

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE BETHEA and U.S. POSTAL SERVICE,
POST OFFICE, Plainfield, NJ

*Docket No. 00-1931; Submitted on the Record;
Issued May 17, 2001*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had filed an untimely request for reconsideration that did not show clear evidence of error.

On October 26, 1996 appellant, then a 41-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation, alleging that on that date she was in a motor vehicle accident that resulted in lower back pain. Appellant stopped work on that date. On November 25, 1996 appellant's claim was accepted for a cervical and lumbosacral sprain, and appellant received compensation and medical benefits.

In a medical report dated September 10, 1997, Dr. Gregory S. Gallick, a Board-certified orthopedic surgeon, concluded that the initial cause of appellant's cervical and lumbar strain was the motor vehicle accident of October 26, 1996, but that at this point these problems have resolved and there was no reason why she could not resume full normal activities without restrictions.

Accordingly, on October 15, 1997, the Office issued a notice of proposed termination of compensation benefits. In response, appellant's attorney submitted a letter dated November 12, 1997, and received by the Office on November 19, 1997, disputing the termination of benefits. This letter enclosed various reports and documents that were already in the record. Furthermore, the letter enclosed an October 28, 1997 medical report from appellant's treating Board-certified physical medicine and rehabilitation specialist, Dr. Mark Friedman, wherein he noted that appellant continued to have pain in her neck and upper back, right shoulder and low back as well as numbness in her right hand and pain radiating down her legs.

In a decision dated November 21, 1997, the Office finalized appellant's termination of compensation benefits as of that date.

By letter dated February 7, 2000, appellant requested reconsideration. By decision dated March 14, 2000, the Office denied appellant's request, as appellant's appeal was not timely filed and failed to demonstrate clear evidence of error.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”¹

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. As appellant filed her request for reconsideration on February 7, 2000, over two years after the November 21, 1997 decision terminating benefits, appellant's petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision.² 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.³ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁵ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁶ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607(b).

³ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁴ *Jimmy L. Day*, 48 ECAB 654 (1997).

⁵ *Id.*

⁶ *Id.*

part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.⁷

On reconsideration, appellant, through her attorney, argued that clear evidence of error was established in that the Office failed to review appellant's attorney's November 12, 1997 letter in the preparation of the November 21, 1997 decision. The arguments set forth, together with most of the evidence submitted, were repetitive of that already in the record. The Board notes that the Office did not consider the October 28, 1997 medical report by Dr. Friedman, which was new evidence, and was submitted along with the letter. However, this failure to do so does not rise to clear evidence of error, as it offered no opinion as to appellant's disability. This evidence is not sufficient to raise a substantial question as to the correctness of the Office's decision.

As appellant's untimely request for reconsideration fails to establish clear evidence of error in the Office's termination of benefits as of November 21, 1997, the Board finds that the Office properly denied her request.

The March 14, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 17, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁷ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).