

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANET S. LAHM and U.S. POSTAL SERVICE,
POST OFFICE, Ronceverte, WV

*Docket No. 01-969; Oral Argument Held October 2, 2002;
Issued December 31, 2002*

Appearances: *Janet S. Lahm, pro se; Jim C. Gordon, Jr., Esq.,*
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PERTER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

On December 9, 1996 appellant, then a 54-year-old letter carrier, filed a claim for a traumatic injury sustained that day when she fell in the snow and sustained a busted nose and facial contusion. Appellant received continuation of pay on December 10 and 11, 1996, and was separated during her probationary period on January 31, 1997.

By letter dated January 1, 1997, the Office advised appellant that it had accepted that she sustained a contusion of the head on December 9, 1996, but that it had not accepted that she sustained a knee condition.

By letter dated March 25, 1997, appellant contended that she twisted her knee on December 9, 1996 and that she filled out her claim form shortly after her injury, when her nose was bleeding, her head hurt badly and she was knocked senseless. She stated that she had no knee problems before she began working at the employing establishment and attributed the torn cartilage found by her attending physician to the December 9, 1996 injury.

By decision dated April 1, 1997, the Office found that the evidence was insufficient to establish that appellant's condition after December 11, 1996 was related to her accepted employment injury.

By letter dated June 24, 1997, appellant requested reconsideration and submitted additional medical evidence.

By decision dated September 11, 1997, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision.

By letter dated January 22, 1998, appellant requested reconsideration and submitted additional medical evidence, including reports from a hospital emergency room dated December 9 and 10, 1996.

By decision dated April 30, 1998, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

By letter dated December 7, 1999, appellant requested reconsideration and submitted letters from two former coworkers at the Corps of Engineers, appellant's employer prior to her work at the employing establishment, stating that appellant did not have physical limitations or problems while she worked with them. Appellant also submitted a September 14, 1998 report from Dr. Russell L. Stewart, an osteopath, stating that, while she had been under his care from January 1994 to September 1996, she had not been treated for symptoms of knee pain and exhibited no evidence of generalized arthritis.

By decision dated March 8, 2000, the Office found that appellant's December 7, 1999 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the Office's March 8, 2000 decision denying appellant's request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.607(a) and that it did not present clear evidence of error. Since more than one year elapsed between the date of the Office's most recent merit decision on April 30, 1998 and the filing of appellant's appeal on February 20, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.¹

The Board finds that appellant's December 7, 1999 request for reconsideration was not timely filed.

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.”

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 “An application for reconsideration must be sent within one year of the date of the

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

[Office's] decision for which review is sought." The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).²

In the present case, the most recent merit decision by the Office was issued on April 30, 1998. Appellant had one year from the date of this decision to request reconsideration and did not do so until December 7, 1999. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.³ 20 C.F.R. § 10.607(b) provides: "[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."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁴ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁵ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ 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.⁸ 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.⁹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁵ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁶ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ *See Leona N. Travis*, *supra* note 5.

⁸ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ *Leon D. Faidley*, *supra* note 2

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁰

The Board finds that appellant's December 7, 1999 request for reconsideration and the evidence submitted with this request did not demonstrate clear evidence of error.

The evidence appellant submitted with her December 7, 1999 request for reconsideration was addressed to the question of whether appellant had knee problems before she began working at the employing establishment. Even if this evidence were sufficient to establish that she did not have such problems, it would not raise a substantial question as to the correctness of the Office's decisions, since the basis of these decisions was that appellant had not established that her knee problems were causally related to her December 9, 1996 injury.

The March 8, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 31, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ *Gregory Griffin, supra* note 3.