

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMMELLA COWLEY and DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS, Van Nuys, CA

*Docket No. 99-528; Submitted on the Record;
Issued June 28, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b); and (2) whether the Office 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 August 22, 1990 appellant, then a 42-year-old enumerator, filed a notice of traumatic injury and claim for compensation, Form CA-1, alleging that, on August 20, 1990, she fell over a water sprinkler system and sustained injuries to her eyes, elbow, head, ankle and lower back. On October 10, 1990 the Office accepted the claim for left elbow, left ankle, cervical and lumbar sprains. The Office paid appellant compensation for temporary total disability beginning January 13, 1991.

By letter dated July 1, 1991, the Office referred appellant for vocational rehabilitation services. On April 2, 1992 the Office referred appellant, together with a statement of accepted facts to Dr. Donald Maxwell, a Board-certified orthopedic surgeon, for a second opinion examination, who examined appellant on June 2, 1992 and determined that she had reached maximum medical improvement and was a good candidate for vocational rehabilitation. In a medical report dated January 25, 1994, Dr. Charles Bosley, an orthopedic surgeon, indicated that appellant had a good recovery and could return to any occupation she desired. He also noted that appellant had no restrictions or residual disability from the August 20, 1990 injury.

On December 15, 1993 the Office issued a notice of proposed reduction of compensation. On December 23, 1993 appellant contested the proposed reduction.

By decision dated February 2, 1994, the Office reduced appellant's compensation on the grounds that the position of women's apparel salesperson fairly and reasonably represented her wage-earning capacity.

On May 19, 1998 appellant requested a hearing before an Office hearing representative.

By decision dated July 16, 1998, the Office denied appellant's request for a hearing because it was untimely filed.

In a postcard postmarked July 27, 1998, appellant requested reconsideration of the Office's February 2, 1994 decision. Appellant submitted no new evidence in support.

By decision dated October 6, 1998, the Office denied appellant's reconsideration request, finding that it was untimely as it was not filed within one year of the February 2, 1994 decision. The Office further determined that appellant failed to present clear evidence that the Office's final decision was erroneous. The instant appeal follows.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b) of the Federal Employees' Compensation Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of the issuance of the decision before a representative of the Secretary.¹ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.² As appellant's May 19, 1998 request for a hearing was postmarked more than 30 days after the Office's February 2, 1994 decision, appellant was not entitled to a hearing as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise its discretion.³ In the present case, the Office exercised its discretion and denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional evidence.⁴ Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing under section 8124 of the Act.⁵

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

¹ See 5 U.S.C. § 8124(b).

² *James D. Zurcher*, 48 ECAB 274, 281 (1997); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990); see also 20 C.F.R. § 10.131.

³ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁴ The Office informed appellant as to the type of evidence needed to prove that the February 2, 1994 wage-earning capacity determination was in error.

⁵ See *Lawrence C. Parr*, 48 ECAB 445, 451 (1997).

Section 8128(a) of the Act does not entitle a claimant to a review of an Office decision as a matter of right.⁶ 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 own motion or on application. The Secretary, in accordance with the facts found on review may:

- (1) end, decrease, or increase the compensation awarded; or
- (2) 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).⁷ 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.⁸ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁹

In this case, the Office properly determined that appellant failed to file a timely reconsideration request. The Office issued its last merit decision on February 2, 1994. Appellant’s reconsideration request was postmarked on July 27, 1998. As appellant’s reconsideration request was outside the one-year time limit, which began the day after February 2, 1994 and ended on February 3, 1995, appellant’s request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held however, 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. Office procedures state 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

⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ Thus, it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. §10.138(b)(1).

⁸ 20 C.F.R. § 10.138(b)(2).

⁹ *See* cases cited *supra* note 6.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office. The evidence must be positive, precise and explicit and must be 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. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. 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.

In support of her reconsideration request, appellant submitted no evidence. Inasmuch as appellant has provided no new evidence in support of her reconsideration request, the Board finds that her reconsideration request is insufficient to *prima facie* shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of the decision.¹² For these reasons, the Board finds that the reconsideration request does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. 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.

¹¹ *Jeanette Butler*, 47 ECAB 128 (1995); *Thankamma Mathews*, 44 ECAB 765 (1993).

¹² *Larry J. Lilton*, 44 ECAB 243 (1992).

The decisions of the Office of Workers' Compensation Programs dated October 6 and July 16, 1998 are hereby affirmed.

Dated, Washington, D.C.
June 28, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member