

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANIE S. BROWN and U.S. POSTAL SERVICE,
WESTSIDE POST OFFICE, Greensboro, NC

*Docket No. 01-43; Submitted on the Record;
Issued July 12, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits on the grounds that her request for review was not timely filed and failed to present clear evidence of error.

On March 26, 1999 appellant, then a 41-year-old letter carrier, filed two notices of occupational disease alleging that she suffered from tendinitis as a result of "using left hand to compensate for pain in right hand when casing, pulling or delivering mail." She added that on March 19, 1999 she "pulled mail and felt a tendon or muscle snap in left wrist." Appellant also alleged a knee condition. In a March 26, 1999 statement, she stated that she had extreme pain when squatting to pick up mail, walking and climbing to deliver mail and exiting jeeps.

By letter dated April 15, 1999, the Office informed appellant that her claims for multiple orthopedic conditions were being combined into one case, file number 060724650. She was also advised of the factual and medical evidence required to establish her occupational disease claim.

In a March 25, 1999 report, Dr. John W. Kregge, a Board-certified orthopedist, stated:

"[Appellant] tells me that she is driving a postal vehicle and gets in and out of this truck 283 times a day. In doing so, she has had to bend her neck and that bothers her when she [grasps] mail. There are various large loads of mail which [appellant] has been grasping with her thumb and hand and she has pain in her thumb. Also getting in and out of the truck, squatting etc. is causing her pain, aching in her knees."

Dr. Kregge noted that some of appellant's pain was postural and she was being sent to physical therapy for exercises and ultrasound of the neck. He added that appellant needed physical therapy for "hamstring quadriceps rehab[ilitation] to include stretching" for the knees. Dr. Kregge prescribed medication and work restrictions, including a 15-pound lifting restriction, no climbing, kneeling, bending or stooping and no vehicle driving for a total of three weeks.

In a decision dated May 18, 1999, the Office denied compensation on the grounds that the medical evidence was insufficient to establish that appellant had a medical condition causally related to factors of her federal employment.

On June 19, 2000 appellant filed a request for reconsideration.¹

In an August 23, 2000 decision, the Office denied appellant's reconsideration request as untimely filed and lacking clear evidence of error.

The only decision before the Board on this appeal is the Office's August 23, 2000 decision. The Board's regulations provided that an appeal must be filed within one year from the date of issuance of a final decision of the Office.² Because more than one year elapsed between the date appellant filed her appeal on September 25, 2000 and the Office decision dated May 18, 1999, the Board lacks jurisdiction to review the May 18, 1999 merit decision.

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ 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.⁷ 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).⁸

In this case, appellant filed a request for reconsideration of the Office's May 18, 1999 merit decision by letter dated June 19, 2000. Because her reconsideration request was not dated

¹ Appellant noted in her letter that she had attempted to file a reconsideration request on May 19, 2000 but that she had listed an incorrect claim number (06-729156). The claim appellant incorrectly referenced was for the conditions of bilateral carpal tunnel syndrome and right carpal tunnel release, which was approved by the Office. The May 19, 2000 letter is not of record.

² 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 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."

⁶ 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 new evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b) (1999).

⁷ 20 C.F.R. § 10.607(a) (1999).

⁸ *See Leon D. Faidley, Jr.*, *supra* note 4.

or postmarked within one year of the May 18, 1999 decision, the Board finds that the Office properly determined that appellant's June 19, 2000 reconsideration request was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.⁹ Section 10.607(b) provides that “[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.”¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷

Appellant did not submit any new evidence with her untimely reconsideration request nor did her request raise a substantial question about the correctness of the Office's prior merit decision. Although appellant disagreed with how the evidence was evaluated, she failed to present any evidence or argument demonstrating clear evidence of error by the Office in denying the claim. Further, her argument that her initial claims should not have been combined is

⁹ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹⁰ 20 C.F.R. § 10.607(b) (1999).

¹¹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *See Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *See Jesus D. Sanchez*, *supra* note 4.

¹⁴ *See Leona N. Travis*, *supra* note 12.

¹⁵ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁷ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

irrelevant. Therefore, the Board concludes that the Office properly found appellant's reconsideration request untimely filed and lacking clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated August 23, 2000 is hereby affirmed.

Dated, Washington, DC
July 12, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member