

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TRENA J. CARMODY and U.S. POSTAL SERVICE,  
POST OFFICE, Detroit, MI

*Docket No. 99-878; Submitted on the Record;  
Issued June 20, 2000*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs' refusal to reopen the record pursuant to section 8128 of the Federal Employees' Compensation Act constituted an abuse of discretion in its March 31 and August 7, 1998 decisions; and (2) whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On November 7, 1994 appellant, then a 32-year-old part-time flexible letter carrier, filed a claim for a right ankle sprain which occurred on November 5, 1994 during the performance of her duties. She stopped work on November 7, 1994 and did not return. The Office accepted the claim for a right ankle sprain. Appellant received continuation of pay for the period November 7 through December 21, 1994.

Appellant filed CA-7 and CA-8 forms claiming total disability from November 1994 onwards. On February 2, 1995 she filed a claim for wage loss for the period February 4 to 17, 1995. By letter dated December 23, 1994, the employing establishment advised appellant that she was terminated for failure to meet the required conditions of employment. By decision dated April 26, 1995, the Office found that the evidence of record failed to establish that appellant was totally disabled beginning February 4, 1995 and denied compensation. Appellant continued to provide medical evidence and submit claims for wage loss. In a March 14, 1996 decision, an Office hearing representative set aside the previous decision and remanded the case to the Office for further development. The hearing representative requested that appellant be referred to a Board-certified orthopedic specialist for examination and determination of whether appellant was disabled beginning November 7, 1994 as a result of her November 5, 1994 employment injury.

By decision dated July 22, 1996, the Office found that evidence of file failed to establish that the claimed disability beyond January 3, 1995 was causally related to the November 5, 1994 injury and appellant had no remaining residuals due to the November 5, 1994 work injury as of

May 28, 1996. This was based on the June 13, 1996 report of Dr. Michael E. Kosinski, a Board-certified orthopedic surgeon, who examined appellant on May 28, 1996 at the Office's request. Appellant subsequently received compensation for the period from December 25, 1994 through January 3, 1995.

Appellant requested an examination of the written record and submitted additional medical reports. In a January 7, 1997 decision, an Office hearing representative affirmed the denial of compensation after May 28, 1996 finding that the medical evidence was insufficient to overcome or create a conflict with the opinion of Dr. Kosinski who determined during his examination of May 28, 1996 that appellant had no further residuals from her work injury. The July 22, 1996 decision was modified to reflect appellant's entitlement to compensation for wage loss through May 28, 1996, the date appellant was examined by Dr. Kosinski. Appellant received compensation for the period January 4, 1995 through May 28, 1996.

Appellant requested reconsideration and submitted additional evidence. By decision dated May 12, 1997, the Office, after performing a merit review of the evidence, denied modification finding that the new evidence was insufficient to overcome or create a conflict with the opinion of Dr. Kosinski. By decisions dated July 23, 1997, March 31 and August 7, 1998, the Office denied appellant's requests for reconsideration on the grounds that she neither raised substantive legal questions nor included new and relevant evidence.

In a letter received by the Office on October 29, 1998, appellant again requested reconsideration. Appellant related her financial difficulties with respect to the nonpayment of her medical expenses and expressed her desire to have the claim settled. Treatment records dated September 18, 1997 and January 20, 1998 from Dr. William A. Athens, Jr., a Board-certified orthopedic surgeon, were also submitted. In his September 18, 1997 progress report, Dr. Athens noted that appellant had a history of a workman's compensation injury in 1994 and diagnosed a compressive neuropathy of the right foot. In his report of January 20, 1998, Dr. Athens noted appellant's complaints of pain and numbness in the dorsal aspect of her right foot and in the web space between the first and second toes of the right foot. After examining appellant, Dr. Athens provided an impression of compressive neuropathy of deep peroneal nerve, right foot and ankle. He noted that appellant inquired about a release of the deep peroneal nerve of the right foot. Dr. Athens noted that he told appellant surgical intervention may not help her. Appellant wanted surgical intervention. Dr. Athens recommended to proceed with excision of exostosis of her distal tibia with release of the deep peroneal nerve of the right foot and ankle.

By decision dated January 6, 1999, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

The decisions on appeal before the Board are the August 7 and March 31, 1998 decisions denying appellant's requests for reconsideration and the January 6, 1999 decision denying appellant's reconsideration request as being untimely and not establishing clear evidence of error. The Board has no jurisdiction to review any prior decisions because they were issued more than one year before the current appeal was filed on January 9, 1999.<sup>1</sup>

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<sup>1</sup> 20 C.F.R. § 501.3(d)(2).

The Board finds that the Office properly denied appellant's requests for reconsideration in its August 7 and March 31, 1998 decisions.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of her claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>2</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>3</sup> Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>4</sup>

In her reconsideration request which the Office received on March 13, 1998, appellant related that she was still suffering from her work injury and stated that evidence from her foot surgeon would be forthcoming. However, no new evidence was received by the Office prior to issuing its March 31, 1998 decision. In her reconsideration request which the Office received on August 4, 1998, appellant related that the physician promised to send out her medical records. However, nothing was received by the Office prior to issuing its August 7, 1998 decision. Although appellant continued to assert that she still suffered from the effects of her November 1994 work injury, her statement is a reargument of points previously considered and addressed by the Office. Furthermore, no new evidence was submitted. Thus, as appellant's reconsideration requests neither raised substantive legal questions nor included new and relevant evidence, the Office properly denied appellant's requests for reconsideration in its decisions of March 31 and August 7, 1998.

The Board further finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error in its decision of January 6, 1999.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). The Office 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> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence of error that the Office's final merit decision was in error.<sup>6</sup> Since more than one year elapsed from the May 12, 1997

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

<sup>3</sup> *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

<sup>4</sup> *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>5</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>6</sup> 20 C.F.R. § 10.607(b) (1999).

merit decision of the Office to appellant's undated reconsideration request which the Office received on October 29, 1998, the request for reconsideration is 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."<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must be 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 merely 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 reconsideration 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, 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.<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>

In this case, the evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision of May 12, 1997 and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in this case is medical in nature and revolves around the question of whether any disability and/or condition of appellant's right leg past May 28, 1996, the date the Office found appellant no longer had any residuals from her work injury, is causally related to the accepted November 5, 1994 work injury. Appellant's narrative statement regarding her financial difficulties in respect to her

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<sup>7</sup> *Id.*

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

<sup>9</sup> See *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> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>14</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

medical expenses does not offer a substantial legal argument to demonstrate that the Office erred in its prior decision.

The medical documentation submitted from Dr. Athens is also insufficient to address a causal relationship between the claimed injury and the employment incident of November 5, 1994. Although Dr. Athens mentions appellant's 1994 work injury, he does not provide a medical rationale explaining the medical reasons by which the 1994 work incident would have caused a compressive neuropathy or explain how such condition is related to the 1994 work injury.<sup>15</sup> Thus, the evidence submitted by appellant is insufficient to establish clear evidence of error as the evidence is not of substantial probative value to support the claim.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The January 6, 1999, August 7 and March 31, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.  
June 20, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>15</sup> See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).