

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARLEEN TREVINO and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Jamaica, NY

*Docket No. 98-683; Submitted on the Record;
Issued September 13, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's July 25, 1997 request for reconsideration on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

In a decision dated September 8, 1995, the Office denied modification of its prior decision denying appellant's claim for physical and mental trauma resulting from an incident in her airspace on July 14, 1992. The Office found that the medical evidence was insufficient to establish that the claimed medical conditions arose from the incident of July 14, 1992.

On July 10, 1996 appellant requested reconsideration and submitted medical evidence to support her claim. In a nonmerit decision dated July 25, 1996, the Office denied appellant's request on the grounds that neither the request nor the medical evidence submitted raised substantive legal questions or included new and relevant evidence.

On July 25, 1997 appellant again requested reconsideration. She stated that she felt that she had sufficiently provided the necessary documentation supporting her claim, that her physician had provided numerous detailed letters explaining the diagnosis of her condition and that she was thoroughly convinced that the Office, together with the employing establishment, was discriminating against her on the basis of gender.

In a nonmerit decision dated September 23, 1997, the Office denied appellant's July 25, 1997 request on the grounds that it was untimely and failed to present clear evidence of error.

An appeal to the Board must be mailed no later than one year from the date of the Office's final decision.¹ Because appellant mailed her December 22, 1997 appeal more than one year after the Office's merit decision of September 8, 1995 and more than one year after the Office's nonmerit decision of July 25, 1996, the Board has no jurisdiction to review those

¹ 20 C.F.R. § 501.3(d) (time for filing); *see id.* § 501.10(d)(2) (computation of time).

decisions. The only decision that the Board may review is the Office's September 23, 1997 nonmerit decision denying appellant's July 25, 1997 request for reconsideration.

The Board finds that the Office properly denied appellant's July 25, 1997 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"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."²

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, 20 C.F.R. § 10.138(b)(2) provides that 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. Office procedures state, however, that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows "clear evidence of error" on the part of the Office.³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁴ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁵ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ 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.⁸ To show clear evidence of error, the evidence submitted must not only be of sufficient probative

² 5 U.S.C. § 8128(a).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁴ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁵ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁶ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ See *Travis supra* note 5.

⁸ *Nelson T. Thompson*, 43 ECAB 919 (1992).

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.⁹ 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 a merit review in the face of such evidence.¹⁰

Appellant filed her July 25, 1997 request for reconsideration more than a year after the Office's merit decision of September 8, 1995. Her request is therefore untimely. In this untimely request, appellant stated that she felt that she had sufficiently provided the necessary documentation to support her claim, that her physician had provided numerous detailed letters explaining the diagnosis of her condition. This expression of disagreement with the denial of her claim does not clearly establish error in the Office's September 8, 1995 decision. Nor does appellant's unsubstantiated allegation of discrimination.

The September 23, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
September 13, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

⁹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ *Gregory Griffin*, 41 ECAB 458, 466 (1990).