

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIDA D. HAMMOND and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

*Docket No. 98-751; Submitted on the Record;
Issued December 15, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
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.

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 September 23, 1997 decision denying appellant's request for a review on the merits of the Office's March 12, 1996 decision and its prior decisions. Because more than one year has elapsed between the issuance of the Office's March 12, 1996 decision and January 8, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the Office's March 12, 1996 decision and its prior decisions.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 See 20 C.F.R. § 501.3(d)(2). In the present case, the Office accepted that appellant sustained back and thigh contusions, post-traumatic headaches, and cervical and lumbar strains on August 29, 1989 and paid compensation for periods of disability. By decision dated March 9, 1992, the Office terminated appellant's compensation effective March 9, 1992 on the grounds that she had no disability due to her August 19, 1989 employment injury after that date and, by decisions dated July 8 and November 16, 1992 and February 4, 1993, the Office denied modification of its March 9, 1992 decision. By decision dated August 21, 1995, the Office denied appellant's request for a schedule award. By decision dated March 12, 1996, the Office denied modification of its August 21, 1995 decision and, by decision dated July 22, 1996, the Office denied appellant's request for merit review of its August 21, 1995 decision.

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or

(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.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for 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 limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

In its September 23, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on March 12, 1996 and appellant's request for reconsideration was dated April 22, 1997, more than one year after March 12, 1996.

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

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), 10.138(b)(2).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). 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 made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, 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, 1157-58 (1992).

must 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 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 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.¹⁵

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 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 did not clearly show that the Office's prior decision was in error.

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 prior decisions and is insufficient to demonstrate clear evidence of error. In support of her reconsideration request, appellant presented several arguments including the following: that the memorandum which accompanied the Office's March 9, 1992 decision was "erroneous and speculative" in nature; that certain medical evidence was not considered; that the Office did not address all of her claimed employment-related conditions; that the Office decisions did not contain adequate findings of fact; and that the Office did seek the guidance of a district medical adviser. The Board has reviewed these arguments and notes that appellant did not provide sufficient support for them or otherwise adequately explain how they show that the Office committed error or abuse in its prior decisions. The issues regarding the termination of appellant's compensation and the denial of her schedule are essentially medical in nature.

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989) *petition for recon., denied*, 41 ECAB 458, 466 (1990).

Appellant also submitted new medical evidence, dated in 1996 and 1997, but this evidence concerns a carpal tunnel syndrome which is not accepted as employment related and it does not contain an opinion relating appellant's medical condition to employment factors. Appellant also submitted medical evidence which had previously been considered by the Office.

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.

The decision of the Office of Workers' Compensation Programs dated September 23, 1997 is affirmed.

Dated, Washington, D.C.
December 15, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member