

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BRENDA CORE and U.S. POSTAL SERVICE,  
MAIN POST OFFICE, Chicago, IL

*Docket No. 99-958; Submitted on the Record;  
Issued September 14, 2000*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' 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 May 7, 1985 appellant, then a 27-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained an injury while in the performance of duty. Appellant stopped work on May 7, 1985 and returned to work on May 26, 1985.

The Office accepted appellant's claim for acute cervical and lumbar strain and left hip and ankle sprain.

On July 20, 1998 appellant submitted a claim (Form CA-2a) alleging that she sustained a recurrence of disability on June 25, 1997 accompanied by medical evidence. An August 3, 1998 telephone memorandum indicated that the Office advised appellant that its previous decisions found that she no longer had a work-related condition on or after November 7, 1986, therefore, it

could not consider her recurrence claim.<sup>1</sup> The Office further advised appellant that, although her appeal rights had expired, she could still request reconsideration. In addition, the Office advised appellant that, even though her request was untimely, the case would be reviewed for “clear evidence of error.” By letter dated September 23, 1998, appellant requested reconsideration of the Office hearing representative’s September 19, 1994 decision, which affirmed the Office’s September 9, 1993 decision, finding the medical evidence of record insufficient to establish that she sustained a recurrence of disability on or after September 5, 1991 causally related to her May 7, 1985 employment. Appellant’s request was accompanied by medical evidence.

In an October 15, 1998 decision, 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>2</sup> Inasmuch as appellant filed her appeal with the Board on January 22, 1999, the only decision properly before the Board is the Office’s October 15, 1998 decision, denying appellant’s request for a review of the merits of its September 19, 1994 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>3</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>4</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

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<sup>1</sup> On November 7, 1986 appellant filed a Form CA-2a alleging that she sustained a recurrence of disability of her May 7, 1985 employment injury on that date, which was denied by the Office in a decision dated February 2, 1987. In letters dated December 5, 7 and 11, 1987, appellant requested reconsideration of the Office’s decision. In a December 5, 1987 letter, appellant requested reconsideration. By decisions dated January 27, 1988, the Office denied appellant’s request for reconsideration without a review of the merits on the grounds that the evidence submitted was duplicative, and thus, insufficient to warrant review of the prior decision. By decision dated April 12, 1988, the Office denied appellant’s December 5, 1987 request for modification based on a merit review of the claim. In letters dated July 1 and October 30, 1988, appellant requested reconsideration of the Office’s decision. In a decision dated November 17, 1988, the Office denied appellant’s request for reconsideration without a review of the merits on the grounds that appellant failed to submit relevant evidence not previously of record or to advance legal contentions not previously considered.

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

<sup>3</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); 20 C.F.R. § 10.138(b)(2).

<sup>4</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

any subsequent merit decision on the issues.<sup>5</sup> The Office issued its last merit decision in this case on September 19, 1994 wherein the hearing representative affirmed the Office's September 9, 1993 decision, finding the medical evidence of record insufficient to establish that appellant sustained a recurrence of disability on or after September 5, 1991 causally related to her May 7, 1985 employment injury. Inasmuch as appellant's September 23, 1998 request for reconsideration 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>6</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>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>9</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>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup>

The Board finds that appellant's September 23, 1998 request for reconsideration failed to show clear evidence of error. Appellant's letter dated September 23, 1998 and the accompanying medical evidence do not establish that the Office's September 19, 1994 decision was in clear error, or raise a substantial question as to the correctness of that decision. The critical issue in the case at the time the Office issued its September 19, 1994 decision, was whether appellant had established that she sustained a recurrence of disability on September 5, 1991 causally related to her May 7, 1985 employment injury. Appellant's September 23, 1998 letter indicated that the medical evidence established that she sustained a recurrence of disability. This is repetitive and does not establish clear evidence of error, therefore, it cannot be considered

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<sup>5</sup> *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>6</sup> *Gregory Griffin*, *supra* note 3.

<sup>7</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 4.

<sup>8</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> *Jesus D. Sanchez*, *supra* note 4.

<sup>11</sup> *Leona N. Travis*, *supra* note 9.

as new, relevant, pertinent evidence and is thus of no probative value in establishing clear evidence of error.

Regarding the medical evidence submitted by appellant, the November 8, 1985 medical treatment note of Dr. Yen indicating that appellant had a chronic sprain of the cervical spine and his December 11, 1985 treatment note revealing that appellant had good range of motion and some tenderness relate to appellant's condition prior to the alleged recurrence of disability on September 5, 1991. Further, they were previously of record thus, they cannot be considered as new, relevant, pertinent evidence and are thus of no probative value in establishing clear evidence of error.

Dr. Yen's 1997 medical treatment notes indicated that appellant stated the numbness in her left hand and fingers and in her back were related to a 1985 work injury and a diagnosis of fibromyalgia. Dr. Yen's treatment notes do not provide a rationalized opinion that appellant's condition was caused by her May 7, 1985 employment injury. Thus, they do not establish clear evidence of error.

The April 26, 1993 medical report of Dr. Reuben T. Nichols, a Board-certified internist, indicated appellant's complaints related to her 1985 work injury, his findings on physical examination, a diagnosis of chronic cervical and lumbar derangement and opinion that appellant remained significantly disabled by this problem. In his July 25, 1994 medical report, Dr. Nichols reiterated his previous findings, noted a review of a medical report dated May 14, 1985 and opined that appellant's signs and symptoms based upon the report were similar to what she was complaining about at the present time. Dr. Nichols' reports are duplicative of documents previously of record and considered by the hearing representative in his September 19, 1994 decision. Therefore, they cannot be considered as new, relevant, pertinent evidence and are thus, of no probative value in establishing clear evidence of error.

In a June 30, 1998 medical report, Dr. Nichols opined that appellant continued to be disabled and had been so since her original injury on May 7, 1985, however, his opinion was not supported by medical rationale explaining the causal relationship between appellant's disability and employment injury. Accordingly, his report does not establish clear evidence of error.

The listing of medical findings covering the period May 8, 1985 through April 1998 and the July 28, 1998 x-ray reports of Dr. Daniel Ives, a Board-certified radiologist, regarding radiological findings, do not address a causal relationship between appellant's conditions and her May 7, 1985 employment injury. Therefore, the listing and Dr. Ives' x-ray reports are insufficient to establish clear evidence of error.

A May 17, 1998 medical report of Dr. Gary O'Gurkiewicz revealed appellant's 1985 employment injury and complaints, a diagnosis of chronic thoracic strain sprain with thoracic disc syndrome and opinion that, due to the length of time and severity of appellant's complaints, she should be placed on total disability. Dr. O'Gurkiewicz did not provide any medical rationale to support his opinion. Thus, his report did not show clear evidence of error.

Inasmuch as appellant's September 23, 1998 request for reconsideration was untimely filed and failed to show clear evidence of error in the Office's September 19, 1994 decision, the Board finds that the Office properly denied that request.

The October 15, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
September 14, 2000

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member