

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BELINDA J. WEBB and U.S. POSTAL SERVICE,
POST OFFICE, Long Beach, Calif.

*Docket No. 97-1396; Submitted on the Record;
Issued January 11, 1999*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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

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

On July 25, 1995 appellant, then a 33-year-old mail carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging bilateral ankle tendinitis developed while in the performance of her duties as a mail carrier. In a decision dated November 9, 1995, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to establish fact of injury. The Office found that there was insufficient evidence in the file regarding whether or not the claimed event, incident or exposure occurred at the time, place and in the manner alleged; and the medical condition resulting from the alleged work incident or exposure was not supported by the evidence of file. In an undated letter received by the Office on January 24, 1996, appellant requested reconsideration of the Office's November 9, 1995 decision, responded to the Office's October 3, 1995 informational letter and submitted a September 12, 1995 report from Dr. Thomas Amberry, a podiatrist. In a February 6, 1996 merit decision, the Office denied modification of its November 9, 1995 decision. Thereafter, in an undated letter received by the Office on February 12, 1997, appellant again requested reconsideration of the Office's prior decisions and submitted the second page of her attending physician's report dated August 11, 1992, and bearing an illegible physician's signature; a September 20, 1994 medical report from Dr. Edward A. Ridgill, practicing in internal medicine; the third page of a medical report bearing the letterhead of Dr. Geoffrey M. Miller, a Board-certified orthopedic surgeon, dated April 26, 1993; and the third page of a medical report from

Dr. Miller dated September 28, 1993. In a decision dated February 14, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not establish clear evidence of error that the Office's decision was erroneous. The Office also noted that a limited review of the evidence submitted with the current request for reconsideration had been done, but noted that the evidence submitted on reconsideration was not of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).³ As one such limitation, the Office has stated that it will review a decision denying or terminating a benefits unless the application for review is filed within one year of the date of that decision.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

The Office properly determined in this case 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.⁶ The last merit decision in this case was the

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 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).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *See* cases cited *supra* note 3.

⁶ *Larry L. Litton*, 44 ECAB 243 (1992).

Office's February 6, 1996 merit decision on reconsideration.⁷ As appellant's application for reconsideration is undated and was not stamped received by the Office until February 12, 1997, it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.⁸ 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 claimant's application for review shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its fact that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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 demonstrated clear error on the part of the Office.¹⁴ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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.¹⁵ 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.¹⁶

⁷ See *Valetta C. Coleman*, 48 ECAB ____ (Docket No. 95-431, issued February 27, 1997).

⁸ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon., denied*, 41 ECAB 458 (1990).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b) (May 1991) 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."

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 2.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ See *Leon D. Faidley, Jr.*, *supra* note 2.

¹⁶ See *Gregory Griffin*, *supra* note 8.

Since more than one year elapsed between the Office's February 6, 1996 merit decision and appellant's undated request for reconsideration which was received by the Office on February 12, 1997, the Board finds that the request was untimely filed.¹⁷ Further, the Board finds that the arguments advanced by appellant on reconsideration failed to demonstrate clear error and the evidence submitted on reconsideration by appellant does not raise a substantial question as to the correctness of the Office's decisions and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

Appellant submitted medical evidence which predates the filing of appellant's occupational claim. The medical evidence submitted on reconsideration is of no probative value and does not show that the Office's February 6, 1996 decision denying appellant's claim for failure to establish a work-related medical condition of ankle tendinitis, was in error. Appellant has not presented clear evidence of error in the Office's February 6, 1996 decision.

The decision of the Office of Workers' Compensation Programs dated February 14, 1997 is hereby affirmed.

Dated, Washington, D.C.
January 11, 1999

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁷ The Office's last merit decisions dated February 6, 1996 and November 5, 1995 were issued more than one year prior to the date that appellant filed his appeal dated and postmarked February 27, 1997, with the Board on March 5, 1997. Therefore, the Board lacks jurisdiction to consider the merits of appellant's claim. 20 C.F.R. § 501.3(d).