

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY BANYAI-SMITH, widow of KERMIT E. SMITH and
DEPARTMENT OF THE AIR FORCE, McCLELLAN AIR FORCE BASE, CA

*Docket No. 98-1411; Submitted on the Record;
Issued November 9, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error.

This is the second appeal in this case.¹ By decision dated November 1, 1996, the Board found that the Office did not abuse its discretion in denying appellant's request for reconsideration. The facts of this case are more fully set forth in that decision and are herein incorporated by reference.

Following the Board's November 1, 1996 decision, appellant, by letter dated December 16, 1997, requested reconsideration of the denial of her claim. She indicated her disagreement with the medical evidence.

By decision dated January 7, 1998, the Office denied appellant's request for reconsideration on the grounds that her request was not timely submitted within one year of the last decision in this case, the Board's November 1, 1996 decision, and on the grounds that appellant had failed to present clear evidence of error.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim on the grounds that her untimely request did not demonstrate 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.² As

¹ See Docket No. 95-161.

² 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

appellant filed her appeal with the Board on March 24, 1998, the only decision properly before the Board is the Office's January 7, 1998 decision denying appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it 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.⁶ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

The Board has held, however, that 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.⁸ In accordance with this holding, the Office has stated in its procedure manual that it 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.⁹

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

In this case, appellant filed her request for reconsideration by letter dated December 16, 1997. This was more than one year after the last merit decision issued in this case, the Office's June 7, 1993 decision, and thus the application for review was not timely filed.¹⁰ In accordance with its internal guidelines and with Board precedent, the Office properly found that

³ 5 U.S.C. § 8128(a).

⁴ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *Leon D. Faidley, Jr.*, *supra* note 4.

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *See Gregory Griffin* and *Leon D. Faidley, Jr.*, *supra* note 4.

⁸ *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996).

¹⁰ The Board's November 1, 1996 decision did not review the merits of the claim as the only issue before the Board was whether the Office abused its discretion in denying appellant's reconsideration request. Therefore the one-year period for reconsideration accompanied the June 7, 1993 decision. *See Larry J. Lilton*, 44 ECAB 243 (1992).

the request was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error which would warrant reopening appellant's case for merit review under 5 U.S.C. § 8128(a) notwithstanding the untimeliness of her application.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application for review was sufficient to show clear evidence of error.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷

In her December 16, 1997 request for reconsideration, appellant stated her disagreement with the medical evidence upon which the Office's denial of her claim was based. However, lay persons are not competent to render a medical opinion.¹⁸ Therefore, appellant failed to show clear evidence of error in the Office's decision to deny her claim for compensation benefits.

As appellant's untimely request for reconsideration failed to present clear evidence of error, the Board finds that the Office's refusal to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

¹¹ *Jeanette Butler*, 47 ECAB 128, 131 (1995).

¹² *See Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁴ *See Leona N. Travis*, *supra* note 12.

¹⁵ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ *Jeanette Butler*, *supra* note 11.

¹⁷ *Id.*

¹⁸ *See James A. Long*, 40 ECAB 538, 542 (1989).

The January 7, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

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

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member