

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA A. FAMA and U.S. POSTAL SERVICE,
POST OFFICE, Jamesburg, NJ

*Docket No. 99-1397; Submitted on the Record;
Issued March 22, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated October 30, 1998 was untimely filed and did not demonstrate clear evidence of error.

The Board has duly reviewed the case record and concludes that the Office properly determined that appellant's October 30, 1998 reconsideration request was untimely filed and did not demonstrate clear evidence of error.¹

On January 2, 1988 appellant, then a 38-year-old rural carrier, was injured in the performance of duty when her vehicle was struck broadside while she was delivering the mail. The Office accepted the claim for cervical and lumbosacral strain. Appellant had also sustained work-related low back strains on February 20, 1986 and June 9, 1987. Following her January 2, 1988 work injury, appellant was off work until April 22, 1991 when she returned to work part time for four hours per day. She received appropriate compensation for wage loss and medical benefits.

On September 27, 1995 appellant filed a claim alleging a recurrence of disability beginning July 30, 1995.

By letter dated February 29, 1996, the Office advised appellant of the factual and medical evidence required to establish her claim for a recurrence of disability.

In a May 8, 1996 decision, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish a causal relationship between appellant's claimed recurrence of disability and her January 2, 1988 employment injury.

¹ The Board's jurisdiction is limited to those final decisions issued by the Office within one year of the date appellant filed her appeal on March 8, 1999; *see* 20 C.F.R. § 501.3(d)(2). Accordingly, the only decision before the Board in this appeal is the Office's decision dated December 28, 1998.

Appellant subsequently requested a review of the written record.

In a decision dated September 19, 1996, an Office hearing representative affirmed the Office's May 8, 1996 decision.

On October 30, 1998 appellant requested reconsideration.

In support of her reconsideration request, appellant submitted a September 12, 1997 report by Dr. Jalal A. Najafi, a Board-certified vascular surgeon.

In his September 12, 1997 report, Dr. Najafi noted that appellant sustained work injuries on June 9, 1987 and January 2, 1998. He also noted:

“She was treated and followed by Dr. Robert W. Morrison who stated the possibility of a herniated disc at L5-S1 level. [Appellant] also was treated by Dr. Richard Rubin who indicates in his report of November 8, 1989 that she is suffering from cervical radiculitis and sciatic radiculitis which [was] caused and aggravated by her multiple occupational injuries.”

Dr. Najafi reported physical findings and concluded that he concurred that appellant's “disabling problem” was related to her work injuries.

In a decision dated December 28, 1998, the Office denied appellant's request for reconsideration as untimely filed. The Office also evaluated appellant's evidence submitted in conjunction with the reconsideration request and determined that it failed to establish clear evidence of error.

The Board finds that the Office properly determined that appellant's request for reconsideration was not timely filed. Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ 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.⁶ The Board has found

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 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.”

⁵ 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 point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

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).⁷

Appellant filed a request for reconsideration of the Office's September 19, 1996 decision by letter dated October 30, 1998. Because appellant's letter was postmarked almost two years after the Office's final decision, the Office properly determined that appellant's reconsideration request was untimely filed.

In 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.⁸ 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. § 10.138(b)(2), if claimant's application for review shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be 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 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 on the face of such evidence.¹⁵

⁷ See *Leon D. Faidley, Jr.*, *supra* note 3.

⁸ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

¹¹ See *Jesus D. Sanchez*, *supra* note 3.

¹² See *Veletta C. Coleman*, *supra* note 8.

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

¹⁴ *Veletta C. Coleman*, *supra* note 8.

¹⁵ *Id.*

While Dr. Najafi stated that appellant's "disabling problem" was related to her "two occupational injuries," the physician does not describe the history of injury or offer any rationale to support his conclusion. Consequently, Dr. Najafi's opinion is not sufficiently reasoned to raise a substantial question as to the correctness of the denial of appellant's claim and thus the report does not establish clear evidence of error regarding the denial of her claim. Appellant's other points on reconsideration merely express her disagreement with the weight of the medical evidence as evaluated by the Office. However, as pointed out above, in evaluating whether there is clear evidence of error, "It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion."¹⁶

Inasmuch as appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied appellant's request for reconsideration.

The decision of the Office of Worker's Compensation Programs dated December 28, 1998 is hereby affirmed.

Dated, Washington, DC
March 22, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁶ In her October 30, 1998 request for reconsideration, appellant refers to a September 24, 1997 request for reconsideration and medical evidence which the Office has not acted on. The record contains no such request or evidence.