

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA A. WILLIAMS and DEFENSE LOGISTICS AGENCY,
New Cumberland, PA

*Docket No. 00-1331; Submitted on the Record;
Issued February 21, 2002*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's August 18, 1999 request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and failed to present clear evidence of error.

On December 4, 1995 appellant, then a 45-year-old administrative assistant, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that she suffered from situational stress, depression and headaches as a result of her federal employment. She identified November 9, 1995 as the date she first realized her illness was caused or aggravated by her employment. Appellant stated that, following the September 1995 promotion of a coworker, she assumed that coworker's prior duties in addition to retaining her previously assigned duties. She further stated that the work was too much to handle and it began to pile up. Appellant reportedly requested assistance from her supervisor, however, appellant stated that she received no help.

After further development of the record, the Office denied appellant's claim by decision dated June 18, 1996. The Office found that the medical evidence failed to support that appellant's condition was causally related to factors of her federal employment.

Appellant subsequently requested reconsideration on four occasions. In response to appellant's first three requests, the Office reviewed the claim on the merits and denied modification. The Office issued its most recent merit decision on August 11, 1998. Appellant's fourth request for reconsideration is dated August 13, 1999 and was received by the Office on August 18, 1999. By decision dated November 5, 1999, the Office denied appellant's most recent request for reconsideration on the basis that the request was untimely filed and appellant failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's August 18, 1999 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.³ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵ Appellant failed to meet this particular requirement in that the Office issued its decision on August 11, 1998 and appellant's request for reconsideration is dated August 13, 1999 and was not received by the Office until August 18, 1999.

In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.⁶ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁸ The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.⁹ Evidence that 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 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.¹²

¹ 5 U.S.C. § 8128(a).

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

³ 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 on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607 (1999).

⁵ 20 C.F.R. § 10.607(a) (1999).

⁶ 20 C.F.R. § 10.607(b) (1999).

⁷ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *See Dean D. Beets*, 43 ECAB 1153 (1992).

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 9.

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

In the instant case, appellant failed to demonstrate clear evidence of error. The evidence appellant submitted with her August 18, 1999 request for reconsideration consisted of an August 13, 1999 letter from Pennsylvania Counseling and Psychiatric Services indicating that appellant underwent psychotherapy on nine occasions between January 11 and May 23, 1996.¹³ The evidence submitted does not address the relevant issues on reconsideration.¹⁴ The mere fact that appellant participated in psychotherapy does not establish that her claimed emotional condition is employment related. Consequently, appellant's record of attendance in psychotherapy is of limited probative value and clearly insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

The November 5, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 21, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ The August 13, 1999 letter was accompanied by a release from appellant authorizing the disclosure of information regarding her attendance in treatment.

¹⁴ In order to establish that she sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition or psychiatric disorder is causally related to the identified compensable employment factors. *See Kathleen D. Walker*, 42 ECAB 603 (1991).