

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANNE L. SCOTT and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Washington, D.C.

*Docket No. 98-1673; Submitted on the Record;  
Issued December 3, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's January 5, 1998 request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's January 5, 1998 request for reconsideration was untimely filed and failed to present clear evidence of error.

On March 31, 1989 appellant, then a 36-year-old medical supply aid and technician, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained an injury when she bumped into a supply cabinet causing four full boxes of scrub brushes to fall on her head. The Office accepted appellant's claim for contusion of the parietal scalp, neck sprain left shoulder and post-traumatic encephalgia. Appellant had suffered a prior work-related head injury on October 29, 1988 when a jack handle she was using to help her load supplies fell and struck her. The Office accepted this claim for left neck strain and contusion to the left side of the head.

By decision dated December 6, 1995, the Office reduced appellant's wage-loss compensation for the injury sustained on March 31, 1989 on the grounds that the evidence of record establishes that appellant is partially, not totally, disabled and has the capacity to earn wages as a telephone order clerk. In a letter received April 24, 1996, appellant requested reconsideration of the Office's decision and submitted additional medical evidence in support of her request.

By decision dated May 17, 1996, the Office found the new medical evidence insufficient to warrant modification of the December 6, 1995 decision. In a letter received August 20, 1996, appellant requested an oral hearing before an Office representative.

By decision dated September 13, 1996, the Office denied appellant's request for an oral hearing on the grounds that she had previously requested reconsideration and that the issue in her case could equally well be addressed by again requesting reconsideration and submitting new evidence in support of her claim. In a letter received August 13, 1996, appellant requested reconsideration of the Office's decision.

By decision dated October 22, 1996, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that appellant's request neither raised substantive legal questions nor included new and relevant evidence and was thus insufficient to warrant review of its prior decision.

In a January 5, 1998 letter, appellant requested reconsideration of the Office's decision. By decision dated January 16, 1998, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not establish clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> As appellant filed her appeal with the Board on April 13, 1998 the only decision properly before the Board is the Office's January 16, 1998 decision denying appellant's request for a review of the merits of the Office's May 17, 1996 decision.<sup>2</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> 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.<sup>4</sup> 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 review within one year of the date of that decision.<sup>5</sup> 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.<sup>6</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the

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<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

<sup>2</sup> The Office's May 17, 1996 decision was the last merit decision in this case.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 20 C.F.R. § 10.138(b)(1)-(2); *Thankamma Mathews*, 44 ECAB 788 (1993).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

date of that decision.<sup>7</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).<sup>8</sup>

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>9</sup> The Office issued its last merit decision in this case, on May 17, 1996 wherein the Office found that the new medical evidence submitted by appellant in support of her request for reconsideration was insufficient to warrant modification of the December 6, 1995 decision of the Office reducing appellant's wage-loss compensation in accordance with her wage-earning capacity as a telephone order clerk. As appellant's January 5, 1998 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases, where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>10</sup> Office procedures state 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.<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

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<sup>7</sup> 20 C.F.R. § 10.138(b)(2); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>8</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>9</sup> *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>10</sup> *Gregory Griffin*, *supra* note 7.

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (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); *Thankamma Mathews*, *supra* note 4; *Jesus D. Sanchez*, *supra* note 8.

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

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

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>

Subsequent to the Office's October 22, 1996 decision on reconsideration, appellant submitted two additional medical reports from her treating physician, Dr. Michael E. Batipps, a Board-certified neurologist. In these reports, dated December 11, 1996 and December 12, 1997, Dr. Batipps diagnosed, chronic post-traumatic cervical shoulder and thoracic strain with possible chronic cervical radiculopathy due to the 1988 and 1989 work injuries, chronic post-traumatic headaches due to the cervical and thoracic strain and chronic post-traumatic lumbosacral strain due to an intervening 1994 car accident. In his December 11, 1996 report, Dr. Batipps concluded that appellant was totally and permanently disabled due to her diagnosed employment-related conditions, and required physical therapy and additional medical testing to rule out radiculopathy. In his December 12, 1997 report, he concluded that appellant was totally disabled for approximately six to eight weeks, but stated that if she completed a course of physical therapy, as recommended, Dr. Batipps expected her to be able to return to light duty afterwards. As these reports are substantially similar to prior reports by Dr. Batipps already contained in the record and as he did not offer a rationalized opinion, in either report, as to whether appellant has the physical capacity to perform the duties of a telephone order clerk, these reports do not raise a substantial question as to the correctness of the Office's May 17, 1996 merit decision and the Office's refusal to reopen the case on its merits was proper.

As the evidence submitted by appellant in support of her request for reconsideration does not manifest on its face that the Office committed error in the January 16, 1998 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

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<sup>14</sup> *Jesus D. Sanchez, supra* note 8.

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

The January 16, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.<sup>16</sup>

Dated, Washington, D.C.  
December 3, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member

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<sup>16</sup> The Board notes that on appeal, appellant contended that mental incapacity prevented her from timely filing her prior request for reconsideration before the Office. Appellant submitted additional medical evidence in support of her contention. As appellant's argument and supporting evidence were not before the Office at the time it issued its January 16, 1998 decision, the Board may not consider them for the first time on appeal. 20 C.F.R. § 501.2(c).