

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAWN S. WUNDERLICH and DEPARTMENT OF VETERANS AFFAIRS,
LEBANON VETERANS HOSPITAL, Lebanon, PA

*Docket No. 98-121; Submitted on the Record;
Issued October 26, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated July 9, 1997 and received by the Office on July 15, 1997 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.

On February 11, 1993, appellant, then a 36-year-old clothing clerk, filed a claim for occupational disease (Form CA-2) alleging that she developed multiple medical problems as a result of her exposure to marking ink and cleaning fluid in the course of her federal employment. In a merit decision dated April 16, 1996, the Office denied appellant's claim on the grounds that the medical evidence of record was insufficient to establish a causal relationship between her diagnosed conditions and her employment-related chemical exposure. By letter dated May 8, 1996, appellant requested review of the April 16, 1996 decision. In a decision dated August 6, 1996, the Office declined to reopen appellant's claim on the grounds that appellant's request for reconsideration neither raised substantive legal questions nor included new and relevant evidence, and therefore was not sufficient to warrant merit review of the prior decision. By letter dated July 9, 1997 and received by the Office on July 15, 1997, appellant requested reconsideration of the Office's prior decision and submitted additional evidence in support of her request. In a decision dated September 12, 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'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.¹ As

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

appellant filed her appeal with the Board on October 1, 1997, the only decision properly before the Board is the Office's September 12, 1997 decision denying appellant's request for a review of the merits of the Office's prior decision.²

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 The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ 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 time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

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.⁸ The Office issued its last merit decision in this case on April 16, 1996 wherein it denied appellant's claim for compensation on the grounds that appellant had not submitted sufficient medical evidence to establish that her multiple medical problems are causally related to chemical exposure in the course of her employment. As appellant's reconsideration request received on July 15, 1997 was outside the one-year time limit, which began the day after April 16, 1996, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.⁹ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing

² The Office's April 16, 1996 decision was the last merit decision in this case.

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 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, the Office has stated that a claimant may obtain review of the merits of a 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; *see* 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *See* cases cited *supra* note 4.

⁸ *Larry L. Lilton*, 44 ECAB 243 (1992).

⁹ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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.¹⁰

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 manifested 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 the present case, the only new evidence appellant submitted in support of her request for reconsideration consisted of articles and excerpts from medical texts regarding the role of methyl alcohol, Dichlorobenzine and related substances in the development or aggravation of various medical conditions. However, the Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing causal relationship as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.¹⁸ Therefore, the Office properly determined that appellant had not submitted sufficient evidence to establish clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated September 12, 1997 is hereby affirmed.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

¹¹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

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

¹³ See *Jesus D. Sanchez*, *supra* note 4.

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

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

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁷ *Gregory Griffin*, *supra* note 9.

¹⁸ *William C. Bush*, 40 ECAB 1064 (1989).

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

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member