

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOYCE M. INTLEKOFER and DEPARTMENT OF VETERANS AFFAIRS,  
MEDICAL CENTER, Reno, Nev.

*Docket No. 97-643; Submitted on the Record;  
Issued September 30, 1998*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

In the present case, appellant filed a claim on May 29, 1988 alleging that she sustained emotional stress, as well as migraine headaches, neck, shoulder, and stomach pain, and irritable bowel syndrome, causally related to her federal employment. By decisions dated September 21, 1988 and January 27, 1989, the Office denied the claim on the grounds that appellant had failed to meet her burden of proof in establishing an injury causally related to factors of her federal employment.

Appellant requested reconsideration by letter dated September 8, 1991; the Office determined that the request was untimely and failed to show clear evidence of error in a decision dated September 24, 1991.<sup>1</sup> In a decision dated April 3, 1992, the Office denied appellant's January 6, 1992 request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

In a letter dated September 30, 1996, appellant again requested reconsideration of her claim. The evidence submitted includes a report dated July 1, 1991 from Dr. Rodger S. Agre, a psychiatrist, a report dated January 18, 1992 from Dr. Alford S. Karayusuf, a psychiatrist, and a January 6, 1995 decision regarding veterans disability pension benefits. By decision dated November 12, 1996, the Office determined that the request for reconsideration was untimely and failed to show clear evidence of error.

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<sup>1</sup> Appellant had filed an appeal with the Board on January 23, 1991 (docketed as No. 91-668). The Board dismissed the appeal by order dated July 30, 1991 on the grounds that there was no final Office decision over which the Board had jurisdiction.

The Board has reviewed the record and finds that the Office properly denied appellant's September 30, 1996 request for reconsideration.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.<sup>2</sup> Since appellant filed her appeal on November 26, 1996, the only decision over which the Board has jurisdiction on this appeal is the November 12, 1996 decision denying her request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>6</sup> As one such limitation, the Office has stated that it 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.<sup>7</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>8</sup>

In this case, the most recent Office decision on the merits of the claim is dated January 27, 1989.<sup>9</sup> Appellant's request for reconsideration, dated September 30, 1996, is more than one year after this decision, and therefore the request is properly considered untimely.

The Board has held, however, that 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.<sup>10</sup> In accordance with this holding, the Office has stated in its procedure manual that it

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<sup>2</sup> 20 C.F.R. § 501.3(d).

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> 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."

<sup>6</sup> 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, the Office has stated that a claimant may obtain review of the merits of a 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; *see* 20 C.F.R. § 10.138(b)(1).

<sup>7</sup> 20 C.F.R. § 10.138(b)(2).

<sup>8</sup> *See Leon D. Faidley, Jr.*, *supra* note 4.

<sup>9</sup> A right to reconsideration within one year accompanies any merit decision on the issues. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). The September 24, 1991 and April 3, 1992 Office decisions did not review the merits of the claim, but rather engaged in a limited review to determine if the untimely requests for reconsideration were sufficient to reopen the claim.

<sup>10</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

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.<sup>11</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>12</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>13</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>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</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>16</sup> 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.<sup>17</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>18</sup>

In this case, the evidence submitted by appellant is not sufficient to establish clear evidence of error. The decision regarding appellant's disability pension benefits is of limited probative value, because the findings of an administrative agency with respect to entitlement to benefits under a specific statutory authority has no bearing on entitlement to compensation under the Act.<sup>19</sup> The July 1, 1991 report from Dr. Agre, while it represented new evidence, contained only a brief statement that appellant was unable to work due to anxiety and depression, without providing a detailed discussion of causal relationship with compensable work factors. The January 18, 1992 report from Dr. Karayusuf was previously submitted and cannot provide a basis for reopening the claim.

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>12</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>13</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>14</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>15</sup> See *Leona N. Travis*, *supra* note 13.

<sup>16</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>17</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>18</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

<sup>19</sup> *Burney L. Kent*, 6 ECAB 378 (1953) (findings by the Veterans Administration had no bearing on proceedings under the Act); see also *Daniel Deparini*, 44 ECAB 657 (1993) (findings of the Social Security Administration are not determinative of disability under the Act).

The Board accordingly finds that the evidence submitted in this case is not sufficient to establish clear evidence of error by the Office, and therefore the Office did not abuse its discretion in denying appellant's September 30, 1996 request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated November 12, 1996 is affirmed.

Dated, Washington, D.C.  
September 30, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member