

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDNA M. BOYD and U.S. POSTAL SERVICE,
POST OFFICE, Berlin, NJ

*Docket No. 98-2147; Submitted on the Record;
Issued November 7, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated November 23, 1997 was untimely filed and did not present clear evidence of error.

This is the sixth appeal in this case. In the first appeal, the Board affirmed a December 14, 1982 decision of the Office, finding that the Office met its burden of proof in establishing that appellant's employment-related disability ceased by October 10, 1979.¹ The Board found that the weight of the medical evidence was represented by Dr. Robert S. Neff, a Board-certified orthopedic surgeon acting as an impartial medical examiner.

In the second appeal, the Board affirmed a September 21, 1988 Office decision denying modification of the determination that appellant's employment-related disability had ceased by October 10, 1979, affirmed a November 16, 1988 Office decision denying appellant's application for review and set aside a July 18, 1989 Office decision denying appellant's application for review.² The Board found that appellant had submitted a May 25, 1989 report from Dr. Herbert Stein, a Board-certified orthopedic surgeon, and an April 3, 1989 report from Dr. Ronald Goldberg, an osteopath, which constituted relevant evidence not previously considered by the Office.

The Office reviewed the evidence and in a May 16, 1990 decision denied modification of its prior decision. Appellant filed an appeal, and the Board remanded the case to the Office for proper assemblage of the case record and an appropriate decision.³ Following an August 21, 1991 decision, appellant again filed an appeal.

¹ 34 ECAB 808 (1983).

² Docket No. 89-1827 (issued February 28, 1990).

³ Docket No. 90-1803.

The Board affirmed the Office's decision with respect to appellant's entitlement to compensation after October 10, 1979, finding that appellant had failed to meet her burden of proof to establish that her disability was causally related to her employment.⁴ The Board remanded the case for further development with respect to appellant's entitlement to a schedule award.

On January 21, 1993 the Office issued a schedule award for 19 percent permanent impairment of the lower extremities for the period covering October 11, 1979 to October 28, 1980. Following a January 21, 1993 denial of reconsideration, appellant again filed an appeal. The Board affirmed the Office's finding that the request for review was properly denied without merit review as appellant's reconsideration request failed to meet the requirements of 20 C.F.R. § 10.138(b)(1).⁵ The facts and history of the case are contained in the Board's prior decisions and are incorporated herein by reference.

In a letter dated March 25, 1994, the Board denied appellant's petition for reconsideration on the grounds that the request was not received within the 30-day period of its December 21, 1993 decision.

By decision dated August 19, 1994, the Office denied reconsideration of appellant's claim on the grounds that the evidence and arguments submitted were repetitious and insufficient to warrant a merit review.

On November 23, 1997 appellant again requested reconsideration. Accompanying her request for reconsideration was a copy of an earnings and deductions statement for the pay period ending July 24, 1970. By decision dated May 4, 1998, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

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 with the Board.⁶ As appellant filed her current appeal with the Board on June 23, 1998, the only decision before the Board is the Office's May 4, 1998 nonmerit decision.

The Board has duly reviewed the case record and concludes that appellant's request for reconsideration dated November 23, 1997 was untimely filed and did not present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act⁷ does not entitle a claimant to a review of an Office decision as a matter of right.⁸ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C.

⁴ Docket No. 92-124 (issued August 27, 1992).

⁵ Docket No. 93-1488 (issued December 21, 1993).

⁶ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁷ 5 U.S.C. § 8128(a).

⁸ *Veletta C. Coleman*, 48 ECAB 367 (1997).

§ 8128(a).⁹ 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.¹⁰ 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).¹¹

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹² In this case, the last merit decision was issued by the Board on December 21, 1993 when it affirmed the Office's January 21, 1993 denial of appellant's request for reconsideration of its decision which denied modification of its earlier determination that appellant's employment-related disability had ceased by October 10, 1979. As appellant's reconsideration request dated November 23, 1997 was outside the one-year time limit which began the day after December 21, 1993, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.¹³ 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.¹⁴

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. 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.

⁹ Thus, although 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).

¹⁰ 20 C.F.R. § 10.138(b)(2).

¹¹ *See Veletta C. Coleman, supra* note 8.

¹² *Id.*; *Larry L. Lilton*, 44 ECAB 243 (1992).

¹³ *Veletta C. Coleman, supra* note 8; *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

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 also 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.¹⁵

In this case, appellant did not submit any new medical evidence or a narrative statement containing arguments. Only a copy of an earnings and deductions statement for the pay period ending July 24, 1970 was received. The Office's May 4, 1998 decision properly determined that appellant had not presented clear evidence of error, as appellant did not submit any evidence pertinent to the issue of whether the Office's determination that appellant's employment-related disability had ceased by October 10, 1979 should be modified. The issue in this case is a medical one and appellant did not submit any pertinent medical evidence.¹⁶

The decision of the Office of Workers' Compensation Programs dated May 4, 1998 is hereby affirmed.

Dated, Washington, DC
November 7, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

¹⁵ *Veletta C. Coleman, supra* note 8.

¹⁶ Appellant appears to argue on appellant that the schedule award for permanent partial impairment should have been 34 percent, not the 19 percent awarded. She however submitted no evidence addressing this issue to the Office.