

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY A. BARNES-WALKER and DEPARTMENT OF THE AIR FORCE,
CIVILIAN PERSONNEL OFFICE, Washington, D.C.

*Docket No. 97-975; Submitted on the Record;
Issued February 1, 1999*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's July 5, 1996 request for reconsideration.

The case has been before the Board on a prior appeal. In a decision dated December 26, 1991, the Board determined that the Office had properly denied appellant's claim as untimely under the Federal Employees' Compensation Act and had properly denied a request for a hearing.¹

In letters dated April 1 and July 5, 1996, appellant requested reconsideration of her claim. Appellant discussed her claim and submitted additional evidence.²

In a decision dated October 15, 1996, the Office denied appellant's requests for reconsideration.

The Board finds that the Office properly denied appellant's request for reconsideration.

¹ Docket No. 91-1302.

² Appellant submitted additional medical evidence and a letter dated December 3, 1995 from the Social Security Administration.

Section 8128(a) of the Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office 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 this case, the last merit decision which provides a one-year period to request reconsideration is the Board's December 26, 1991 decision.⁹ Since appellant's April 1 and July 5, 1996 requests for reconsideration were more than one year after December 26, 1991, they were 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 must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise

³ 5 U.S.C. § 8128(a).

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

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 The Board notes that the Office indicated that appellant was requesting reconsideration of the Board's December 26, 1991 decision. A request for reconsideration sent to the Office is a request for reconsideration of the underlying Office decisions; reconsideration of the Board's decision is pursued through a petition for reconsideration sent to the Board within 30 days of the Board's decision. 20 C.F.R. § 501.7.

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).

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

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 this case, the relevant underlying issue was the timeliness of appellant's claim for compensation filed on October 30, 1989. None of the evidence submitted addresses the issues raised under the time limitation provision for filing a claim for compensation.¹⁹ Since appellant has failed to submit probative evidence establishing clear evidence of error, she is not entitled to merit review of her claim.

The decision of the Office of Workers' Compensation Programs dated October 15, 1996 is affirmed.

Dated, Washington, D.C.
February 1, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

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 5 U.S.C. § 8122.