

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEARL J. HILL and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Cleveland, OH

*Docket No. 99-2232; Submitted on the Record;
Issued June 12, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

In late 1987 the Office accepted that appellant, then a 46-year-old laboratory technician, sustained employment-related rhinosinusitis and aggravation of bronchial asthma. Appellant received compensation for various periods of disability. By decision May 3, 1996, the Office terminated appellant's compensation effective May 3, 1996 on the grounds that the medical evidence established that she did not have any employment-related disability after that date. The Office based its termination on the opinions of Dr. David Berzon and Dr. John Given, both Board-certified internist and pulmonary specialists who served as Office referral physicians. By decision dated and finalized January 15, 1998, an Office hearing representative affirmed the Office's May 3, 1996 decision. By decision dated April 15, 1999, the Office denied appellant's request for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's April 15, 1999 decision denying appellant's request for a review on the merits of its January 15, 1998 decision. Because more than one year has elapsed between the issuance of the Office's January 15, 1998 decision

and June 18, 1999, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the January 15, 1998 decision.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² 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.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.⁴ 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.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

In its April 15, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on January 15, 1998 and appellant's request for reconsideration was dated April 10, 1999, more than one year after January 15, 1998.

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 to determine whether the application establishes "clear evidence of error."⁷ Office procedures provide that the Office will reopen a claimant's

¹ See 20 C.F.R. § 501.3(d)(2). Appellant had previously filed an appeal with the Board, but the appeal was dismissed, by order dated August 19, 1999, because the record did not contain a final decision within the Board's jurisdiction.

² 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 her own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ 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.¹⁵

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein 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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. Appellant submitted a December 18, 1998 report in which Dr. Edward M. Cordasco, an attending Board-certified internist and pulmonary specialist, indicated that the nature of her respiratory condition was unclear. Dr. Cordasco noted that appellant should undergo additional diagnostic testing, including computerized tomography testing, and recommended that she visit several other medical specialists to evaluate her condition. The Board has performed a limited review of this report and notes that it does not show clear evidence of error because it does not provide a clear opinion on the relevant issue of the present case, *i.e.*, whether appellant had disability after May 3, 1996 due to her employment-related rhinosinusitis and aggravation of bronchial asthma. In his report, Dr. Cordasco indicated that appellant should "remain on short-term [w]orkers' [c]ompensation (three months)" but he did not provide any explanation for this statement and such an unexplained comment would not clearly show that the Office erred in its prior merit decision.¹⁶

The April 15, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 12, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

¹⁶ Appellant also submitted the findings of diagnostic testing performed by Dr. Cordasco in August 1998, but the findings do not contain an opinion on causal relationship and are not relevant to the main issue of the present case.