

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DOROTHY JOHNSON and U.S. POSTAL SERVICE,  
POST OFFICE, Chicago, IL

*Docket No. 99-1360; Submitted on the Record;  
Issued November 1, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's January 27, 1999 request for reconsideration was untimely and failed to demonstrate clear evidence of error.

The Office accepted that appellant sustained back injuries in the performance of duty on September 22, 1986, including acute lumbosacral muscle strain and herniated nucleus pulposus at L4-5. By decision dated October 2, 1997, the Office terminated appellant's compensation effective October 11, 1997, on the grounds that the medical evidence established that she had no continuing employment-related condition.<sup>1</sup> In a decision dated December 22, 1997, the Office denied modification of the prior decision.

In a letter dated January 27, 1999, appellant requested reconsideration of her claim. By decision dated February 12, 1999, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.<sup>2</sup> As appellant filed her appeal on February 27, 1999, the only decision over which the Board has jurisdiction on this appeal is the February 12, 1999 decision denying her request for reconsideration.

The Board has reviewed the record and finds that the Office properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

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<sup>1</sup> The memorandum accompanying the decision stated that appellant had no continuing employment-related disability, but the decision also terminated authorization for medical treatment.

<sup>2</sup> See 20 C.F.R. § 501.3(d).

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>6</sup> 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.<sup>7</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>8</sup>

In this case, the most recent Office merit decision is dated December 22, 1997. The request for reconsideration is dated January 27, 1999, which is more than one year after the merit decision. Accordingly, the request for reconsideration is untimely.<sup>9</sup>

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.<sup>10</sup> In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>11</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>12</sup> The evidence must be positive, precise and explicit and

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> 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."

<sup>6</sup> 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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606.

<sup>7</sup> 20 C.F.R. § 10.607.

<sup>8</sup> *See Leon D. Faidley, Jr.*, *supra* note 4.

<sup>9</sup> Appellant asserted on appeal that a request for reconsideration was timely submitted to her employer's union. The issue is whether a timely reconsideration request was filed with the Office, and the record contains no evidence to support a timely filing in this case.

<sup>10</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

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

<sup>12</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

must be manifest on its face that the Office committed an error.<sup>13</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>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</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>16</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>17</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>18</sup>

In this case, appellant submitted medical evidence that included reports dated June 12, 1998 and January 25, 1999, from her attending physician, Dr. Charles M. Slack, an orthopedic surgeon. In the June 12, 1998 report, Dr. Slack indicated that appellant had increased pain in her back in August 1997, and was seen on September 25, 1997. In the January 25, 1999 report, Dr. Slack recommended a lumbar magnetic resonance imaging scan due to ongoing symptoms. He did not discuss causal relationship with employment or the issue of a continuing employment-related condition after October 11, 1997. Similarly, appellant submitted hospital form reports from August 1997 showing treatment for back pain. These reports do not address the relevant issue.

As noted above, the clear evidence of error is a difficult standard to meet. Appellant has not submitted evidence of such probative value that it shifts the weight of the evidence in her favor. The Board finds that appellant did not show clear evidence of error in this case, and therefore the Office properly denied her request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated February 12, 1999 is affirmed.

Dated, Washington, DC  
November 1, 2000

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<sup>13</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>14</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>15</sup> See *Leona N. Travis*, *supra* note 13.

<sup>16</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>17</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>18</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

Michael J. Walsh  
Chairman

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member