

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH A. PIERCE and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Detroit, MI

*Docket No. 99-1047; Submitted on the Record;
Issued July 25, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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 finds that the Office 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.

The only decision before the Board on this appeal is the Office's October 15, 1998 decision, denying appellant's request for a review on the merits of its June 16, 1997 decision. By decision dated June 16, 1997, the Office denied modification of its January 27, 1997 decision on the grounds that appellant did not show that she had more than a 30 percent permanent impairment of both upper extremities, for which she received a schedule award.¹ Because more than one year has elapsed between the issuance of the Office's June 16, 1997 decision and January 7, 1999, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 16, 1997 decision.²

¹ The Office had accepted that appellant sustained an employment-related acceleration of bilateral carpal tunnel syndrome and also approved the resultant surgery for right carpal tunnel release on June 1, 1992. By award of compensation dated August 10, 1994, the Office granted appellant a schedule award for a 30 percent permanent impairment of both arms. The award ran from March 21, 1994 through January 5, 1996. The Office based its schedule award on the Office medical adviser's review and calculation of the March 21 and June 2, 1994 reports of Dr. James E. Beale, Jr., appellant's attending physician and a Board-certified orthopedic surgeon. Upon expiration of the schedule award, appellant requested a supplemental schedule award, which the Office denied in a decision dated January 27, 1997.

² See 20 C.F.R. § 501.3(d)(2).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ 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 a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision 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.⁵ 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.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁷

In its October 15, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision regarding the permanent impairment of appellant's arms on June 16, 1997 and appellant's request for reconsideration was dated July 2 and August 6, 1998 more than one year after June 16, 1997. Although appellant's attorney asserted that "mail problems, lost paperwork, a stolen car and spinal surgery with rehabilitation," delayed appellant from filing a timely request for reconsideration, the record is devoid of any evidence establishing those assertions. Accordingly, the Office properly noted that appellant's reconsideration requests were untimely.

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."⁸ 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he 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).

⁴ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

must manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of her application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. In support of her reconsideration requests, appellant submitted a June 17, 1998 letter from Dr. Prabhudas R. Lakhani, a Board-certified internist, who references Dr. Nagpal's May 1, 1997 examination, in which he indicated that appellant's condition is predominately carpal tunnel syndrome and indicates that diabetes may be an under factor. Dr. Lakhani provides no new physical findings based on his own examination of appellant and fails to provide any opinion relevant to the issue of whether appellant's work-related carpal tunnel condition has worsened given the fact that she has not been employed since October 1990. The Board notes, however, that a review of the Office's decisions reflects that the May 1, 1997 examination performed, by Dr. Nagpal was

¹¹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 7.

¹⁶ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

considered at the time of the June 16, 1997 decision. Moreover, Dr. Lakhani's June 17, 1998 letter fails to demonstrate clear evidence of error.

Appellant also submitted an occupational therapy evaluation, dated March 10, 1998 rendered by a physical therapist. Although measurements pertaining to appellant's range of motion and strength in her upper extremities are provided, no opinion is rendered between these findings and whether appellant's work-related condition has worsened. Since a physical therapist is not a physician for the purposes of the Act, the measurements pertaining to appellant's range of motion and strength in her upper extremities are not regarded as medical evidence and are, therefore, not sufficient to *prima facie* shift the burden of proof in favor of appellant and establish clear evidence of error.¹⁷

For these reasons, the Office 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.

The decision of the Office of Workers' Compensation Programs dated October 15, 1998 is affirmed.

Dated, Washington, D.C.
July 25, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

¹⁷ See *Jane A. White*, 34 ECAB 515 (1983).