

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLYE A. DANIELS and U.S. POSTAL SERVICE,
BROAD STREET ANNEX, Newark, NJ

*Docket No. 98-72; Submitted on the Record;
Issued July 19, 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 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.

On January 4, 1996 appellant, then a 55-year-old distribution window clerk, filed a claim for traumatic injury alleging that on December 8, 1995 she suffered a stroke as a result of a stressful confrontation with her supervisor, John Carmichael. Appellant stated that she was working alone on the date in question when Mr. Carmichael ordered her to "get rid of all mails." She added that she became "very agitated" and told her supervisor that she did not feel well. In support of her claim, appellant submitted a medical treatment form from Medemerge dated December 7, 1995, which indicates that appellant was treated for a cerebrovascular accident.

The employing establishment controverted appellant's claim and submitted a statement from appellant's supervisor, Mr. Carmichael, who stated that appellant was not working alone on the day in question and that he only asked her to do the same job she has been doing for most of her career. He further stated that he spoke to appellant in the same tone of voice that he has used for years and that he did not feel that either his own actions or the requirements of appellant's job had caused her stroke. Mr. Carmichael explained that appellant had recently been stressed from personal problems and that she had complained about feeling ill and of being out of medication for her high blood pressure. He concluded that appellant looked sick when she reported to work and that he asked her to seek medical attention, but she declined, as she wished to finish her duties. Later that day when she did not look any better, Mr. Carmichael stated that he insisted that she leave work early and called appellant's husband to collect her.

By letter dated February 22, 1996, the Office requested that appellant submit additional medical and factual evidence in support of her claim. In response, appellant submitted a December 28, 1995 discharge summary from John F. Kennedy Medical Center which indicated,

in pertinent part, that appellant had been admitted on December 15, 1995, having been transferred from St. Peter's Medical Center "status post left pontine cerebrovascular accident with right hemiparesis on [December 7, 1995]." The report further indicated that appellant "was admitted after waking up with right leg weakness and slurred speech" and that over the course of the day the right-sided weakness increased and she was referred to St. Peter's Medical Center for a computerized tomography (CT) scan of the head which was negative.

In a merit decision dated March 28, 1996, the Office denied appellant's claim on the grounds that appellant failed to submit evidence that her cerebrovascular accident occurred at the time, place and in the manner alleged. The Office specifically found that the record contained conflicting evidence as to the date of the injury, as the medical evidence indicated that appellant was initially treated on December 7, 1995, one day prior to the date of injury listed on her claim form, and that the medical reports submitted in support of the claim do not contain a description of any employment incidents or contain an opinion as to whether appellant's employment played any role in her injury.

In a letter dated April 15, 1996, appellant's counsel stated that he would request reconsideration of the Office decision when additional medical evidence had been obtained. In addition, counsel requested that the date of injury be amended to December 7, 1995. Counsel explained that appellant's stroke actually occurred on December 7, 1995, and that December 8, 1995 was the date she was hospitalized for her condition.

By letter dated May 23, 1996, the Office informed counsel that before the Office could amend the date of injury, counsel needed to submit corroborating statements from both appellant and the employing establishment indicating that the date of the alleged injury was erroneous and should be December 7, 1995.

In a letter dated April 3, 1997, appellant, through counsel, requested reconsideration of the Office's prior decision. In support of the request, counsel submitted three witness statements from appellant's coworkers, each of whom indicated that appellant's stroke occurred on December 7, 1995, after she had been involved in a confrontation with her supervisor. Subsequent to the request for reconsideration, appellant additionally submitted medical evidence from her treating physicians.

In response to the witness statements submitted by appellant, the employing establishment submitted a narrative statement from Mr. Carmichael in which he stated that the incident in question had in fact occurred on December 8, 1995, as originally indicated by appellant. In support of his contentions, Mr. Carmichael submitted copies of two accident report forms generated as a result of the accident, both of which indicated that appellant had become ill at work on December 8, 1995.

In a decision dated June 30, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error.

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

The only decision before the Board on this appeal is the Office's June 30, 1997 decision denying appellant's request for a review on the merits. Because more than one year has elapsed between the issuance of the Office's most recent merit decision, issued March 28, 1996, and September 30, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the Office's merit decision.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² 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.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.⁴ 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.⁵ 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.⁶

In its June 30, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on March 28, 1996. As appellant's request for reconsideration was dated April 3, 1997, more than one year after the March 28, 1996 decision, appellant's request for reconsideration of her case 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."⁷ 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.

¹ See 20 C.F.R. § 501.3(d)(2).

² 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 his own motion or on application. 5 U.S.C. § 8128(a).

³ 20 C.F.R. §§ 10.138(b)(1), (2).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *Charles J. Prudencio*, 41 ECAB 499 (1990).

§ 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ 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 in the face of such evidence.¹⁵

In the present case, appellant alleged she sustained a stroke at work on December 8, 1995 when she became upset over a confrontation with her supervisor. The medical evidence of record indicates that appellant was first treated for a cerebrovascular accident on December 7, 1995, having awakened that morning with leg weakness and slurred speech. With her request for reconsideration of the March 28, 1996 decision, appellant submitted three witness statements indicating that appellant looked well on the morning of December 7, 1995, but that later that day, after appellant reported having had a confrontation with her supervisor, appellant looked ill and her mouth appeared "twisted." This evidence is contradicted, however, by the narrative statement submitted by appellant's supervisor who stated that the incident occurred on December 8, 1995, and submitted copies of the accident reports, dated accordingly, in support of

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996). The Office therein states:

"The term 'clear evidence or error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example, proof that a schedule award miscalculated)."

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr*, *supra* note 6.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

his contention. The witness statements submitted by appellant are directly contradicted by the statement of appellant's supervisor, which in turn is supported by documentary evidence. The statements do not demonstrate clear evidence of error on its face on the part of the Office in its March 28, 1996 merit decision. Moreover, the medical evidence submitted by appellant in support of her claim is also insufficient to establish clear error on the part of the Office in rejecting her claim. In a form report dated May 13, 1996, Dr. Henry J. Scharf, a Board-certified internist and treating physician, diagnosed appellant with a cerebrovascular accident, hypertension and diabetes mellitus, indicated that her prognosis was good, and listed her physical restrictions as a result of her condition. Dr. Scharf did not give a history of appellant's stroke or give any opinion as to its cause. Similarly, in a form report dated August 28, 1996, Dr. Anna Dunn, also a treating physician, diagnosed "S/P [left] Pontine Infarct" and listed appellant's physical restrictions, but did not give a history of appellant's injury or give an opinion as to the cause of her condition. Finally, the record contains reports from a Dr. J. Rosen, dated April 17, 1989 and December 13, 1990, several years prior to appellant's cerebrovascular accident, and which diagnose only hypertension and obesity. This evidence does not demonstrate clear evidence of error on its face on the part of the Office in its March 28, 1996 merit decision.

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.

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 30, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 19, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member