

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of INGA CROCKETT and U.S. POSTAL SERVICE,  
LINCOLN PARK POST OFFICE, Chicago, IL

*Docket No. 99-1553; Submitted on the Record;  
Issued November 16, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, PRISCILLA ANNE SCHWAB,  
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs in its January 20, 1999 decision properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Appellant, then a 37-year-old postal truck driver, sustained a work-related injury on March 28, 1994, which was accepted by the Office for right wrist contusion and neuralgia of the right upper extremity. She worked intermittently after the injury and returned to work in a light-duty position on December 19, 1994.

Appellant sustained a recurrence of disability on January 10, 1996, which was also accepted by the Office. She stopped work on January 10, 1996 and the Office authorized payment of all appropriate compensation.<sup>1</sup>

In support of appellant's claim for total disability, the Office received a medical report dated February 15, 1996, from Dr. William Farrell, a Board-certified orthopedic surgeon, in which he diagnosed cervical radiculitis with superimposed reflex sympathetic dystrophy, based on a persisting symptomatology and determined that appellant was unable to work. In a report dated April 18, 1996, Dr. Farrell stated that appellant continued to experience symptoms of "reflex-sympathetic-dystrophy-like pattern involving her right upper extremity" and was still unable to work.

The Office subsequently referred appellant to Dr. Gerald Harris, a Board-certified specialist in hand surgery, to aid in further consideration of her claim. In a report dated August 13, 1996, he reported that he found no clinical evidence for the presence of reflex sympathetic dystrophy. In a report dated September 26, 1996, Dr. Harris stated that there was no medical contraindication to appellant performing her work as a letter carrier.

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<sup>1</sup> The Board notes that appellant returned to work on December 16, 1998.

On October 29, 1996 the Office issued a notice of proposed termination of compensation on the basis that appellant's disability had ceased. The Office found that the opinion of Dr. Harris represented the weight of the medical evidence regarding whether appellant had any continuing disability or physical condition causally related to the March 28, 1994 employment injury. The Office afforded appellant 30 days to submit additional evidence in support of her claim.

Appellant submitted previous reports of record and argued that she suffered from pain and intermittent paralysis in her upper extremity and continued to be disabled from work.

By decision dated December 4, 1996, the Office terminated appellant's compensation benefits effective December 5, 1996.

Following a hearing held at appellant's request, the Office hearing representative affirmed the December 4, 1996 decision by a decision dated September 24, 1997, finalized September 25, 1997.

Appellant requested reconsideration of the Office hearing representative's decision in a letter dated September 25, 1998.<sup>2</sup> In her request, appellant provided the general symptomatology of reflex sympathetic dystrophy as described in a periodical she referenced and further outlined her course of treatment since the March 28, 1994 employment injury based on medical reports of record.

By decision dated January 20, 1999, the Office denied appellant's request for reconsideration, as it was not received within one year of the date of the last Office decision. The Office also found that appellant's request for reconsideration did not present clear evidence of error.

The Board finds that the Office, in its January 20, 1999 decision, properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The only decision before the Board in this appeal is the January 20, 1999 decision, in which the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. Since more than one year has elapsed between the date of the Office's merit decision dated September 24, 1997, finalized September 25, 1998 and the filing of appellant's appeal on April 29, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>3</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>4</sup> the Office's regulations provide that a claimant's

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<sup>2</sup> The Board notes that appellant's reconsideration request was notarized on September 26, 1998. Additionally, the letter was date-stamped as received by the Office on October 14, 1998.

<sup>3</sup> 20 C.F.R. § 501.3(d)(2).

<sup>4</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or

application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law, or (2) advances a relevant legal argument not previously considered by the Office, or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.” To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>5</sup> The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish on its face that such decision was erroneous.<sup>6</sup>

In its January 20, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. She was issued appeal rights with the September 24, 1997 decision, finalized September 25, 1997, which stated that, if she requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. The Office noted that appellant’s reconsideration request was dated September 25, 1998 and contained a notarized signature dated September 26, 1998. Therefore, appellant’s request letter was postmarked after September 24, 1998. As appellant’s September 25, 1998 reconsideration request was outside the one-year time limit, which began the day after September 25, 1997, appellant’s application for review was untimely.<sup>7</sup>

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 of the case to determine whether the application establishes “clear evidence of error.” The Office will reopen a claimant’s case for merit review notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows clear evidence of error on the part of the Office.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>10</sup> Evidence which does not

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against payment of compensation at any time on his own motion or application.” 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.606(a).

<sup>6</sup> 20 C.F.R. §10.607(b).

<sup>7</sup> See *John B. Montoya*, 43 ECAB 1148 at 1151-52 (1992).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992). The Office regulations promulgated at 20 C.F.R. § 10.138(b) have since been revised and will be utilized in Office decisions issued after January 1, 1999. The new Office regulations will be interpreted with the same applicability as in prior decisions, with regard to time limitations for reconsideration requests and the clear evidence of error standard.

<sup>10</sup> See *Leona N. Travis*, 43 ECAB 0227 (1991).

raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</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 also 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>14</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>15</sup>

In support of her September 25, 1998 request for reconsideration, appellant outlined her course of medical treatment since March 24, 1994 and provided information concerning her previously diagnosed condition of reflex sympathetic dystrophy. The Office determined that this evidence did not establish that the Office's September 24, 1997 decision, finalized September 25, 1997, was in error, or raise a substantial question as to the correctness of that decision. No further evidence was submitted with appellant's reconsideration request.

The critical issue in the case at the time the Office issued its September 24, 1997 decision, finalized September 25, 1997, the Office met its burden of proof in terminating appellant's compensation. Appellant did not submit any medical evidence regarding whether she continued to be disabled due to conditions caused by the March 28, 1994 employment injury. Therefore, as appellant has not raised a substantial question as to the correctness of the merit decision or presented evidence, which on its face shows that the Office made an error, appellant has failed to establish clear evidence of error with respect to its September 24, 1997 decision, finalized September 25, 1997.

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<sup>11</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>12</sup> See *Leona N. Travis*, *supra* note 10.

<sup>13</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>14</sup> See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>15</sup> See *Gregory Griffin*, 41 ECAB 458 (1990).

The decision of the Office of Workers' Compensation Programs dated January 20, 1999 is hereby affirmed.

Dated, Washington, DC  
November 16, 2000

Michael J. Walsh  
Chairman

Priscilla Anne Schwab  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member