

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KATIE McCORMICK and U.S. POSTAL SERVICE,  
MAIN POST OFFICE, Lexington, KY

*Docket No. 00-2206; Submitted on the Record;  
Issued July 23, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's March 9, 2000 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On October 24, 1995 appellant, then a 49-year-old distribution clerk, filed a notice of traumatic injury alleging that she hurt her left palm and wrist at work. The Office accepted the claim for a left wrist contusion and authorized appropriate medical and compensation benefits at that time. Thereafter, appellant submitted claims for a recurrence and a schedule award. By decision dated February 14, 1997, the Office denied appellant's claim for a recurrence of disability and for a schedule award. Appellant requested an oral hearing which was held on October 28, 1997. By decision dated January 9, 1998, the hearing representative affirmed the Office's February 14, 1997 decision. By letter dated December 18, 1998, appellant requested reconsideration. In a merit decision dated January 21, 1999, the Office denied modification of the prior decisions. In a letter received by the Office on July 19, 1999, appellant again requested reconsideration. By decision dated July 26, 1999, the Office denied appellant's request for review. By letter dated March 9, 2000, appellant requested reconsideration.<sup>1</sup> Her request was denied as untimely on May 9, 2000.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant filed her appeal with the Board on March 9, 2000, the only decisions before the Board on this appeal are the Office's July 26, 1999 decision denying appellant's request for review and

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<sup>1</sup> The Office stated that this request was implied.

<sup>2</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

the May 9, 2000 decision denying reconsideration since the request was untimely filed. The Board has no jurisdiction to consider the Office's previous decisions.

The Board has reviewed the case record and finds that the Office, in its July 26, 1999 decision, acted within its discretion in refusing to reopen appellant's case for further reconsideration of the merits of her claim.

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not give a claimant the right upon request or impose a requirement upon the Office to review a final decision of the Office awarding or denying compensation. Section 8128(a) of the Act, which pertains to review, vests the Office with the discretionary authority to determine whether it will review a claim following issuance of a final Office decision. The Office, through regulations, has placed limitations on the exercise of that discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>4</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.<sup>5</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>6</sup>

In support of her request for reconsideration received on July 19, 1999, appellant submitted a personal statement describing the history of her case, but did not identify the grounds upon which reconsideration was being requested. She also did not submit any new or relevant evidence or present any legal contentions previously not considered by the Office.

Since appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office, appellant has not established that the Office abused its discretion by denying her request for a review.

The Board also finds that the Office acted within its discretion in denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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>7</sup> The Board has found that the

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<sup>3</sup> 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 20 C.F.R. § 10.606.

<sup>6</sup> 20 C.F.R. § 10.608.

<sup>7</sup> 20 C.F.R. § 10.607(a).

imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>8</sup>

The Office properly found, by its May 9, 2000 decision, that the one-year time limit for filing a request for reconsideration of the Office's last merit decision, dated January 21, 1999, expired on January 21, 2000 and that the request for reconsideration dated March 9, 2000 was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has 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>9</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>10</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>11</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>12</sup>

In support of her March 9, 2000 request for reconsideration, appellant submitted reports from Dr. L. Douglas Kennedy, a Board-certified anesthesiologist, dated November 16, 1999 and January 19, 2000, a report from Drs. Kennedy and Donald Douglas dated April 2, 1999, a report from Dr. Firdaus Hashim dated January 7, 1999 and a letter from appellant's attorney to Dr. Cynthia Evans, a Board-certified family practitioner, dated October 6, 1999. The other documentation submitted by appellant was previously of record and is not a basis for reopening a claim.

While Dr. Kennedy, in his November 16, 1999 report, provides a history of appellant's condition and states that all of appellant's medical problems, including her bulging disc at C5-6 are a result of her October 1995 work-related injury, his statements do not raise a substantial question as to the correctness of the denial of appellant's claim. The Board notes, for example, that Dr. Kennedy had earlier reported on November 12, 1997, that appellant's bulging disc at C5-6 was only an incidental finding, while he reported in November 1999 that this condition was central to appellant's complaints. It is appellant's burden to establish that the Office clearly

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<sup>8</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>11</sup> *Leon D. Faidley, Jr.*, *supra* note 8.

<sup>12</sup> *Gregory Griffin*, *supra* note 9.

erred in denying her recurrence claim. The evidence appellant submitted only establishes that Dr. Kennedy changed his opinion regarding the cause of appellant's complaints, without any real medical explanation.

The reports from Dr. Kennedy dated January 19, 2000, from Drs. Kennedy and Douglas dated April 2, 1999, and from Dr. Hashim dated January 7, 1999, are all diagnostic reports and do not address appellant's alleged recurrence or the issue of causal relationship. These diagnostic reports are not sufficiently supported by rationale to raise a substantial question as to the correctness of the Office's decision. Finally, appellant's own personal statement does not raise any new arguments or address any error on the part of the Office and thus does not constitute the necessary clear evidence of error.

As appellant's request was untimely filed and did not demonstrate clear evidence of error, the Office properly denied it.

The May 9, 2000 and July 26, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
July 23, 2001

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member