

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE R. McGINNIS and U.S. POSTAL SERVICE,
PROCESSING & DISTRIBUTION CENTER, San Bernardino, CA

*Docket No. 00-2113; Submitted on the Record;
Issued March 15, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration dated March 16, 2000 was not timely filed and did not demonstrate clear evidence of error.

On October 14, 1997 appellant, then a 44-year-old former letter sorting machine operator, who last worked on March 23, 1993, filed a claim for repetitive trauma injury. By decision dated November 18, 1997, the Office found that appellant's claim was not timely filed.

Appellant requested a hearing and an Office hearing representative, by decision dated May 27, 1998, remanded the case for development on the issue of timely filing. By decision dated October 1, 1998, the Office found that appellant's claim for repetitive trauma was timely filed but that there was no medical evidence supporting the claim, which was denied.

By letter dated March 15, 1999, appellant requested reconsideration. By decision dated March 29, 1999, the Office found that the evidence appellant submitted with her request was repetitious and not sufficient to warrant review of its prior decision.

By letter dated March 16, 2000, appellant requested reconsideration and stated that the Office did not give her the benefit of the doubt. By decision dated April 20, 2000, the Office found that appellant's 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 April 20, 2000 decision denying appellant's request for reconsideration on the basis that it was not filed with 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 October 1, 1998 and the filing of appellant's appeal on May 25, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.¹

The Board finds that appellant's March 16, 2000 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

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: "An application for reconsideration must be sent within one year of the date of the 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 October 1, 1998. Appellant had one year from the date of this decision to request reconsideration. The Office properly determined that appellant's application for review dated March 16, 2000 was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a). As the Office's March 29, 1999 decision was not a merit review, it did not renew the one-year limitation period.³

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.⁴ 20 C.F.R. § 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."

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.

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

³ *Naomi L. Rhodes*, 43 ECAB 645 (1992).

⁴ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ 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.¹⁰ 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.¹¹

Appellant did not submit any evidence with her March 16, 2000 request for reconsideration. Her claim was denied on the basis of the absence of medical evidence. Appellant's argument that she was not given the benefit of the doubt does not demonstrate clear evidence of error.

⁵ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁷ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ See *Leona N. Travis*, *supra* note 6.

⁹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ See *Leon D. Faidley*, *supra* note 2.

¹¹ See *Gregory Griffin*, *supra* note 4.

The decision of the Office of Workers' Compensation Programs dated April 20, 2000 is affirmed.

Dated, Washington, DC
March 15, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member