

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MONETTE F. DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, Ingelwood, CA

*Docket No. 01-488; Submitted on the Record;
Issued October 26, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On July 25, 1996 appellant, then a 40-year-old flat sorter clerk, filed a claim for an occupational disease assigned claim No. 13-1109090, alleging that she first became aware that her shoulder strain was caused or aggravated by her employment on June 23, 1996.

By letter dated September 20, 1996, the Office accepted appellant's claim for left shoulder strain.

By decision dated July 23, 1997, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability during the period June 25 through August 6, 1996 and August 29 through September 5, 1996 causally related to her June 23, 1996 employment injury. Appellant appealed the Office's decision to the Board.

In an April 28, 1999 decision, the Board affirmed the Office's decision. By letter dated July 21, 1999, appellant requested reconsideration before the Office.

By decision dated October 26, 1999, the Office denied appellant's request for a merit review of her claim. She requested reconsideration of the Office's decision by letter dated September 5, 2000.

In an October 5, 2000 decision, the Office denied appellant's request for a merit review of her claim on the grounds that her request for reconsideration was untimely filed and it did not establish clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely 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.¹ As appellant filed her appeal with the Board on December 5, 2000, the only decision properly before the Board is the Office's October 5, 2000 decision.

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 The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶

The last merit decision in this case was issued by the Board on April 28, 1999, wherein the Board affirmed the Office's July 23, 1997 decision denying appellant's recurrence claim. Since appellant's September 5, 2000 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, 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.⁷ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

² 5 U.S.C. § 8128(a).

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

⁴ 20 C.F.R. § 10.607(a).

⁵ See cases cited *supra* note 3.

⁶ *Larry L. Lilton*, 44 ECAB 243 (1992).

⁷ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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 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 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

The issue for purposes of establishing clear evidence of error in this case is whether appellant has submitted evidence establishing that there was an error in the Office's determination, that she did not sustain a recurrence of disability during the period June 25 through August 6, 1996 and August 29 through September 5, 1996 causally related to her June 23, 1996 employment injury.

In support of her request for reconsideration, appellant submitted an August 10, 2000 report of Dr. Charn-Jiuan Huang, a Board-certified physiatrist and her treating physician. Dr. Huang provided a history of appellant's medical treatment, specifically noting that he first saw appellant on May 4, 1995 and that he saw her again on December 8, 1997. He opined that appellant had chronic pain with decreased range of motion and multiple trigger points. Dr. Huang further opined that appellant continued to have pain and that it was unlikely that significant changes in her function would be seen. He noted appellant's physical restrictions and opined that if the employing establishment could not accept appellant's restrictions, then

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(d)(May 1996); *see also* 20 C.F.R. § 10.607(b).

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

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

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

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

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

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁵ *Gregory Griffin*, *supra* note 7.

appellant was not able to return to work. Dr. Huang's report does not contain any opinion regarding appellant's disability during the period of her alleged recurrence. In fact, his report does not indicate that he treated appellant during the period of her alleged disability. Thus, appellant has failed to establish that the Office committed error in denying her recurrence claim.

For these reasons, 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.

The October 5, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 26, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member