

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA L. TRIBELLI and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Providence, RI

*Docket No. 98-1731; Submitted on the Record;
Issued December 28, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

The case has been before the Board on a prior appeal. In a decision dated February 12, 1997, the Board determined that the Office had properly denied appellant's request for a hearing, and had properly denied requests for reconsideration without merit review of the claim.¹ The history of the case as provided in the Board's prior decision is incorporated herein by reference.

By letter dated February 4, 1998, appellant requested reconsideration of the Office's March 29, 1993 wage-earning capacity determination. In a decision dated May 5, 1998, the Office determined that the request was untimely and failed to show clear evidence of error.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.² Since appellant filed her appeal on May 18, 1998, the only decision over which the Board has jurisdiction on this appeal is the May 5, 1998 decision denying her request for reconsideration.

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

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office

¹ Docket No. 95-208.

² 20 C.F.R. § 501.3(d).

³ 5 U.S.C. § 8128(a).

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

with discretionary authority to determine whether it will review an award for or against compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ 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.⁷ 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).⁸

In the present case, appellant requested reconsideration of a March 29, 1993 Office decision by letter dated February 4, 1998. Although a subsequent merit decision, by either the Office or the Board, will provide a one-year period to request reconsideration, there record does not contain a subsequent merit decision in this case.⁹ The January 31, May 20, and August 24, 1994 Office decisions were not reviews of the merits of the claim, and therefore the Board's February 12, 1997 decision is not a merit decision. The last merit decision is the March 29, 1993 Office decision, and therefore appellant's February 4, 1998 request for reconsideration is 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.¹⁰ In accordance with this holding the Office has stated in its Procedure Manual that it 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

⁵ 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."

⁶ 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).

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ *See Leon D. Faidley, Jr., supra* note 4.

⁹ A merit review by the Office is a determination, pursuant to the discretionary authority granted by 5 U.S.C. § 8128(a), of whether the evidence is sufficient to modify the prior decision. A nonmerit review is a limited review to determine if the evidence submitted on reconsideration is sufficient under 20 C.F.R. § 10.138(b)(1) to reopen the case for merit review, and the only right of appeal is to the Board. *See* 20 C.F.R. § 10.138; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7.8 (June 1997). The denial of a hearing request is not considered a merit review of the claim.

¹⁰ *Leonard E. Redway*, 28 ECAB 242 (1977).

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

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

must be 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

In the present case, appellant argued that the March 29, 1993 Office decision was contrary to FECA Bulletin No. 84-4; she also argued that the retroactive wage-earning capacity determination was contrary to the Office's procedure manual. With respect to the first argument, the Board notes that FECA Bulletin 84-4 expired on February 23, 1985. The substance of the bulletin is contained in the Office's Procedure Manual at Chapter 2.1601.9, which provides that if a hearing representative's decision finds that the Office did not meet its burden of proof in reducing or terminating compensation, the Office should reinstate benefits to the claimant "at the previous level."¹⁹ In the present case, the record indicates that appellant had initially received OPM (Office of Personnel Management) benefits. The wage-earning capacity decisions dated November 5, 1990 and April 26, 1991 were attempts to determine the nature and extent of appellant's entitlement to compensation. Both of those decisions were reversed by Office hearing representatives, but there was no requirement that any benefits be reinstated at the previous level, since appellant had not been receiving compensation benefits and the relevant issues regarding disability had not been resolved. The Board finds no clear evidence of error in the March 29, 1993 decision with respect to reinstatement of benefits.

Appellant's additional argument is that the Office's procedures prohibit the use of a retroactive loss of wage-earning capacity determination when compensation has been paid. In this case the March 29, 1993 decision was a retroactive determination of wage-earning capacity, finding that the selected position of medical secretary represented appellant's wage-earning capacity as of August 1987. Office procedures indicate that retroactive determinations should be

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

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

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

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

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁸ *Gregory Griffin*, 41 ECAB 458 (1990).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.9(b) (December 1995).

made only when “no compensation has been paid.”²⁰ Appellant argues that the Office had accepted that appellant was entitled to compensation for temporary total disability, but clearly this is for the period prior to August 1987, and compensation for this period had not been paid as of March 29, 1993.²¹ There is no probative evidence that appellant had been paid compensation for wage loss, commencing in August 1987, prior to the March 29, 1993 Office decision, and therefore no evidence that a wage-earning capacity determination retroactive to August 1987 was contrary to Office procedures. Accordingly, the Board finds that appellant has not established clear evidence of error in this case.

The decision of the Office of Workers’ Compensation Programs dated May 5, 1998 is affirmed.

Dated, Washington, D.C.
December 28, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(f) (December 1995) (formerly 2.813.13(g)).

²¹ In September 1993 appellant received a payment representing compensation for total disability during the period January 1985 to August 1987.