

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ADELINE I. HORST and DEPARTMENT OF HEALTH & HUMAN SERVICES, INDIAN HEALTH SERVICE, Tucson, AZ

*Docket No. 00-2051; Submitted on the Record;  
Issued July 5, 2001*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

On May 3, 1996 appellant, then a 39-year-old education specialist, was searching for records in a trailer that was contaminated with animal feces. She developed a headache and a lung condition. In a June 14, 1996 letter, the Office accepted her claim for acute bronchitis, resolved.<sup>1</sup>

Appellant subsequently claimed that she was exposed to the Hanta virus in the May 3, 1996 incident and had been unable to work since September 27, 1996. In an August 13, 1998 decision, the Office denied appellant's claim on the grounds that the medical evidence did not establish that appellant was totally disabled after September 27, 1996 due to an employment-related condition. The Office found that the medical evidence did not contain any objective findings to confirm that she had contracted the Hanta virus.

In a September 2, 1998 letter, appellant requested reconsideration. In a September 22, 1998 merit decision, the Office denied her request for modification of the August 13, 1998 decision. In a November 11, 1998 letter, appellant again requested reconsideration. In a February 11, 1999 decision, the Office denied this request for reconsideration on the grounds that the evidence submitted was immaterial and therefore insufficient to warrant review.

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<sup>1</sup> Appellant was separated from the employing establishment due to a reduction-in-force effective September 27, 1996.

Appellant appealed to the Board but subsequently withdrew her appeal so she could submit additional evidence and seek reconsideration from the Office. In a February 24, 2000 order, the Board dismissed appellant's appeal.<sup>2</sup>

In a letter dated April 13, 2000, appellant requested reconsideration. In a May 18, 2000 decision, the Office denied her request for reconsideration as untimely and lacking clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The implementing federal regulations<sup>4</sup> provide guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review. Section 10.607 of the regulations provide that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."<sup>5</sup> In *Leon D. Faidley, Jr.*,<sup>6</sup> the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

The Office issued its last merit decision on September 12, 1998. As the Office did not receive the application for review until April 13, 2000, the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office may not deny an application for review based 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 is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.<sup>7</sup>

To establish clear evidence of error, a claimant 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

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<sup>2</sup> Docket No. 99-1083 (issued February 20, 2000).

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606.

<sup>5</sup> 20 C.F.R. § 10.607.

<sup>6</sup> 41 ECAB 104 (1989).

<sup>7</sup> *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error."

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

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 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, however, 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 fundamental question as to the correctness of the Office decision.<sup>13</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>14</sup>

Appellant, in her request for reconsideration, submitted numerous documents in support of her claim that she had contracted the Hanta virus during the May 3, 1996 incident. However, the records submitted by appellant were duplicates of those previously submitted to the Office, from which the Office determined appellant had not established that she had contracted the Hanta virus. The record contains a February 29, 2000 report from Dr. Geoffrey L. Ahern, a Board-certified neurologist, who noted that tests for the Hanta virus antibodies had been negative. The repetitive evidence submitted by appellant did not establish clear evidence of error in the Office's decision denying appellant's claim for compensation.

Appellant also submitted a July 1, 1999 decision of the Merit Systems Protection Board, which waived the one-year time limit for filing a claim for disability retirement on the grounds that she had a mental incapacity. That decision noted that appellant claimed her mental incapacity was due to exposure to the Hanta virus and the effects of a June 8, 1997 automobile accident. The decision indicated that the evidence showed appellant's mental incapacity arose after the accident.

The Board has held that findings of other administrative agencies are not dispositive of proceedings under the Act, which is administrated by the Office and the Board.<sup>15</sup> In its decision the Merit Systems Protection Board decided only a procedural matter and made no determination on the issue of appellant's disability for work. That decision therefore does not contain any clear

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

<sup>10</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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

<sup>13</sup> *Leon Faidley, Jr.*, *supra* note 6.

<sup>14</sup> *Gregory Griffin*, *supra* note 7.

<sup>15</sup> *Richard L. Ballard*, 44 ECAB 146 (1992).

evidence of error in the Office's determination that appellant had not established that she had contracted Hanta virus as a result of the May 3, 1996 incident and, as a result, was disabled.<sup>16</sup>

The May 18, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
July 5, 2001

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>16</sup> On appeal appellant raised questions relating to payment of medical benefits. In a November 18, 1999 letter, the Office indicated that all authorized medical services in connection with appellant's claim rendered by February 11, 1999 would be payable by the Office but medical benefits after February 11, 1999 were not payable. As part of the August 13, 1998 decision, the Office denied appellant's claim for medical benefits as well as compensation. Thereafter, any denial of a request for reconsideration or modification of the August 13, 1998 decision was also a denial of appellant's claim for additional medical benefits.