

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GABRIELLE E. ARIZMENDI and DEPARTMENT OF VETERANS  
AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER,  
Philadelphia, PA

*Docket No. 00-1244; Submitted on the Record;  
Issued April 17, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's reconsideration request was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's claim was not timely filed and failed to present clear evidence of error.

On April 3, 1995 appellant, then a 29-year-old research nurse coordinator (registered nurse), filed an occupational disease claim for an emotional condition. Appellant alleged discrimination and harassment by her supervisor, Robert Lyle, contributed to complications in her pregnancy and brought about the onset of her mental illness. The Office, in a July 15, 1995 decision, denied the claim on the grounds that appellant had not submitted evidence sufficient to establish fact of injury. By letter dated October 20, 1999, appellant requested reconsideration. In support of her request, appellant submitted a copy of a March 18, 1999 decision from the Appeals Branch of the Office of Personnel Management approving her application for disability retirement benefits; a copy of an August 11, 1995 decision from the Social Security Administration, Office of Hearing and Appeals, which found appellant to be disabled within the meaning of the Social Security Act since July 30, 1993; and numerous medical reports and records ranging from April 26, 1993 through October 5, 1998. By decision dated December 15, 1999, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's December 15, 1999 decision denying appellant's request for a review on the merits of its July 15, 1995 decision denying her claim for an emotional condition. Because more than one year has elapsed between the issuance of the Office's July 15, 1995 decision and January 5, 2000, the date appellant filed

her appeal with the Board, the Board lacks jurisdiction to review the July 15, 1995 Office decision.<sup>1</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence of error that the Office's final merit decision was in error.<sup>3</sup> Since more than one year elapsed from the July 15, 1995 merit decision of the Office to appellant's October 20, 1999 reconsideration request, the request for reconsideration is untimely.

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 to determine whether the application establishes "clear evidence of error."<sup>4</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>5</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>6</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>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>8</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>9</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>10</sup> The Board makes

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>3</sup> 20 C.F.R. § 10.607(b) (1999).

<sup>4</sup> *Id.*

<sup>5</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>6</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>7</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>8</sup> See *Leona N. Travis*, *supra* note 6.

<sup>9</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>10</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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>11</sup>

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of her application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. In support of her reconsideration requests, appellant submitted copies of decisions from the Office of Personnel Management and the Social Security Administration. Although these agencies found appellant to be disabled and entitled to benefits, those decisions are of limited probative value in the present case as the findings of an administrative agency with respect to entitlement to benefits under a specific statutory authority is not determinative of disability and entitlement to compensation under the Act.<sup>12</sup>

Among the medical evidence submitted, a medical report dated May 30, 1995 from Dr. Oscar A. Ruiz Lacomba stated that chronologically, appellant's acute depressive symptoms correlated with occupationally related circumstances while working as a research registered nurse for the employing establishment. He further stated that extensive correspondence with pertinent agencies and appellant establish what strongly suggest job discrimination and unfair labor practices while at work, between December 1992 and July 1993. The Board notes, however, that the issue in the case is whether appellant has established any compensable factors of employment to establish a fact of injury. Inasmuch as appellant has not established that job discrimination or unfair labor practices occurred at the employing establishment, this report can not constitute a basis for reopening a claim.<sup>13</sup>

In appellant's request for reconsideration and in her appeal before the Board, appellant alleged that she was unable to timely request reconsideration due to her emotional condition. In pertinent part, section 8122(d)(2) provides that the time limitation of section 8122(a) does not "run against an incompetent individual while he is incompetent and has no duly appointed legal

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<sup>11</sup> *Gregory Griffin*, 41 ECAB 458, 466 (1990).

<sup>12</sup> *Daniel Deparini*, 44 ECAB 657 (1993) (findings of the Social Security Administration are not determinative of disability under the Act).

<sup>13</sup> *James A. England*, 47 ECAB 115 (1995); *Barbara A. Weber*, 41 ECAB 163 (1995).

representative.”<sup>14</sup> The Board has held that it is appellant’s burden to show that she was incompetent for a given period by submitting medical evidence stating that her condition was such that she was not capable of filling out a form or of otherwise furnishing the relatively simple information necessary for satisfying the limitation requirements.<sup>15</sup> Appellant has not submitted any medical evidence establishing that she was incompetent at any time within the meaning of the Act. Therefore, appellant has failed to show that the time limitation of section 8122(a) did not run against her.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The December 15, 1999 decision of the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, DC  
April 17, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>14</sup> 5 U.S.C. § 8122(d)(2).

<sup>15</sup> *Paul S. Devlin*, 39 ECAB 715, 726 (1988).