

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SELVENA CREARY and U.S. POSTAL SERVICE,  
POST OFFICE, New York, NY

*Docket No. 98-824; Submitted on the Record;  
Issued October 19, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for further consideration of her case on its merits on the grounds that her request was untimely filed and presented no clear evidence of error.

The Board 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.

The only decision before the Board on this appeal is the Office's September 26, 1997 decision denying appellant's request for a review on the merits of the February 16, 1996 decision.<sup>1</sup> Because more than one year has elapsed between the issuance of the Office's February 16, 1996 and December 24, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the prior Office decision.<sup>2</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence

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<sup>1</sup> The February 16, 1996 decision specifically addressed only appellant's October 21, 1995 recurrence; the Office's September 22, 1997 decision vacated a September 11, 1996 order addressing a January 25, 1996 recurrence claim and expanded her claim to include acceptance of herniated discs at L4-5 and L5-S1. Consequently, the time limitation period for requesting reconsideration of appellant's October 21, 1995 recurrence claim began to run on February 16, 1996 and not on September 11, 1996 as appellant's representative argues.

<sup>2</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>3</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. 21 8128(a).

not previously considered by the Office.<sup>4</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.<sup>5</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>6</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>7</sup>

In its September 26, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on February 16, 1996, and appellant's request for reconsideration was dated August 29, 1997 which was clearly more than one year after February 16, 1996. Therefore, appellant's request for reconsideration of her case on its merits was untimely filed.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."<sup>8</sup> Office procedures provide 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>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>11</sup> Evidence which does not raise

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<sup>4</sup> 20 C.F.R. §§ 10.138(b)(1), (2).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>7</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). The Office therein states:

"The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

<sup>10</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</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>14</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>15</sup> The Board makes an independent determination as to 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.<sup>16</sup>

In the present case, with her request for reconsideration of the February 16, 1996 decision, appellant, through her representative, argued that the recurrence claim forms did in fact refer to both upper and lower back pain, and she submitted an August 18, 1997 report from Dr. Ravi Venkataraman and a June 6, 1997 report from Dr. Isaiah Florence, both Board-certified anesthesiologists and pain management specialists, which merely stated that she was being treated at the Pain Management Center. Also submitted were prescriptions, authorizations for medical treatment and duty status reports, a light-duty recommendation and an October 30, 1996 report from Dr. Thomas R. Haher, a Board-certified orthopedic surgeon, which identified two bulging discs and "various reoccurrences in 1995 and 1996." None of this evidence specifically addressed an alleged recurrence of disability on October 21, 1995, and was, therefore, irrelevant to the issue in question. Consequently, this evidence did not demonstrate any clear evidence of error on its face on the part of the Office in its February 16, 1996 decision.

As this evidence does not raise a substantial question as to the correctness of the prior February 16, 1996 Office decision or *prima facie* shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration on that basis.

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<sup>12</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>13</sup> See *Leona N. Travis*, *supra* note 11.

<sup>14</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>15</sup> *Leon D. Faidley, Jr.* *supra* note 7.

<sup>16</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Office, therefore, did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 26, 1997 is hereby affirmed.

Dated, Washington, D.C.  
October 19, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member