

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LONNETTA DORSETT and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 01-1300; Submitted on the Record;
Issued May 29, 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 refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act on the grounds that the application for review was not timely filed within the one-year time limitation period and that the application failed to present clear evidence of error.

On August 30, 1973 appellant, then a 38-year-old substitute clerk, injured her back in the performance of duty while pushing a bread rack to the elevator. The Office accepted the claim for a lumbosacral strain. Appellant received compensation for wage loss from August 30 to October 22, 1973 and from July 27, 1974 through January 9, 1996.

In a decision dated January 9, 1996, the Office terminated appellant's compensation for the reason that she was no longer disabled and had no further residuals due to her work injury of August 30, 1973.

In an October 18, 1996 decision, an Office hearing representative affirmed the Office's January 9, 1996 decision.

Appellant thereafter requested reconsideration on June 25, 1997 and submitted new evidence.

In an April 22, 1997 decision, the Office denied modification of its prior decisions.

In a June 8, 1998 letter, appellant requested reconsideration. To support this request she cited materials forwarded through the office of Congressman Steve Cabot by letter dated May 14, 1997.

In a decision and supporting memorandum dated June 19, 1998, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to

establish clear evidence of error. The Office noted that all of the materials submitted on May 14, 1997 had been previously of record. The only document which was not considered in prior decisions was noted to be a statement by appellant prepared on March 28, 1997, whereby she argued the weight of the medical opinion evidence. The Office concluded that the March 28, 1997 statement by appellant did not constitute new or relevant information sufficient to establish clear evidence of error.

Appellant filed an appeal with the Board. By order dated September 26, 2000, the Board set aside the June 18, 1998 Office decision and ordered that the case be remanded for reconstruction of the record.¹ The Board directed the Office to issue a new decision on remand to protect appellant's appeal rights.

In a March 2, 2001 decision, the Office indicated that missing portions of the case file had been located and the record was reconstructed pursuant to the Board's order. The Office referenced the June 18, 1998 decision and once again held that appellant's June 8, 1998 reconsideration request was untimely filed and failed to establish clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed her appeal with the Board on April 16, 2001, the only decision before the Board is the March 2, 2001 Office decision denying appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.³

The Board concludes that the Office properly determined that appellant filed an untimely reconsideration request and that she failed to demonstrate clear evidence of error.

Section 8128(a) of the Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁷

¹ The record before the Board did not contain a copy of the June 19, 1998 decision

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ Appellant submitted additional evidence on appeal; however, the Board only has jurisdiction to review the evidence that was before the Office at the time it issued its decision. *See* 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 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."

⁷ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b) (1999).

As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁸ 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).⁹

Appellant filed a request for reconsideration on June 8, 1998. Inasmuch as appellant's reconsideration request was not filed within one year of the issuance of the Office's April 22, 1997 decision, the Office correctly determined that the reconsideration request was untimely filed under section 8128.¹⁰

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹¹ The regulations further provide that "[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."¹²

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹³ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁴ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ 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.¹⁷ 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

⁸ 20 C.F.R. § 10.607(a) (1999).

⁹ See *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁰ 20 C.F.R. § 10.607(a) (1999) states that a reconsideration request will be considered timely filed if postmarked by the employing establishment within the time period allowed. Otherwise if there is no postmark, the regulation permits the Office to rely on other evidence to establish the mailing date.

¹¹ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹² 20 C.F.R. § 10.607(b) (1999).

¹³ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ See *Jesus D. Sanchez*, *supra* note 5.

¹⁶ See *Leona N. Travis*, *supra* note 14.

¹⁷ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

a substantial question as to the correctness of the Office decision.¹⁸ 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.¹⁹

In this case, appellant did not submit any evidence on reconsideration to show clear evidence of error with respect to the Office's termination of her compensation. The evidence cited by appellant on reconsideration was previously considered by the Office in the January 9 and October 18, 1996 decisions. The only new evidence offered in support of appellant's reconsideration request was a March 28, 1997 statement she prepared to argue the weight of the medical reports. Appellant's statement, however, is insufficient to show clear evidence of error. As noted previously in this decision, it is not enough merely to show that the evidence could be construed to reach a contrary conclusion. Appellant has presented no new probative medical opinion to shift the weight of the evidence in her favor. His statement likewise fails to establish a clear procedural error or otherwise raise a substantial question as to the correctness of the Office decision. Because appellant's March 28, 1997 statement does not meet the criteria for establishing clear evidence of error, the Board concludes that the Office properly denied appellant's reconsideration request.

The decision of the Office of Workers' Compensation Programs dated March 2, 2001 is hereby affirmed.

Dated, Washington, DC
May 29, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁸ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁹ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).