

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of HALEY CHILES and U.S. POSTAL SERVICE,
POST OFFICE, Oklahoma City, OK

*Docket No. 99-1902; Submitted on the Record;
Issued October 19, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's January 7, 1999 request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, appellant filed a traumatic injury claim (Form CA-1) alleging that she sustained injury to her knees causally related to walking with a mailbag on March 29, 1993. By decision dated June 15, 1993, the Office denied the claim on the grounds that the evidence was insufficient to establish fact of injury on March 29, 1993. By decision dated May 16, 1994, the Office's Branch of Hearings and Review determined that appellant had abandoned her request for a hearing. In a decision dated May 23, 1996, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error. By decision dated January 27, 1999, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.¹

The Board has reviewed the record and finds that the Office properly determined that appellant's January 7, 1999 request for reconsideration was untimely and failed to show clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against

¹ The record also contains orders dismissing appeal by the Board dated April 4, 1996 (Docket No. 94-2168) and November 24, 1997 (Docket No. 97-2014).

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ 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.⁶ 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).⁷

In this case, the only merit decision of record is dated June 15, 1993. The January 7, 1999 reconsideration request is beyond the one-year time limitation and is, therefore, untimely.

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.⁸ In accordance with this holding, 20 C.F.R. § 10.607(b) provides that the Office will consider an untimely application for reconsideration if the application demonstrates “clear evidence of error” on the part of the Office.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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

⁴ 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.”

⁵ 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(b).

⁶ 20 C.F.R. § 10.607(a).

⁷ *See Leon D. Faidley, Jr.*, *supra* note 3.

⁸ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² *See Leona N. Travis*, *supra* note 10.

¹³ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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.¹⁴ 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 the present case, appellant filed a traumatic injury claim for an injury on March 29, 1993. Although it appears that appellant was claiming and walking over a period of more than one day contributed to a knee injury (appellant worked from March 19, 1993 and stopped working in April 1993), the claim filed was a CA-1 and the only merit decision is a denial of a claim for injury on March 29, 1993.¹⁶ Therefore, the issue on appeal is whether appellant has established clear evidence of error in denying her claim for a traumatic injury on March 29, 1993.

The evidence submitted on reconsideration is not sufficient to establish clear evidence of error in the June 15, 1993 decision. In a report dated July 5, 1996, Dr. William Harsha, an orthopedic surgeon, reported that he had examined appellant on February 13, 1995 with anterior knee joint pain. He opined that it was more probable than not that “the job-related incident is proximately related to the knee impairment that I found on February 13, 1995.” It is not clear on what specific history of injury Dr. Harsha was basing his opinion; he refers to the knee being overloaded with extended walking and carrying loads and in a December 11, 1996 report he notes carrying and lifting over a three-week period. The issue, as noted above, is whether there is clear evidence of error in denying a claim for injury on March 29, 1993. In an October 16, 1996 report, Dr. Harsha reports that appellant was carrying a mail sack on March 9, 1993 and while he apparently meant to indicate March 29, 1993, he did not provide a reasoned medical opinion as to a knee injury causally related to a March 29, 1993 incident. The Board notes that, the lack of symptoms prior to the employment incident does not itself provide rationale in support of a causal relationship between a condition and employment.¹⁷

The remainder of the evidence is also insufficient to establish clear evidence of error. In a report dated May 9, 1997, Dr. J. Calvin Johnson, an orthopedic surgeon, opined that appellant’s symptoms occurred while employed in August 1993, without providing additional detail or explanation.

The clear evidence of error standard is a difficult standard to meet. Although appellant submitted evidence regarding an employment-related condition, she did not submit sufficient evidence to establish that the June 15, 1993 decision, denying her claim for injury on March 29,

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁵ *Gregory Griffin*, 41 ECAB 458 (1990).

¹⁶ A traumatic injury is a condition caused by incidents within a single work day; an occupational disease or illness is a condition produced by the work environment over a period longer than a single work day. See 20 C.F.R. § 10.5(q) and (ee).

¹⁷ See, e.g., *Walter J. Neumann, Sr.*, 32 ECAB 69, 72 (1980).

1993, was clearly erroneous. Accordingly, the Office properly denied appellant's request for reconsideration in this case.

The decision of the Office of Workers' Compensation Programs dated January 27, 1999 is affirmed.

Dated, Washington, DC
October 19, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member