

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of LAUREEN WALL and U.S. POSTAL SERVICE,  
POST OFFICE, Sterling Heights, Mich.

*Docket No. 97-2583; Submitted on the Record;  
Issued June 1, 1999*

---

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's June 25, 1997 request for reconsideration.

In a nonmerit decision dated July 24, 1997, the Office denied appellant's June 25, 1997 request for reconsideration because it was untimely and failed to show clear evidence of error in the Office's April 15, 1996 decision denying her claimed recurrence of disability.

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

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"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."<sup>1</sup>

---

<sup>1</sup> 5 U.S.C. § 8128(a).

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>2</sup> As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office 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.<sup>3</sup> Office procedures state, however, that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>4</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>5</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>6</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>8</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>9</sup> 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.<sup>10</sup> 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 a merit review in the face of such evidence.<sup>11</sup>

---

<sup>2</sup> 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, a claimant may obtain review of the merits of his 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. 20 C.F.R. § 10.138(b)(1).

<sup>3</sup> *But see Leonard E. Redway*, 28 ECAB 242, 246 (1977) (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).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>5</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>6</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>7</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>8</sup> *See Leona N. Travis*, *supra* note 6.

<sup>9</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>11</sup> *Gregory Griffin*, 41 ECAB 458, 466 (1990).

Appellant's June 25, 1997 request for reconsideration is untimely. Appellant made this request more than one year after the Office's last merit decision on April 15, 1996. The question or determination, therefore, is whether the evidence submitted in support of appellant's untimely request shows clear evidence of error in the April 15, 1996 decision.<sup>12</sup>

In its decision of April 15, 1996, the Office found that the weight of the medical evidence established that appellant had no condition or disability after May 31, 1995 that was causally related to the employment injury of August 24, 1987, which the Office accepted for the conditions of right shoulder strain and acute subacromial bursitis of the right shoulder. The Office found that the weight of the medical evidence rested with the well-rationalized June 1, 1995 opinion of the impartial medical specialist, who was selected to resolve a conflict between appellant's attending physician and an Office referral physician.

The Board has carefully reviewed the evidence appellant submitted to support her June 25, 1997 request for reconsideration to determine whether it is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant and to raise a substantial question as to the correctness of the Office's April 15, 1996 decision. The Board finds that the evidence appellant submitted is irrelevant to the grounds upon which the Office based its April 15, 1996 decision. The issue that the Office addressed was a medical one, namely, whether appellant continued to have residuals of the right shoulder strain and acute subacromial bursitis she sustained on August 24, 1987. Rather than submit a narrative medical opinion positively establishing that she does in fact have residual strain or bursitis causally related to her August 24, 1987 employment injury, and that the opinion of the impartial medical specialist was clearly flawed or erroneous, appellant submitted evidence relating to a new claim for an emotional condition, one that she asserts is consequential to her accepted right shoulder injury. This evidence has no bearing whatsoever on the Office's April 15, 1996 decision and does not shift the weight of the evidence in her favor.

---

<sup>12</sup> In its July 24, 1997 decision, the Office noted only that appellant had submitted about an inch of evidence, that some of it was duplicative and that some of it was new. This does not show how the evidence submitted with the reconsideration request bears on the evidence previously of record and is not the type of limited review the Board has generally required. *Robert M. Pace*, 46 ECAB 551 (1995). To avoid an order setting aside its denial of reconsideration in cases such as this, the Office must endeavor to address the issue decided by the last merit decision and how the untimely evidence or argument bears on that issue so that the Board may properly determine the basis of the Office's finding that the untimely request fails to show clear evidence of error.

As appellant failed to support her untimely request with clear evidence of error, the Board finds that the Office did not abuse its discretion in denying a merit review of appellant's case.

The July 24, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

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

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member