

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLIE JACKSON and U.S. POSTAL SERVICE,
MAIN POST OFFICE, New Orleans, LA

*Docket No. 01-73; Submitted on the Record;
Issued August 15, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

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

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

By decision dated August 29, 1997, the Office denied appellant's occupational disease claim¹ for right carpal tunnel syndrome on the grounds that the evidence did not establish that a condition was diagnosed in connection with the claimed accident, event or employment factor.

On September 8, 1997 appellant's representative requested a hearing, which was held on June 4, 1998. By merit decision dated July 23, 1998, the Office hearing representative affirmed the Office's August 29, 1997 decision on the grounds that appellant had not established that she sustained right carpal tunnel syndrome in the performance of duty.

By letter dated August 11, 1998, appellant's representative requested reconsideration. By decision dated October 8, 1998, the Office denied merit review of appellant's claim, finding that appellant neither raised substantive legal questions, nor included new and relevant evidence. By letter dated July 25, 2000, appellant requested reconsideration. By decision dated September 1, 2000, the Office denied appellant's reconsideration request as untimely and found that the statements appellant made in support of her request and the evidence submitted, presented no clear evidence of error on the part of the Office.

¹ On June 16, 1997 appellant, then a 36-year-old clerk, filed an occupational disease claim indicating her right carpal tunnel syndrome was caused by her employment. She was on limited duty due to an employment-related shoulder condition.

The only decision before the Board in this appeal is the September 1, 2000 decision in which the Office denied appellant's request for reconsideration as untimely filed and failed to demonstrate clear evidence of error. Since more than one year has elapsed between the date of the Office's most recent merit decision dated July 23, 1998 and the filing of appellant's appeal on October 3, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act³ the Office's regulations provide that a claimant's application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office." To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁴ The Office will consider an untimely application for reconsideration 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.⁵

In its September 1, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the July 23, 1998 decision, which stated that, if she requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. As appellant's July 25, 2000 request for reconsideration was outside the one-year time limit, appellant's request was untimely.

The Office, however, may not deny an application for review solely on the ground 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 of the case to determine whether the application establishes "clear evidence of error." The Office will reopen a claimant's case for merit review not withstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and

² 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193. 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 motion or application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(a).

⁵ 20 C.F.R. § 10.607(b).

⁶ 20 C.F.R. § 10.607(a).

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

must be manifested on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

In this case, the Office denied appellant's occupational disease claim on the grounds that she had not established fact of injury. The Office found that the evidence lacked a rationalized medical opinion establishing that the described work factors caused or contributed to claimant's right carpal tunnel syndrome. Therefore, the issue on appeal is whether appellant has established clear evidence of error in denying her claim for an occupational disease.

The evidence submitted in support of appellant's July 25, 2000 request for reconsideration consisted of her July 25, 2000 letter requesting reconsideration, a copy of the Office's October 8, 1998 decision, a faxed cover sheet to appellant's representative and a March 23, 2000 letter to appellant's representative. The information submitted by appellant was not medical evidence and did not show that the Office's decision was erroneous. Therefore, this information was not relevant to the issue, which was decided by the Office.

Appellant additionally asserted that she wanted her case to be reopened so that she could present additional evidence showing that she had suffered carpal tunnel syndrome from her employment. However, no medical evidence accompanied her request. Additionally, she requested that the Office waive her failure to file within the time limit because her representative failed to send in the necessary paperwork to have the case appealed or reconsidered. However, her representative's failure to send in paperwork is irrelevant to the issue in this case, which is that appellant failed to provide a rationalized medical opinion establishing that the described work factors caused or contributed to her right carpal tunnel syndrome. Additionally, the letter

⁸ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ See *Gregory Griffin*, 41 ECAB 458 (1990).

to appellant's representative was dated March 23, 2000, well over the one-year time period for filing a request for reconsideration. Contentions made by appellant regarding her attorney's alleged failure to file a timely request for reconsideration have no reasonable color of validity in view of the absence of medical evidence relevant to the issue.¹⁴

The Board finds that the evidence submitted on reconsideration did not raise a substantial question as to the correctness of the Office's August 11, 1998 merit decision and was insufficient to establish clear evidence of error. Therefore, the Office acted within its discretion in denying a merit review of appellant's claim.

The decision of the Office of Workers' Compensation Programs dated September 1, 2000 is hereby affirmed.

Dated, Washington, DC
August 15, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹⁴ See *John F. Critz*, 44 ECAB 788 (1993) (reopening of a claim not required where a legal contention does not have a reasonable color of validity).