

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VAILE WALDERS and DEPARTMENT OF THE NAVY,
NAVAL SEA SYSTEMS COMMAND, Washington, D.C.

*Docket No. 97-1955; Oral Argument Held January 6, 1999;
Issued March 26, 1999*

Appearances: *James H. Lesar, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on the grounds that her request for reconsideration was not timely filed and did not contain clear evidence of error.

The Board has duly reviewed the case on appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

This is the second appeal in this claim. By decision dated June 21, 1995, the Board found that appellant had not met her burden of proof in establishing that she developed an emotional condition, chronic fatigue syndrome and headaches due to factors of her federal employment.¹ Appellant filed a petition for reconsideration, which the Board denied by order dated October 17, 1995, without *de novo* review of the claim, on the grounds that appellant was merely rearguing her case in the guise of a petition for reconsideration and had not cited any error of fact or law in the Board's June 21, 1995 decision. The facts and circumstances of the case as set out in the prior decision are adopted herein by reference. Following the Board's June 21, 1995 decision, appellant through her attorney, requested reconsideration from the Office on October 16, 1996. By decision dated February 10, 1997, the Office denied appellant's request finding that it was not timely filed and failed to present clear evidence of error.

Section 8128(1) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section, vesting the Office

¹ Docket No. 93-2284.

² 5 U.S.C. § 8128(a).

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 regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). 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.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the 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. The last merit decision in this case was the Board’s *de novo* review of the case, issued on June 21, 1995. The October 17, 1995 order which denied appellant’s petition for reconsideration before the Board, does not constitute merit review of the case. While an appellant is allowed an opportunity by regulation to petition the Board for reconsideration,⁶ such petition for reconsideration, unless granted by the Board, does not constitute a merit review of the case. In addressing the finality of the Board’s decisions and orders, the applicable regulations provides that “The decision of the Board shall be final upon the expiration of 30 days from the date of the filing of the order, unless the Board shall in its order fix a different period of time or reconsideration by the Board is granted.”⁷ The Board’s decision and order thus becomes final unless the Board grants a petition for reconsideration and reopens the case. The Board has previously concluded that an order by the Board merely denying a petition for reconsideration, which does not grant reopening of the case, does not constitute a merit decision.⁸

³ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ 20 C.F.R. § 10.138(b)(2). *Gregory Griffin*, 41 ECAB 186 (1989) *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ See case cited *supra* note 3.

⁶ 20 C.F.R. § 501.7.

⁷ 20 C.F.R. § 501.6.

⁸ See *Veletta C. Coleman*, (Docket No. 95-431 issued February 27, 1997).

When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error. Appellant, through her attorney, argued that the Board applied an incorrect legal standard in evaluating her claim, that she had substantiated the factors alleged to have caused or contributed to her condition and that she established that her reassignment was inappropriate.

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

The arguments submitted in this case, while relevant to the issue at hand, merely show that the evidence could be construed so as to produce a contrary conclusion. Appellant has not submitted clear evidence that the incidents to which she attributed her condition were factors of employment as defined by Board precedent. Furthermore, appellant's argument that the incorrect standard of review was applied in her case is not persuasive given appellant's allegations that stress worsened her condition. As appellant failed to present clear evidence of error in the prior decisions, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The decision of the Office of Workers' Compensation Programs dated February 10, 1997 is hereby affirmed.

Dated, Washington, D.C.
March 26, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

⁹ *Jeanette Butler*, 47 ECAB 128, 131 (1995).