

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONSTANCE L. WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, Nashville, TN

*Docket No. 00-2270; Submitted on the Record;
Issued May 24, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

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.

This is the second appeal of this case. Appellant, then a 29-year-old postal worker, filed a traumatic injury claim on October 14, 1995 alleging that on October 13, 1995, she was involved in an employment-related automobile accident which left her with cuts on her face and injury to her neck, low back and shoulder. By decision dated January 9, 1996, the Office denied the claim and appellant requested reconsideration. In a decision dated March 12, 1996, the Office denied appellant's request for review, on the grounds that the evidence submitted was insufficient to warrant a merit review. She thereafter appealed to the Board.

The Board, by decision dated April 9, 1998, affirmed the decision of the Office on the grounds that appellant failed to demonstrate that she had sustained an injury on October 13, 1995 in the performance of duty as alleged.¹ The Board also found the Office properly denied appellant's application for review. She filed a petition for reconsideration with the Board, which was denied on July 13, 1999, as untimely. The facts and circumstances surrounding the prior appeal are more fully set forth in the Board's prior decision, which is hereby incorporated by reference.

Appellant filed a request for reconsideration with the Office on December 6, 1999 and submitted additional evidence.

¹ Docket No. 96-1314 (issued April 9, 1998).

By decision dated June 19, 2000, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for merit review on the grounds that her request was not timely filed and failed to present clear evidence of error.

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.² As appellant filed her appeal with the Board on July 7, 2000, the only decision properly before the Board is the June 19, 2000 Office decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ the Office's regulations provide that a claimant must (1) show that the Office erroneously applied or interpreted a specific point of law; or (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." To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁴ 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. The application must establish on its face that such decision was erroneous.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 June 19, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Board issued the last merit decision in this case on April 9, 1998. Appellant's December 6, 1999 reconsideration request was outside the one-year time limitation and her request for reconsideration was properly found untimely filed.

The Office, however, may not deny an application for review solely on the grounds 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 of the case to determine whether the application establishes "clear evidence of error." The Office will reopen a claimant's case for merit review

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 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 his own motion or application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(a).

⁵ 20 C.F.R. § 10.607(b).

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

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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² 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.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁴

In the instant case, the Board finds that appellant's December 6, 1999 request for reconsideration failed to establish clear evidence of error. In support of her request for reconsideration, appellant argued that the Office had never asked her at any time during the original claims process to submit any factual or medical documentation to support her claim. However, the record contains a November 1, 1995 letter from the Office requesting that appellant submit a medical report addressing: a history of the injury including any similar problems which may have preexisted the condition for which she was treated; the current clinical findings and results of any tests or x-rays performed; the diagnosis of the condition resulting from the injury; office treatment notes and tests reports since being treated for the injury; and in particular, a physician's rationalized medical opinion on the causal relationship between the alleged work injury and the condition for which she was being treated. Appellant was allotted

⁷ 20 C.F.R. § 10.607(a).

⁸ See *Dean D. Beets*, 43 ECAB 1153 (1992). The Office regulations promulgated at 20 C.F.R. § 10.138(b) have since been revised and will be utilized in Office decisions issued after January 1, 1999. The new Office regulations will be interpreted with the same applicability as in prior decisions, with regard to time limitations for reconsideration requests and the clear evidence of error standard.

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ See *Leona N. Travis*, *supra* note 8.

¹² See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁴ See *Gregory Griffin*, 41 ECAB 458 (1990).

30 days within which to submit the requested evidence; however, the requested information was not received. The record substantiates that the Office properly attempted to develop the evidence in this case.

Appellant submitted copies of medical billing statements and a copy of the original accident report, taken on the day of the accident. This evidence, however, is immaterial and cumulative of evidence already of record. The medical statements merely indicate that appellant had received treatment for her alleged injuries and the original accident report simply provided an account of the incident that occurred while appellant was working on October 13, 1995. The evidence does not contain a rationalized medical opinion which supports that appellant sustained an injury on that day, causally related to employment factors. Therefore, the evidence fails to raise a substantial question concerning the correctness of the Office's last merit decision dated January 9, 1996 and is therefore insufficient to establish clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated June 19, 2000 is affirmed.

Dated, Washington, DC
May 24, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member