

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BRENDA J. TUCKER and DEPARTMENT OF VETERANS AFFAIRS  
VETERANS ADMINISTRATION MEDICAL CENTER, Chicago, IL

*Docket No. 02-934; Submitted on the Record;  
Issued August 23, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, 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 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 September 18, 1992 appellant, then a 40-year-old clerk typist, filed a notice of occupational disease claim for a bilateral arm and hand condition.

In a November 3, 1997 decision, the claim was accepted for bilateral carpal tunnel syndrome. Appellant returned to work in a modified job on June 18, 1999. In an October 19, 2000 decision, appellant received an award for 10 percent impairment of each upper extremity.

The only decision before the Board on this appeal is the Office's decision denying appellant's request for a review on the merits of its January 11, 2002 decision. Because more than one year has elapsed between the issuance of the Office's last merit decision on October 19, 2000 and January 29, 2002 the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the October 19, 2000 decision.<sup>1</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant must

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</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).

(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>3</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>4</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>5</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>6</sup>

In its January 11, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on October 19, 2000 and appellant's request for reconsideration was dated December 9, 2001 more than one year later.

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>7</sup> Office procedures provide 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

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<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>6</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>7</sup> See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>8</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 an error (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...."

<sup>9</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>10</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</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>14</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>15</sup>

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform 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 reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

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.

The issue in question is whether appellant was entitled to greater than 10 percent impairment for each upper extremity. In support of her reconsideration request, appellant submitted a February 16, 2000 medical report from Dr. Edward Nicholson and a February 8, 2000 report from Dr. Michael J. Shaenboen.

Dr. Nicholson's report does not address the date of appellant's maximum medical improvement and is repetitive of his report already in the record.

Dr. Shaenboen's report does not even address permanent impairment and therefore is not relevant to the critical question in the case, the degree of appellant's permanent impairment. Since appellant has not submitted new and convincing medical evidence that establishes on its face an error by the Office, the Board finds that appellant has not met her burden of proof.

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<sup>11</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>12</sup> See *Leona N. Travis*, *supra* note 10.

<sup>13</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>14</sup> *Leon D. Faidley, Jr.*, *supra* note 6.

<sup>15</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

The decision of the Office of Workers' Compensation Program dated January 11, 2002 is affirmed.

Dated, Washington, DC  
August 23, 2002

Alec J. Koromilas  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member