

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CLARA M. EDWARDS (McGEE) and DEPARTMENT OF VETERANS  
AFFAIRS, ALLEN PARK VETERANS ADMINISTRATION CENTER,  
Allen Park, Mich.

*Docket No. 97-1023; Submitted on the Record;  
Issued March 9, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for 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 this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for 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 September 9, 1994 appellant, then a medical clerk, filed a claim for an occupational disease (Form CA-2) alleging that she first realized that her allergies, and eye and emotional conditions were caused or aggravated by her employment in 1993. Appellant's claim was accompanied by factual and medical evidence.

By letter dated May 16, 1995, the Office advised the employing establishment to submit additional factual evidence in response to appellant's claim. By letter of the same date, the Office advised appellant to submit additional factual and medical evidence supportive of her claim.

By letter dated June 8, 1995, the employing establishment submitted additional factual evidence.

By decision dated October 17, 1995, the Office found the evidence of record insufficient to establish that appellant sustained an injury as alleged. In an October 31, 1995 letter, appellant requested reconsideration of the Office's decision.

By decision dated November 21, 1995, the Office denied appellant's request for reconsideration on the grounds that she neither raised legal questions nor submitted relevant evidence, and therefore found her request insufficient to warrant a review of its prior decision. In an October 18, 1996 letter, appellant requested reconsideration of the Office's decision accompanied by medical evidence.

By decision dated October 31, 1996, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not establish clear evidence of error.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under section 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> Inasmuch as appellant filed her appeal with the Board on January 17, 1997, the only decision properly before the Board is the Office's October 31, 1996 decision denying appellant's request for a review of the merits of its October 17, 1995 decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a 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 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 Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. 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>6</sup> The Board has found that the imposition of this one-year time limitation

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<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 20 C.F.R. § 101.38(b)(1)-(2); *Thankamma Mathews*, 44 ECAB 788 (1993).

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

<sup>5</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>6</sup> 20 C.F.R. § 10.138(b)(2); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).<sup>7</sup>

In this case, the Office properly determined 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.<sup>8</sup> The Office issued its last merit decision in this case on October 17, 1995 wherein appellant's claim was denied on the grounds that the evidence of record was insufficient to establish that she sustained an injury as alleged. Inasmuch as appellant's October 18, 1996 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, 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.<sup>9</sup> 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 the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>11</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>12</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>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup>

In support of her request for reconsideration, appellant submitted medical treatment notes covering the period February 17, 1965 through July 15, 1994 that related to her allergies, eye problems and various other conditions. In further support of her claim, appellant submitted

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<sup>7</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>8</sup> *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>9</sup> *Gregory Griffin*, *supra* note 6.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (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); *Thankamma Mathews*, *supra* note 3; *Jesus D. Sanchez*, *supra* note 7.

<sup>11</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> *Jesus D. Sanchez*, *supra* note 7.

<sup>14</sup> *Leona N. Travis*, *supra* note 12.

objective test results covering the period February 17, 1965 through June 23, 1993. These treatment notes and test results, however, failed to indicate that appellant's conditions were caused by factors of her federal employment.

In addition, appellant submitted medical treatment notes dated April 30, 1993 and signed by J. Minster, a registered nurse. These notes provided that appellant was crying and upset because she had been treated unjustly. These notes also indicated that appellant had a complaint pending with the Equal Employment Opportunity Commission. The August 13, 1993 medical treatment notes signed by J. Minster revealed that appellant was upset over a disagreement with a coworker. The Board has long held that a nurse is not considered a "physician" under the Act,<sup>15</sup> therefore, treatment notes from a nurse do not constitute medical evidence to establish a compensable employment factor.

Appellant also submitted medical treatment notes dated February 22, 1994 from a person whose signature is illegible revealing that she complained of stress at her job. These notes failed to identify a specific factor of employment or give a definitive opinion on a causal relationship between appellant's employment and her emotional condition.

Appellant also submitted a May 14, 1991 disability certificate from a physician whose signature is illegible revealing that she had allergies. In disability certificates dated August 11 and August 29, 1994, Dr. Robert G. Glinski, an orthopedic surgeon, indicated that appellant had been under his care for anxiety. In a September 1, 1994 disability certificate, Dr. D.P. Dayananda, a Board-certified internist, indicated that appellant had weakness, anxiety, anemia and shortness of breath. These disability certificates failed to discuss whether or how the diagnosed conditions were caused by factors of appellant's federal employment.<sup>16</sup>

Inasmuch as the evidence submitted by appellant in support of her request for reconsideration does not manifest on its face that the Office committed error in the October 31, 1996 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

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<sup>15</sup> *Carmen Dickerson*, 36 ECAB 409 (1985).

<sup>16</sup> *Daniel Deparini*, 44 ECAB 657, 659 (1993).

The decision of the Office of Workers' Compensation Programs dated October 17, 1995 is affirmed.

Dated, Washington, D.C.  
March 9, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member