

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DOREEN A. BALLS and U.S. POSTAL SERVICE,  
UTICA GENERAL MAIL FACILITY, Utica, NY

*Docket No. 99-460; Submitted on the Record;  
Issued October 11, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Worker's Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On March 2, 1991 appellant, then a 32-year-old carrier, filed a traumatic injury claim (Form CA-1) assigned number A02-628925 alleging that on March 1, 1991, she sustained a right elbow injury when she lost her footing on a porch and hit a railing with her elbow. Appellant stopped work on March 2, 1991 and returned to limited-duty work on March 8, 1991.

The Office accepted appellant's claim for a contusion of the right elbow.

On May 7, 1992 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability on April 30, 1992. Appellant indicated that she was experiencing soreness, numbness and pain in her neck and shoulders. Appellant stopped work on April 30, 1992 and returned to work on May 3, 1992. By letter dated August 13, 1992, the Office advised appellant to submit factual and medical evidence supportive of her claim.

By decision dated October 8, 1993, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability and that the claimed conditions of cervical sprain and right rotator cuff tear were causally related to her March 1, 1991 employment injury. In a December 20, 1993 letter, appellant requested reconsideration of the Office's decision.

In a decision dated January 20, 1994, the Office denied appellant's request for modification based on a merit review of the claim.

On November 15, 1994 appellant filed a Form CA-2a alleging that she sustained a recurrence of disability on April 5, 1994. Appellant's supervisor, indicated that the medical evidence revealed a diagnosis of carpal tunnel syndrome. Appellant did not stop work.

By decision dated March 23, 1995, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability and that the claimed condition of carpal tunnel syndrome was causally related to her March 1, 1991 employment injury. In an April 13, 1995 letter, appellant, through her counsel, requested reconsideration of the Office's decision.

By decision dated July 14, 1995, the Office denied appellant's request for modification based on a merit review of the claim. In a March 1, 1996 letter, appellant, through her counsel, requested reconsideration of the Office's decision.

In an August 19, 1996 decision, the Office denied appellant's request for modification based on a merit review of the claim. In this decision, the Office noted that appellant's request for modification was filed on April 13, 1995. By decision of the same date, the Office set aside and reissued its July 14, 1995 decision. The Office found that it did not realize until August 19, 1996 that the March 1, 1996 letter from appellant's counsel was a request for reconsideration. The Office also found that appellant's counsel was not properly appointed by appellant as her counsel pursuant to 20 C.F.R. § 10.142. Inasmuch as it erred and appellant's petition was defective, the Office found that in the interest of equity, the July 14, 1995 decision should be set aside and reissued to protect appellant's appeal rights. The Office then found that appellant's appeal rights commenced as of August 19, 1996.

In a September 4, 1996 letter, appellant requested reconsideration of the Office's decision. By letter dated September 10, 1996, the Office advised appellant to clarify which decision she wished to have reconsidered. In an October 8, 1996 response letter, appellant, through her counsel, requested reconsideration of the Office's decision. Appellant's counsel indicated that he would submit additional evidence in the future. In a letter dated October 28, 1996, the Office advised appellant that this letter did not constitute a valid reconsideration request because she failed to submit relevant evidence that was not previously of record.

By letter dated January 27, 1997, appellant, through her counsel submitted medical evidence supportive of her request for reconsideration. In a February 3, 1997 letter, the Office reviewed the merits and found the evidence submitted insufficient to establish appellant's claim. The Office advised appellant to exercise her appeal rights which accompanied its August 19, 1996 decision. In an August 18, 1998 letter, appellant, through her counsel, requested reconsideration of the Office's decision.

By decision dated October 21, 1998, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that it was untimely filed and that it did not establish 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.<sup>1</sup> Inasmuch as appellant filed her appeal with the Board on November 16, 1998, the only decision properly before the Board is the Office's October 21, 1998 decision denying appellant's request for a review of the merits of its August 19, 1996 decision.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act. 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>2</sup> 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 section 8128(a).<sup>3</sup>

In this case, the Office properly determined 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.<sup>4</sup> The Office issued its last merit decision in this case on February 3, 1997. Because appellant's instant request for reconsideration dated August 18, 1998 was made outside the one-year time limitation, the Board finds that it was untimely filed.

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.<sup>5</sup> 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.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit, and

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<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

<sup>2</sup> 20 C.F.R. § 10.138(b)(2); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>3</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>4</sup> *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>5</sup> *Gregory Griffin*, *supra* note 2.

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (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); *Thankamma Mathews*, 44 ECAB 788 (1993); *Jesus D. Sanchez*, *supra* note 3.

<sup>7</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

must be manifest on its face that the Office committed an error.<sup>8</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>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</sup>

In support of her August 18, 1998 request for reconsideration, appellant, through her counsel, submitted a July 28, 1998 medical report of Dr. Gregory B. Shankman, a Board-certified orthopedic surgeon. In this medical report, Dr. Shankman opined that appellant's shoulder injury was caused by her employment-related elbow injury. He, however, failed to provide any medical rationale to support his opinion. Therefore, Dr. Shankman medical report is insufficient to establish that the Office committed clear evidence of error in finding that appellant did not sustain a recurrence of disability on April 5, 1994 causally related to her March 1, 1991 employment injury.

Inasmuch as appellant's August 18, 1998 request for reconsideration was untimely filed and appellant failed to show clear evidence of error in the Office's August 19, 1996 decision, the Board finds that the Office properly denied appellant's request.

The October 21, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
October 11, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member

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<sup>8</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>9</sup> *Jesus D. Sanchez*, *supra* note 3.

<sup>10</sup> *Leona N. Travis*, *supra* note 8.