

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROSIE L. CARTER and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Chicago, IL

*Docket No. 01-68; Submitted on the Record;  
Issued August 14, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On February 24, 1997 appellant, then a 44-year-old claims examiner, filed a claim for benefits, alleging that she had a chronic sinus condition causally related to factors of her federal employment. She stated that she first became aware of these conditions in March 1994.

Appellant submitted a January 19, 1996 treatment note, which contained a diagnosis of sinus infection and placed appellant on disability as of January 24, 1996; clinic notes which document appellant's treatment for a sinus condition since 1983; and a February 20, 1996 report from Dr. Marie Vlahos, which stated findings on examination, indicated that appellant had a chronic sinus condition and noted appellant's complaints that her workplace was unhealthy.

Appellant also submitted a June 26, 1996 report from Dr. Stephen M. Hessel, Board-certified in internal and preventive medicine, who stated that he was treating appellant for a sinus condition she had experienced since 1980. He noted that appellant's symptoms had recently worsened due to unhealthy working conditions and recommended that she not be required to work with wide variations of temperature and humidity and particularly in uncomfortably cold areas.

By decision dated June 4, 1998, the Office denied appellant's claim, finding that the medical evidence was insufficient to establish that her claimed sinus condition was causally related to factors of her employment.

By letter dated July 1, 1998, appellant requested an oral hearing, which was held on December 14, 1998. By decision dated February 26, 1999, an Office hearing representative affirmed the June 4, 1998 decision.

By letter dated March 15, 2000, appellant requested reconsideration. She did not submit any additional medical evidence with her request.

By decision dated June 5, 2000, the Office denied reconsideration without a merit review, finding appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error in its final merit decision.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> does not entitle an employee to a review of an Office decision as a matter of right.<sup>2</sup> This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>3</sup> 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.<sup>4</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).<sup>5</sup>

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on February 26, 1999. Appellant requested reconsideration on March 15, 2000. Thus, appellant's reconsideration request was untimely filed which was outside the one-year time limit.

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> 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 point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

<sup>4</sup> 20 C.F.R. § 10.607(b).

<sup>5</sup> *See* cases cited *supra* note 2.

In those cases where a request for reconsideration is not timely filed, the Board had 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 an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.<sup>7</sup>

To establish clear evidence of error, an appellant 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 manifested 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> 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>12</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's decision.<sup>13</sup> The Board makes an independent determination of whether an appellant 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>14</sup>

The Board finds that appellant's March 15, 2000 request for reconsideration fails to show clear evidence of error. She did not submit any medical opinion evidence with her request which presented any evidence of error on the part of the Office. In addition, appellant did not present any evidence of error in her request letter. Consequently, the evidence submitted by her on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

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<sup>6</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

<sup>10</sup> *See Jesus D. Sanchez*, *supra* note 2.

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

<sup>12</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 2.

<sup>14</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

The June 5, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
August 14, 2001

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member