

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANNA FOTI and U.S. POSTAL SERVICE,  
POST OFFICE, San Jose, Calif.

*Docket No. 97-1152; Submitted on the Record;  
Issued January 21, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

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 has duly reviewed the case record and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as her request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's November 28, 1996 decision denying appellant's request for a review on the merits of its October 6, 1995 decision. Because more than one year has elapsed between the issuance of the Office's October 6, 1995 and its August 19, 1994 decisions and February 6, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review either the October 6, 1995 or the August 19, 1994 decision.<sup>1</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>3</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

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<sup>1</sup> 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.138(b)(1),(2).

within one year of the date of that decision.<sup>4</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>5</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>6</sup>

In its November 28, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on October 6, 1995 and appellant's request for reconsideration was dated October 8, 1996 which was more than one year after October 6, 1995. Therefore, appellant's request for reconsideration of her case on its merits was untimely filed.

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."<sup>7</sup> 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.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>10</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>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative

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<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>6</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

<sup>9</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>12</sup> *See Leona N. Travis*, *supra* note 10.

<sup>13</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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>14</sup> The Board makes an independent determination as to 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 on the face of such evidence.<sup>15</sup>

With her request for reconsideration, appellant submitted an October 7, 1996 medical report from Dr. Jose R. Bolanos, a specialist in obstetrics and gynecology, which states that appellant noted a back injury during her pregnancy and two weeks after her September 29, 1993 delivery. The Board finds that the evidence submitted by appellant in support of such a request does not raise a substantial question as to the correctness of the Office's October 6, 1995 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The doctor noted that, based on a January 1994 magnetic resonance imaging (MRI) scan performed by Dr. Duckham, appellant had a herniated disc of the lumbar area. Dr. Bolanos stated that he had never seen "a normal pregnancy as the initiating factor for a herniated disc" and therefore concluded that "the injury to her back was related to a(n) undue lower back stress/strain at work that prompted the herniation that she relates." The Board finds, however, that Dr. Bolanos did not explain how the factors of appellant's employment caused or aggravated the diagnosed herniated disc. Dr. Bolanos's report is therefore not sufficiently rationalized and does not raise a substantial question as to the correctness of the Office in denying appellant's claim. Appellant submitted some medical reports that had been previously considered by the Office and therefore are of no probative value.<sup>16</sup>

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, 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. As appellant has not, by the submission of medical evidence, raised a substantial question as to the correctness of the Office's November 28, 1996 decision, she has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of her claim.

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<sup>14</sup> *Leon D. Faidley, Jr.*, *supra* note 6.

<sup>15</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *aff'd on recon.*, 41 ECAB 458 (1990).

<sup>16</sup> The Board notes that the file contains evidence received subsequent to the Office's November 28, 1996 decision. The Board's jurisdiction on appeal is limited to a review of the evidence which was in the case record before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). The Board may not review new evidence on appeal which was not considered by the Office in the decision. Therefore, the Board is precluded from reviewing this evidence.

Accordingly, the decision of the Office of Workers' Compensation Programs dated November 28, 1996 is hereby affirmed.

Dated, Washington, D.C.  
January 21, 1999

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member