 20, 1988, and that this injury left her with an injury-related problem, which she would prove.

In a decision dated June 5, 1996, the Office found that appellant's May 31, 1996 request was untimely filed and denied her request on the grounds that it failed to show clear evidence of error.

The Board finds that the Office properly denied appellant's May 31, 1996 request.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”¹

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).² As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.³ Office procedures state, however, that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows “clear evidence of error” on the part of the Office.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁵ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁶ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ To

¹ 5 U.S.C. § 8128(a).

² Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, a claimant may obtain review of the merits of his claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.138(b)(1).

³ *But see Leonard E. Redway*, 28 ECAB 242, 246 (1977) (a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁵ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁷ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ *See Travis*, *supra* note 6.

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

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.¹⁰ 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 a merit review in the face of such evidence.¹¹

Appellant made her May 31, 1996 request for reconsideration more than one year after the Office's July 20, 1993 decision. The Office therefore properly found her request to be untimely filed. Further, the Board finds that the statement made by appellant in support of her request, impugning the adequacy of her attorney's representation and asserting injury-related residuals, in no way shows that the Office made an error in its July 20, 1993 decision, which was decided on the medical evidence of record. Because appellant's untimely request fails to show clear evidence of error, the Board finds that the Office properly denied her request.

The June 5, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 16, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ *Gregory Griffin*, 41 ECAB 458, 466 (1990).