

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOANN EVOLA and DEPARTMENT OF JUSTICE,  
IMMIGRATION & NATURALIZATION, Detroit, MI

*Docket No. 01-441; Submitted on the Record;  
Issued August 31, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

The case has been before the Board on a prior appeal. In a decision dated November 27, 1998, the Board affirmed a July 26, 1996 Office decision, finding that appellant had not established an injury in the performance of duty on August 2, 1994. The history of the case is found in the Board's prior decision and is incorporated herein by reference.

In a letter dated June 8, 2000, appellant requested reconsideration of her claim. By decision dated June 22, 2000, the Office determined that the reconsideration request was untimely and failed to show clear evidence of error.

The Board finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.<sup>1</sup> As appellant filed her appeal on November 21, 2000, the only decision over which the Board has jurisdiction on this appeal is the June 22, 2000 decision denying her request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with

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

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>5</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>6</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>7</sup>

The last merit decision in this case was the Board's November 28, 1998 decision. Since appellant's June 8, 2000 request for reconsideration was more than one year after the Board's decision, it is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.<sup>8</sup> In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding 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.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>11</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>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</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

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<sup>4</sup> 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 own motion or on application."

<sup>5</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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> *See Leon D. Faidley, Jr., supra* note 3.

<sup>8</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>10</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>13</sup> *See Leona N. Travis, supra* note 11.

and whether the new evidence demonstrates clear error on the part of the Office.<sup>14</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>15</sup> The Board makes 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>16</sup>

Appellant submitted the deposition testimony of Dr. Konstatin V. Elisevich, a neurosurgeon, dated June 24, 1999. Dr. Elisevich had previously provided medical reports regarding appellant's treatment. His deposition testimony provides some additional detail regarding his treatment of appellant, but it is not of such probative value that it *prima facie* shifts the weight of the evidence in this case. In response to a question as to how appellant's back condition was caused or aggravated by a fall on August 4, 1994, Dr. Elisevich stated that appellant "must have sustained some further injury, not only in the mechanical sense which one might expect naturally from having a fall of that sort onto the buttock, and this would be primarily arthritic in nature, induced by inflammatory change within the joints of the lower back but also sustained injury in some fashion to the nerve roots within the lower back." Dr. Elisevich refers in speculative terms to an injury arthritic in nature, and a nerve root injury, without providing a clear diagnosis and detailed explanation as to causal relationship with the fall on August 4, 1994. The Board finds that the evidence submitted in this case is not sufficient to meet the "clear evidence of error" standard for an untimely reconsideration request.

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<sup>14</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>15</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

<sup>16</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

The decision of the Office of Workers' Compensation Programs dated June 22, 2000 is affirmed.

Dated, Washington, DC  
August 31, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member