

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BOBBIE J. WALTON and U.S. POSTAL SERVICE,  
POST OFFICE, San Bernardino, CA

*Docket No. 98-854; Submitted on the Record;  
Issued September 15, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused 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.

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.

The only decision before the Board on this appeal is the Office's December 16, 1997 decision denying appellant's request for a review on the merits of the June 21, 1994 Office decision.<sup>1</sup> Because more than one year has elapsed between the issuance of the Office's June 21, 1994 and January 26, 1998, the date appellant formally 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 not previously considered by the Office.<sup>4</sup> To be entitled to a merit review of an Office decision

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<sup>1</sup> On June 21, 1994 the Office rejected appellant's claim for carpal tunnel syndrome, finding that she failed to meet her burden of proof to establish that she developed the alleged medical condition.

<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. § 8128(a).

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

denying or terminating a benefit, a claimant also must 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 December 16, 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 June 21, 1994 and appellant's request for reconsideration was dated December 2, 1997 which was clearly more than one year after June 21, 1994. 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.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative

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

<sup>10</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>12</sup> *See Leona N. Travis*, *supra* note 11.

<sup>13</sup> *See 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.<sup>14</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>15</sup>

In the present case, with her request for reconsideration of the June 21, 1994 decision, appellant submitted a November 20, 1997 medical report from Dr. Paul Tien Liu, a Board-certified internist. This report addressed appellant's back, knee, arthritic, neurologic and post-surgical conditions in 1997, none of which had been accepted by the Office as being employment related and opined that appellant was totally disabled from her previous occupation due to these conditions. As it did not discuss appellant's condition in 1994 or any causal relationship with her employment, it was not relevant and it did not demonstrate any clear evidence of error on its face on the part of the Office in its June 21, 1994 decision, as the Office properly ascertained. Therefore, the Board now finds that it is indeed insufficient to reopen appellant's case for further consideration on its merits.

Appellant also submitted a 1996 disability certificate and a January 22, 1996 report from Dr. William C. Hanes, a Board-certified orthopedic surgeon. The disability certificate indicated only that appellant was on permanent disability retirement and Dr. Hanes' report discussed appellant's de Quervain's tenosynovitis and multiple remedial surgeries, none of which had been accepted by the Office as being employment related. The report discussed her orthopedic conditions at that time and opined that appellant should consider early medical retirement. The report did not discuss causation of appellant's alleged carpal tunnel syndrome in 1994. Even if it did provide such a discussion, the Board has explained that 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.

As none of this evidence raises a substantial question as to the correctness of the prior June 21, 1994 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>14</sup> *Leon D. Faidley, Jr., supra* note 7.

<sup>15</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 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 December 16, 1997 is hereby affirmed.

Dated, Washington, D.C.  
September 15, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member