

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY MARCANO and U.S. POSTAL SERVICE,
POST OFFICE, New York, N.Y.

*Docket No. 97-32; Submitted on the Record;
Issued October 13, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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 November 16, 1994 appellant, then a 35-year-old postal worker, filed a claim alleging that she developed a herniated disc as a result of her employment duties. Appellant indicated that she first noticed that her condition was caused or aggravated by her employment on May 12, 1994.¹ Appellant submitted a narrative statement and medical evidence in support of her claim.

By decision dated April 4, 1995, the Office denied appellant's claim on the grounds that the fact of injury was not established. In an accompanying memorandum, the Office found that the evidence supported the fact that the claimed events, incidents or exposures occurred at the times, places and in the manners alleged, but that the medical evidence, which consisted of form reports and the summarized results of several diagnostic tests, was insufficiently rationalized to support a finding that a medical condition had resulted from the accepted trauma or exposure.

By letter dated March 27, 1996 and received April 2, 1996, Mr. Juan A. Campos, on behalf of appellant, requested reconsideration of the Office's April 4, 1995 decision and submitted additional medical evidence.

¹ The record reflects that appellant previously filed a claim for a 1991 employment-related back injury, number A2-632342, which the Office subsequently accepted and for which appellant is currently receiving compensation benefits. Appellant returned to light duty following the original injury. In connection with the instant claim, appellant initially filed a claim for a recurrence of disability, Form CA-2a, dated July 5, 1994. Based on a medical report which indicated that appellant's condition was exacerbated by her employment duties over a period of time, the Office instructed appellant to file a claim for occupational disease, Form CA-2, upon which the instant claim is based.

In a letter dated April 4, 1996, the Office advised Mr. Campos that the record did not contain a signed release authorizing him to have access to appellant's case file, and therefore the request for reconsideration could not be considered a valid request. The Office instructed Mr. Campos to forward a signed release from the claimant authorizing him to represent her, together with a new request for reconsideration.

By letter received May 3, 1996, appellant's representative provided a signed attorney authorization form, dated April 11, 1996, to the Office, again requesting reconsideration of appellant's claim and resubmitting medical evidence in support of the request.

In a decision dated June 18, 1996, the Office denied appellant's request for merit review of its April 4, 1995 decision on the grounds that appellant's application for review was not timely filed and failed to present clear evidence of error. The Office stated that appellant's reconsideration request was untimely in that the initial reconsideration request dated March 27, 1996 and received April 2, 1996, did not represent a valid reconsideration request, given that Mr. Campos was not authorized to act as appellant's representative, and that appellant did not submit a valid reconsideration request until more than one year after the Office's last merit decision. The Office nevertheless examined the newly submitted medical evidence, in particular the April 12, 1995 report of appellant's treating physician, Dr. Robert Spindel.

In his report, Dr. Spindel stated that, while he and his colleagues initially believed that appellant had sustained a reherniation of her previously injured lumbar disc, subsequent testing revealed that in fact appellant had not sustained a reherniation, but had instead developed lumbar radiculopathy related to a bony overgrowth which was causally related to her previous 1991 herniated disc, and possibly to the surgery done on the disc. He further explained that, because appellant experienced exacerbation of her pain upon her return to work, it appeared to be related to a new injury, but subsequent medical evidence revealed that there was no new injury, but simply new symptoms which were precipitated by her return to work. Dr. Spindel suggested that appellant's current claim be combined with her 1991 active claim.

The Office found that Dr. Spindel's report did not support a finding that appellant had sustained a new injury in 1994, for which she filed a claim, but rather supported a finding that her current condition was related to her 1991 injury for which she was already receiving compensation benefits under case number A2-632342. The Office concluded that Dr. Spindel's report was not sufficient to establish clear evidence of error by the Office in its April 4, 1995 decision denying appellant's claim.

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 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 June 18, 1996 decision denying appellant's request for a review on the merits of its April 4, 1995 decision. Because more than one year has elapsed between the issuance of the Office's April 4, 1995 decision and

September 13, 1996, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the April 4, 1995 decision.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ 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 a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.⁵ 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.⁶ 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.⁷

In its June 18, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant's counsel contends that he filed a timely reconsideration request after the Office's April 4, 1995 decision, arguing that the appeal rights accompanying the decision listed the options available to appellant but did not specify that a signed release is required in order for a request for reconsideration to be considered valid. However, as found by the Office in its June 18, 1996 decision, section 10.142 of the Office's implementing federal regulations regarding the representation of claimants clearly requires that a written notice, signed by the claimant, appointing a representative be sent to the Office.⁸ Appellant has not submitted evidence to show that Mr. Campos was authorized to act as her official representative before the Office at any time prior to April 11, 1996 for the purpose of filing a reconsideration request.⁹ The Board has reviewed the record and notes that the reconsideration request filed by Mr. Campos after the Office's decision of April 4, 1995 was the letter dated April 30, 1996, and received May 3, 1996. This letter was accompanied by a statement, signed on April 11, 1996, in which appellant authorized Mr. Campos to act as her representative regarding her compensation claim. The Office rendered its last merit decision on

² See 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. § 8101 *et seq.* 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 his own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ 20 C.F.R. 10.142.

⁹ See generally 20 C.F.R. §§ 10.138, 10.142-10.144; *Vincente P. Taimanglo*, 45 ECAB 504 (1994); *Ira D. Gray*, 45 ECAB 445 (1994) regarding authorized representation of claimants and requirements for reconsideration requests.

April 4, 1995 and appellant's request for reconsideration was dated April 30, 1996, more than one year after April 4, 1995. Further, the written notice of Mr. Campos' authorization to represent appellant was dated April 11, 1996, outside one year following the April 4, 1995 decision. Appellant, therefore, did not file a timely reconsideration request after the Office's decision of April 4, 1995.

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."¹⁰ 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.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

¹⁰ *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹² *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹³ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁴ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁵ *See Leona N. Travis*, *supra* note 13.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 7.

¹⁸ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458, 466 (1990).

In accordance with its internal guidelines and with Board precedent, the Office properly performed 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 her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it was not sufficient to establish clear evidence of error by the Office in its prior decisions.

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 untimely reconsideration request, appellant submitted an April 12, 1995 report, and a follow-up report dated August 25, 1995, from Dr. Spindel, which indicated that appellant's current condition was not caused by a new back injury sustained in 1994, but rather is related to a 1991 back injury for which appellant is currently receiving compensation benefits under claim number A2-632342. Therefore, 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 decision of the Office of Workers' Compensation Programs dated June 18, 1996 is affirmed.¹⁹

Dated, Washington, D.C.
October 13, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁹ The Board notes that the decision herein does not preclude appellant from further pursuing her prior claim, number A2-632342.

