

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELEANOR McGEE and DEPARTMENT OF VETERANS AFFAIRS,
WEST SIDE MEDICAL CENTER, Chicago, IL

*Docket No. 00-2244; Submitted on the Record;
Issued August 1, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's December 29, 1999 request for reconsideration.

In a decision dated February 18, 1998, the Office denied appellant's claim that she sustained an injury when she inhaled irritants at work. The Office found that she experienced the inhalation incident but that the evidence failed to establish a connection with any medical condition.

In a decision dated April 27, 1998, an Office hearing representative denied appellant's March 23, 1998 request for a hearing.

On December 29, 1999 appellant requested reconsideration. She explained the difficulty she had in receiving Office correspondence and decisions.¹ She submitted copies of correspondence and documents pertaining to indoor air quality surveys conducted in 1997. She also submitted emergency room records, medical notes and minutes from monthly staff meetings at the employing establishment.

In a decision dated April 3, 2000, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's December 29, 1999 request for reconsideration.

¹ The record shows that the Office mailed its correspondence and decisions to appellant's proper address. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *George F. Gidicsin*, 36 ECAB 175 (1984).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application 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.³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁴ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁵ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ 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.⁸ 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.⁹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607.

⁴ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁵ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁶ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ See *Leona N. Travis*, *supra* note 5.

⁸ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.¹⁰

The Office denied appellant's claim on February 18, 1998. Appellant did not make her request for reconsideration until December 29, 1999, more than a year after the Office's decision on the merits of her claim. Appellant's request for reconsideration is therefore untimely. The question for determination is whether appellant's request establishes clear evidence of error in the Office's February 18, 1998 decision.

An employee seeking benefits under the Federal Employees' Compensation Act¹¹ has the burden of proof to establish the essential elements of her claim. When an employee claims that she sustained an injury in the performance of duty, she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. She must also establish that such event, incident or exposure caused an injury.¹²

In its February 18, 1998 decision, the Office accepted appellant's inhalation exposure incident but denied her claim because the record contained no medical evidence establishing that the accepted exposure caused or contributed to a diagnosed medical condition.

The evidence submitted in support of her untimely request for reconsideration does not establish error in the Office's denial of her claim. Her difficulties receiving correspondence and decisions, the indoor air quality surveys, the emergency room records, medical notes and monthly staff meetings do not raise a substantial question as to the correctness of the Office's April 27, 1998 decision. Because appellant's untimely request for reconsideration failed to present clear evidence of error in the Office's rejection of appellant's claim, the Board will affirm the Office's April 3, 2000 decision denying her request.

¹⁰ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹¹ 5 U.S.C. §§ 8101-8193.

¹² See generally *John J. Carlone*, 41 ECAB 354 (1989); *Abe E. Scott*, 45 ECAB 164 (1993); see also 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease or illness" defined).

The April 3, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
August 1, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member