

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of OLGA M. SWANSON and U.S. POSTAL SERVICE,  
POST OFFICE, Amarillo, TX

*Docket No. 98-1100; Submitted on the Record;  
Issued January 12, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that her request was untimely and lacking clear evidence of error.

On July 20, 1993 appellant, then a 43-year-old manual clerk, filed an occupational disease claim, alleging that she sustained ruptured and bulging discs, of which she first became aware in April 1993 and realized was causally related to factors of her federal employment on June 29, 1993. The Office accepted appellant's claim for herniated discs at the C6 to 7 level and authorized discectomy surgery. Appellant returned to limited-duty work for four hours a day on January 18, 1994. On February 21, 1994 she increased to six hours a day. Her treating physician, Dr. William Price, released appellant to work eight hours a day with restrictions effective March 15, 1994. Appellant began working full time; however, on March 30, 1994 she stopped work. Appellant filed a claim for continuing compensation beginning March 30, 1994.

In a decision dated August 3, 1994, the Office denied appellant's claim for continuing compensation and denied any compensation for wage loss effective March 16, 1994 on the grounds that the evidence did not establish that she had a work-related disability after March 15, 1994. By merit decision dated February 21, 1995, the Office denied appellant's request for reconsideration and modified the August 3, 1994 decision of the Office, finding that appellant was entitled to continuing medical benefits for her cervical condition.

On August 14, 1995 appellant, filed a claim for a schedule award. In a decision dated February 16, 1996, the Office granted appellant a schedule award for an eight percent permanent impairment of the left upper extremity for the period of May 23 to November 13, 1995 for a total of 24.96 weeks of compensation. By letter dated September 10, 1997, appellant requested reconsideration, asserting that she was entitled to compensation after November 13, 1995, the date her schedule award ended, as the Office of Personnel Management had approved her application for retirement in July 1995 and it became effective April 8, 1994. In a decision

dated November 14, 1997, the Office denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

The Board had reviewed the case record and finds that the Office properly denied appellant's request for reconsideration with respect to the February 16, 1996 schedule award decision.<sup>1</sup>

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations,<sup>3</sup> which provide guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."<sup>4</sup> In *Leon D. Faidley, Jr.*,<sup>5</sup> the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's procedure manual provides:

"The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one-year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written decision, any denial of modification following reconsideration and decision by the Employees' Compensation Appeals Board, but does not include precoupment hearing/review decisions."<sup>6</sup>

The Office issued its last merit decision on February 16, 1996 when it granted appellant's claim for a schedule award. As the Office did not receive appellant's request for reconsideration dated September 10 until September 19, 1997, the request was not timely filed. Consequently, the Office properly found that appellant failed to timely file a request for reconsideration.

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<sup>1</sup> 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. As appellant filed her appeal with the Board on February 12, 1998 the only decision before the Board is the Office's November 14, 1997 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.138(b).

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

<sup>5</sup> 41 ECAB 104 (1989).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(a) (May 1991).

However, the Office may not deny a request for reconsideration based solely on the grounds that the request was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when a request is not timely filed, the Office must nevertheless undertake a limited review to determine whether the request presents clear evidence that the Office's final merit decision was erroneous.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which is decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>9</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>10</sup> It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> This entails a limited review by the Office of how the evidence submitted with the request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>12</sup> To show clear evidence of error, however, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish 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 fundamental question as to the correctness of the Office's decision.<sup>13</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>14</sup>

On reconsideration, appellant contended that she was entitled to compensation after November 13, 1995 because the Office of Personnel Management approved her application for retirement, finding that she was disabled from employment. The Board notes that the last merit decision was a determination that appellant was entitled to a schedule award due to an eight percent permanent impairment of the left upper extremity. However, appellant's September 10, 1997 letter requesting reconsideration and continuing compensation is effectively a request for reconsideration of both the last merit decision dated February 16, 1996, awarding a schedule

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<sup>7</sup> *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); see e.g. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(b) which states: "the term 'clear evidence of error' is intended to present a difficult standard." The claimant must present evidence which on its face shows that the Office made an error.

<sup>8</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>11</sup> See *Leona N. Travis*, *supra* note 9.

<sup>12</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon D. Faidley*, *supra* note 5.

<sup>14</sup> *Gregory Griffin* *supra* note 7.

award and of the February 21, 1995 decision, denying modification of the Office's earlier denial of appellant's claim for continued compensation.

The Board finds that appellant's contention on reconsideration is not relevant to the subject-matter of the February 16, 1996 schedule award decision and in any case, findings of other administrative agencies are not determinative with regard to proceedings under the Act which is administered by the Office and the Boards.<sup>15</sup> Thus, appellant's contention does not establish error by the Office with respect to the February 16, 1996 decision. Between the February 16, 1996 decision and appellant's request for reconsideration, appellant also submitted a plethora of medical evidence consisting largely of medical reports for the period of 1995 to 1997. However, none of the medical reports address whether appellant had more than an eight percent permanent impairment of the left upper extremity that is causally related to her accepted employment injuries. Therefore, this evidence is not sufficient to establish error in the February 16, 1996 decision. Appellant has not demonstrated any error in the February 16, 1996 decision.

The Board also finds that this case is not in posture for decision with respect to appellant's request for reconsideration of the February 21, 1995 decision denying her request for continuing compensation.

Appellant's September 10, 1997 request for reconsideration which was received September 19, 1997 was not filed within one year of the February 21, 1995 decision denying continuing compensation. Therefore, it was not timely. As noted *infra*, the Office may not deny a request for reconsideration based solely on the grounds that the request was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when a request is not timely filed, the Office must nevertheless undertake a limited review to determine whether the request represents clear evidence that the Office's merit decision was erroneous.<sup>16</sup> The Office did not undertake such a limited review of its February 21, 1995 decision, in which it denied modification of its earlier decision denying continuing compensation. Thus, this case must be remanded for an appropriate decision on the issue of continuing compensation raised by appellant in her September 10, 1997 letter.

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<sup>15</sup> *George A. Johnson*, 43 ECAB 712 (1992).

<sup>16</sup> *See generally Charles Prudencio*, *supra* note 7; *Gregory Griffin*, *supra* note 7.

The decision of the Office of Workers' Compensation Programs dated November 14, 1997 is affirmed with respect to the February 16, 1996 schedule award decision and is remanded for an appropriate decision concerning the issue of continuing compensation.

Dated, Washington, D.C.  
January 12, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

A. Peter Kanjorski  
Alternate Member