

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DOROTHY M. CUPP and DEPARTMENT OF LABOR,  
OFFICE OF THE INSPECTOR GENERAL, Washington, DC

*Docket No. 99-1247; Submitted on the Record;  
Issued August 23, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On April 15, 1992 appellant, then a 48-year-old auditor, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that she sustained lower back pain on March 10, 1992 while working around boxes. She indicated that she "may have moved one to get to papers inside." She began to lose time from work on March 30, 1992.

By decision dated June 25, 1992, the Office denied appellant's claim on the grounds that the fact of an injury was not established. Additionally, the Office denied appellant's claim for continuation of pay as untimely filed.

In a letter dated July 19, 1992, appellant requested an oral hearing, which was held on January 29, 1993.

In a decision dated April 5, 1993 and finalized on April 6, 1993, the hearing representative affirmed the June 25, 1992 decision of the Office finding that appellant timely filed claim of pay that she had not established that the claimed injury occurred at the time, place and in the manner alleged.

On March 31, 1994 appellant requested reconsideration of the April 5, 1993 decision of the Office and submitted additional medical reports and affidavits relative to the issue of fact of

injury. Appellant contended that her claim should have been developed under a different claim file for a 1991 work injury.<sup>1</sup>

By decision dated July 6, 1994, the Office denied appellant's request for review of the merits of the case after finding that the evidence submitted in support of the request for review was cumulative in nature and not sufficient to warrant a review of the prior decision.

By letter dated July 9, 1998, appellant requested that her claim be reopened and asserted that the claim should have been developed under the claim for her 1991 injury. The Office treated this as a request for reconsideration.

In a decision dated November 12, 1998, the Office determined that appellant's request for reconsideration was denied as it was untimely filed and clear evidence of error was not established.

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.<sup>2</sup> As appellant filed her appeal with the Board on February 18, 1999, the only decision properly before the Board is the November 12, 1998 decision.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle an employee to a review of an Office decision as a matter of right.<sup>4</sup> This section vesting the Office with discretionary authority to determine whether it will review an award for or against compensation provides: "The Secretary of Labor may review an award for or against payment of compensation at any time on his motion or application. The Secretary in accordance with the facts found on review may -- end, or increase the compensation awarded; or award compensation previously refused or discontinued."

The Office, through its 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.<sup>5</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted to the Office under 5 U.S.C. § 8128(a).<sup>6</sup>

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<sup>1</sup> While there are some documents regarding the other case file that are in the report before the Board, this other claim is not before the Board on the present appeal.

<sup>2</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>3</sup> 5 U.S.C. § 8128(a).

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

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

<sup>6</sup> See cases cited *supra* note 4.

The Office properly determined in this case that appellant failed to file a timely request for reconsideration. The Office issued its last merit decision in this case on April 5, 1993. Appellant requested a reconsideration on July 9, 1998; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

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.<sup>7</sup> Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the application for review shows "clear evidence of error" on the part of the Office.<sup>8</sup>

To establish clear evidence of error, appellant 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 merely enough 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 evidence of 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 value to create a conflict of 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 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.<sup>15</sup>

In support of her July 9, 1998 request for reconsideration, appellant did not supply any additional information. She did not present any evidence to suggest that the Office's final merit decision was erroneous or that the Office made some type of error that would constitute an abuse of discretion in denying a merit review of her case. Appellant generally contended that her claim

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<sup>7</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<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*, *supra* note 4.

<sup>12</sup> *See Leona N. Travis*, *supra* note 10.

<sup>13</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>14</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>15</sup> *Thankamma Matthews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

should have been developed under a different Office claim file. However, the Office had previously considered this contention.<sup>16</sup>

The Board finds that the Office's November 12, 1998 decision was proper in that appellant did not demonstrate clear evidence of error.

The Board further finds that, with respect to the decision dated March 22, 1999, the Office did not have jurisdiction to render a decision on the same issue in the claim while the case was on appeal to the Board. Therefore, that decision is null and void.<sup>17</sup>

The decision of the Office of Workers' Compensation Programs dated November 12, 1998 is affirmed.

Dated, Washington, D.C.  
August 23, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Valerie D. Evans-Harrell  
Alternate Member

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<sup>16</sup> See *Eugene F. Butler*, 36 ECAB 393, 398 (1984) (Where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

<sup>17</sup> After the Board obtained jurisdiction over the appeal on February 18, 1999, the Office issued a March 22, 1999 decision finding that appellant filed an untimely reconsideration request. However, it is well established that the Board and the Office may not simultaneously have jurisdiction over the same issue in the same case. *Russel E. Lerman*, 43 ECAB 770, 772 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).