

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLOTTE L. CAMPBELL and DEPARTMENT OF VETERANS  
AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Muskogee, OK

*Docket No. 01-1920; Submitted on the Record;  
Issued April 10, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

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.

On May 14, 1987 appellant, then a 54-year-old practical nurse, sustained a right shoulder sprain, cervical sprain and stenosis at C4-5 and C5-6 when she was jolted while pushing an uncooperative patient in a wheelchair at work. On February 3, 1988 she underwent a discectomy and fusion with iliac bone graft at C4-5 and C5-6 which was authorized by the Office.<sup>1</sup> By decision dated September 22, 1997, the Office terminated appellant's compensation on the grounds that she no longer had disability due to her May 14, 1987 employment injury. On October 21, 1997 appellant requested reconsideration. By decision dated January 12, 1998, the Office affirmed its September 22, 1997 decision. On March 26, 2001 appellant again requested reconsideration. By decision dated June 4, 2001, 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 June 4, 2001 decision denying appellant's request for a review on the merits of its January 12, 1998 decision. Because more than one year has elapsed between the issuance of the Office's January 12, 1998 decision

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<sup>1</sup> Appellant began working in a limited-duty position and then stopped work on June 1, 1987. The Office had previously accepted that appellant sustained a thoracic strain on March 7, 1987 when she lifted a patient into a wheelchair.

and July 11, 2001, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the January 12, 1998 decision.<sup>2</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> 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.<sup>4</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for review without reviewing the case on the merits.<sup>6</sup> 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.<sup>7</sup>

In its decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on January 12, 1998 and appellant's request for reconsideration was dated March 26, 2001, more than one year after.

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 to determine whether the application establishes "clear evidence of error."<sup>8</sup> Office procedures provide that the Office will reopen a claimant's

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<sup>2</sup> See 20 C.F.R. § 501.3(d)(2). The Board also does not have jurisdiction over an October 19, 1998 Office decision denying a request for a review of the written record and a November 17, 1999 Office decision which granted a schedule award.

<sup>3</sup> 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).

<sup>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> 20 C.F.R. § 10.608(b).

<sup>7</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>8</sup> 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.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>11</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

In accordance with internal guidelines and Board precedent, the Office properly performed 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 his application for review, but found that it did not clearly show that the Office's prior decision was in error.

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<sup>9</sup> 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."

<sup>10</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>11</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>12</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>13</sup> See *Leona N. Travis*, *supra* note 11.

<sup>14</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>15</sup> *Leon D. Faidley, Jr.*, *supra* note 7.

<sup>16</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (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. In support of her reconsideration request, appellant submitted numerous medical reports which had previously been submitted to and considered by the Office. Therefore, these documents would not be relevant to the main issue of the present case, *i.e.*, whether the medical evidence shows appellant had disability after September 22, 1997 due to her May 14, 1987 employment injury, and would not clearly show that the Office committed error in its prior decisions. Appellant also submitted various administrative documents, concerning the course of her claim and her insurance coverage. These also would not be relevant in that the main issue of the present case is medical in nature.

Appellant submitted various medical reports which had not been previously submitted. These reports would not be relevant in that they do not contain any opinion that appellant had employment-related disability after September 22, 1997. Therefore, they do not demonstrate clear evidence or error.<sup>17</sup> For example, in reports dated November 8, 2000 and February 20, 2001, Dr. Trina Joslin, an attending Board-certified rheumatologist, indicated that appellant was disabled by degenerative cervical disc disease. In a report dated February 21, 2001, Dr. Guy Grooms, an attending Board-certified orthopedic surgeon, provided a similar assessment of appellant's condition. However, these physicians did not provide any opinion that appellant had disability after September 22, 1997 due to her May 14, 1987 employment injury.<sup>18</sup>

The June 4, 2001 decision of the Office of Workers' Compensation Programs is affirmed.<sup>19</sup>

Dated, Washington, DC  
April 10, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>17</sup> It has not been accepted that appellant sustained employment-related degenerative cervical disc disease.

<sup>18</sup> It has not been accepted that appellant sustained employment-related degenerative cervical disc disease.

<sup>19</sup> Appellant submitted additional evidence after the Office's June 4, 2001 decision, but the Board cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).