

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LaVERN PARTRIDGE and U.S. POSTAL SERVICE,
DETROIT BULK MAIL CENTER, Detroit, MI

*Docket No. 99-1155; Submitted on the Record;
Issued July 11, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs, by its August 27, 1998 decision, properly denied appellant's request for consideration under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's request for reconsideration dated November 24, 1998 was not timely filed and failed to present clear evidence of error.

On January 21, 1997 appellant, then a 49-year-old temporary mail processor, filed a Form CA-2, notice of occupational disease, alleging that on October 14, 1995 she sustained an injury to her left arm and ribs when a high-low driver pinned her between the high-low machine and the stock. She was on crutches at the time of the alleged injury for a nonwork-related injury. Appellant did not stop work as a result of the alleged injury. She was terminated from her temporary position on March 7, 1996.¹

In support of the claim, appellant submitted a letter from Dr. Margaret Meyers, a specialist in family practice, dated April 24, 1997, documenting her injury. Dr. Meyers noted that appellant had been complaining of left shoulder and chest pain, which she related to her employment injury in October 1995. She noted that the chest x-rays and rib x-rays were normal. Dr. Meyers opined that appellant's pain was musculoskeletal.

By letter dated June 5, 1997, the Office requested that appellant submit additional factual and medical evidence to support her claim.

In a response dated June 27, 1997, appellant submitted factual information and a copy of a June 13, 1997 update from Dr. Meyers, who noted fecal leakage since the accident, but advised

¹ A May 20, 1997 letter from the employing establishment indicates that appellant was terminated because she failed to meet the employing establishment standard of conduct and failed to follow instructions.

that she could not give a pathophysiologic reason for the problem. She also indicated that a workup for the left lateral chest pain had been negative.

In a decision dated July 7, 1997, the Office denied appellant's claim as the evidence was not sufficient to establish that the condition was caused by the employment. The Office noted that there was no medical evidence submitted which provided a history of the injury, objective findings upon examination, diagnosis or a reasoned opinion as to how the diagnosed condition was caused or aggravated by the claimed accident.

By faxed letter dated July 7, 1998, appellant requested reconsideration and submitted additional medical evidence.

The medical records noted appellant's status with regard to several conditions. These reports did not contain a physician's opinion regarding whether an employment incident in October 1995 caused or aggravated a medical condition.

By decision dated August 27, 1998, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was insufficient.

In a November 24, 1998 letter, appellant requested reconsideration and generally claimed that she sustained multiple medical problems as a result of the alleged employment injury. Accompanying her request, appellant submitted a letter from Dr. Stanley M. Poleck, Board-certified in anesthesiology, dated July 9, 1998, who noted treating appellant October 16, 1995. He indicated appellant was complaining of right hip and abdominal pain which she attributed to an incident at work, where she was caught between stacks and a high-low machine. Dr. Poleck diagnosed appellant with a right inguinal strain. Appellant was again seen by him on October 23, 1995, complaining of pains along the abdomen and right rib cage, as well as leaking stools. Dr. Poleck's impression at that time was gastritis versus anxiety neurosis. He noted seeing appellant several times after this period for other health problems.

On December 7, 1998 the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

The only decisions before the Board on this appeal are those of the Office dated August 27 and December 7, 1998. Since more than one year elapsed from the date of issuance of the Office's July 7, 1997 merit decision to the date of the filing of appellant's appeal, February 22, 1999, the Board lacks jurisdiction to review this decision.²

The Board finds that the Office in its August 27, 1998 decision properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.³

² See 20 C.F.R § 501.3(d).

³ See 20 C.F.R. § 10.138(b)(1)(i-iii).

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

- “(i) Showing that the Office erroneously applied or interpreted a point of law; or
- (ii) Advancing a point of law or fact not previously considered by the Office; or
- (iii) Submitting relevant and pertinent evidence not previously considered by the Office.”⁴

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1) (i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁵ Evidence that repeats or duplicates evidence already in the case record has not evidentiary values and does not constitute a basis for reopening a case.⁶ Evidence that does not address the particular issues involved also does not constitute a basis for reopening a case.⁷

In the present case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was insufficient. In support of her request for reconsideration, appellant submitted a narrative statement and medical evidence. The narrative statement reiterated the same information already in the record. The medical evidence submitted included radiographs which depicted no abnormalities of the chest or ribs, and medical reports from Dr. Dominick Lago and Dr. Jeffrey J. Kimpson. The reports did not address the relevant and pertinent issue at hand, which is whether an employment incident in October 1995 caused or aggravated a medical condition. This is medical in nature and can only be established by medical evidence.⁸ Therefore, appellant did not submit relevant evidence not previously considered by the Office.

The Board further finds that the Office properly determined that appellant's request for reconsideration dated November 24, 1998 was untimely filed and did not demonstrate clear evidence of error.

In its December 7, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on July 7, 1997

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *Daniel Deparini*, 44 ECAB 657 (1993).

⁷ *Id.*

⁸ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

and appellant's request for reconsideration was dated November 24, 1998, which was more than one year after July 7, 1997.

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."⁹ 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.¹⁰

The Office's procedure manual discusses "clear evidence of error" as follows:

"The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made a mistake (for example, proof that a schedule award was miscalculated). 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."¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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

⁹ *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹⁰ *Anthony Lucszynski*, 43 ECAB 1129 (1992).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹² *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Jesus D. Sanchez*, *supra* note 8.

¹⁵ *See Leona N. Travis*, *supra* note 13.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

and raise a fundamental question as to the correctness of the Office decision.¹⁷ 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.¹⁸

The Board has reviewed evidence submitted with appellant's most recent reconsideration request and concludes that appellant has not established clear evidence of error in this case. Appellant submitted a narrative statement in which she reiterated the same information she provided in her CA-1 and a prior narrative statement. Appellant also submitted a medical report dated July 9, 1998 from Dr. Poleck, an anesthesiologist, who diagnosed right hip pain, abdominal pain, right rib cage pain and leaking stools. Dr. Poleck, however, does not relate a specific history of the injury or provide an opinion or medical rationale for the conclusion that appellant sustained an injury in the performance of duty, and thus this report is not sufficient to raise a substantial question as to the correctness of the Office's merit decision.¹⁹

The decisions of the Office of Workers' Compensation Programs dated December 7 and August 27, 1998 are hereby affirmed.

Dated, Washington, D.C.
July 11, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

¹⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁸ *Gregory Griffin*, 41 ECAB 458, 466 (1990); *Thankamma Mathews*, 44 ECAB 765 (1993).

¹⁹ *See Jesus D. Sanchez*, *supra* note 8.