

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CALLIE L. KESTLER and DEPARTMENT OF THE ARMY,
RED RIVER ARMY DEPOT, Texarkana, TX

*Docket No. 01-2075; Submitted on the Record;
Issued May 9, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for a merit review under 5 U.S.C. § 8128(a); and (2) whether the Office abused its discretion by refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

This case has previously been before the Board on appeal. On the previous appeal, the Board, in a December 22, 1999 decision, affirmed the Office's September 29, 1997 decision denying modification of an August 6, 1996 determination that appellant's October 17, 1995 occupational disease claim was untimely filed pursuant to section 8122(a) of the Federal Employees' Compensation Act. The Board found that appellant was aware or by exercise of reasonable diligence should have been aware of her injury in 1989. The Board also found that appellant's supervisor did not have actual knowledge of the injury or written notice of the injury within 30 days. The facts of the case are set forth in that decision.¹

On February 2, 2000 appellant filed a petition for reconsideration with the Board. In an order dated June 12, 2000, the Board denied her request for reconsideration. In an August 8, 2000 letter, appellant requested that the Office reconsider the Board's decision.

By decision dated October 17, 2000, the Office denied appellant's request for a merit review of her claim on the grounds that it did not raise substantive legal questions or include new and relevant evidence and thus insufficient to review its prior decision. On February 8, 2001 appellant visited the Office and requested reconsideration. She submitted factual and medical evidence in support of her request.

¹ Docket No. 99-168 (issued December 22, 1999).

In a February 16, 2001 decision, the Office denied appellant's request for a merit review finding her request was untimely filed and failed to establish clear evidence of error. On April 11, 2001 she requested reconsideration of the Office's decision accompanied by factual evidence.

By decision dated April 25, 2001, the Office again denied appellant's request for a merit review of her claim on the same grounds as in its February 16, 2001 decision.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for a merit review under 5 U.S.C. § 8128(a).

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 July 23, 2001, the only decisions properly before the Board are the Office's October 17, 2000 and February 16 and April 25, 2001 decisions.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office's regulations provide that a claimant must: (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.⁴ 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.⁵ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.⁶

In her August 8, 2000 request for reconsideration, appellant did not raise any new relevant legal argument or show that the Office erroneously applied or interpreted a specific point of law. She contended that her mental incompetence prevented her from filing a timely claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening the case.⁷ As the Office, previously considered this argument, it is repetitive in nature and thus insufficient to warrant reopening of

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

³ 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).

⁴ 20 C.F.R. § 10.606(b)(1)-(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ *Sandra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

appellant's claim on the merits.⁸ Appellant also did not submit any relevant and pertinent new evidence with her request for reconsideration.⁹

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a relevant argument not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

Section 8128(a) of the Act¹⁰ does not entitle a claimant to a review of an Office decision as a matter of right.¹¹ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.¹² The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹³

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁴

The last merit decision in this case was issued by the Board on December 22, 1999, wherein the Board affirmed the Office's September 29, 1997 decision denying modification of its August 6, 1996 decision determination that appellant's October 17, 1995 occupational disease claim was untimely filed. Since appellant's February 8 and April 11, 2001 requests for reconsideration were made outside the one-year time limitation, the Board finds that they were untimely filed.

⁸ *James A. England*, 47 ECAB 115, 119 (1995).

⁹ The Board notes that appellant stated that she submitted an updated report from Dr. Robert C. Potts, a Board-certified psychiatrist, a statement from another physician indicating that she was mentally incapable of filing a claim until 1995 and a copy of section 8122 of the Act accompanied her request for reconsideration. However, the record does not indicate that this evidence accompanied appellant's request.

¹⁰ 5 U.S.C. § 8128(a).

¹¹ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² 20 C.F.R. § 10.607(a).

¹³ See cases cited *supra* note 11.

¹⁴ *Larry L. Lilton*, 44 ECAB 243 (1992).

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.¹⁵ Office procedures state 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.¹⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹⁷ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁰ 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.²¹ 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.²² 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.²³

The issue for purposes of establishing clear evidence of error in this case is whether appellant has submitted sufficient evidence establishing that her October 17, 1995 occupational disease claim was timely filed.

In support of her requests for reconsideration, appellant submitted medical treatment notes from the employing establishment covering the period June 4 through July 26, 1993. The medical treatment notes were previously of record and considered by the Office. Evidence previously of record or which does not address the pertinent issue of causation does not

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(d) (May 1996); *see also*, 20 C.F.R. § 10.607(b).

¹⁷ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁸ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁹ *Jesus D. Sanchez*, *supra* note 11.

²⁰ *Leona N. Travis*, *supra* note 18.

²¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

²² *Leon D. Faidley, Jr.*, *supra* note 11.

²³ *Gregory Griffin*, *supra* note 15.

constitute a basis for reopening a claim.²⁴ Therefore, appellant has not established clear evidence of error.

Appellant submitted a copy of a July 2, 1996 decision of the Social Security Administration. Although this agency found her to be disabled and entitled to benefits due to her emotional condition, its decision is of limited probative value in this case as the findings of an administrative agency with respect to entitlement to benefits under a specific statutory authority is not determinative of disability and entitlement to compensation under the Act.²⁵

In seeking to justify her delay in filing a claim, appellant asserted in her requests for reconsideration that she was mentally incompetent due to her emotional condition and that her delay in filing her claim should be excused. In pertinent part, section 8122(d)(2) of the Act provides that the time limitation of section 8122(a) does not “run against an incompetent individual while he is incompetent and has no duly appointed legal representative.”²⁶ The Board has held that it is appellant’s burden to show that she was incompetent for a given period by submitting medical evidence stating that her condition was such that she was not capable of filling out a form or of otherwise furnishing the relatively simple information necessary for satisfying the limitation requirements.²⁷

Among the additional medical evidence submitted by appellant, a July 20, 2000 report of Dr. Gregory Montoya, a Board-certified psychiatrist, indicated that appellant was not mentally/emotionally able to file a claim until March 27, 1995, the date when necessary medications were prescribed to stabilize her condition so that she could function normally in her environment. A January 18, 2001 report of Dr. Robert C. Potts, a Board-certified psychiatrist, revealed that he treated appellant in the 1990s. Dr. Potts stated that appellant was too disorganized and that her ability to function was severely impaired which rendered her unable to file her claim in a timely manner. Drs. Montoya and Potts did not provide any explanation for their statements and such an unexplained comment would not clearly show that an error had been made in the Office’s prior merit decision.

A December 14, 1992 report of Dr. Edward W. Tobey, a Board-certified psychiatrist, noted appellant’s complaints of insomnia, her family, medical and social history and his findings on mental examination. He stated that he did not have a sufficient history to diagnose a depressive illness and thus diagnosed primary insomnia and prescribed medication. In an undated report, Dr. Tobey provided his findings on mental examination and a history of medical treatment he provided appellant. He diagnosed depressive disorder and stated that appellant’s work activities were not restricted at that time. Dr. Tobey’s reports did not address whether appellant was unable to timely file her occupational disease due to her mental incompetence and

²⁴ *James A. England*, *supra* note 8; *Barbara A. Weber*, 41 ECAB 163 (1995).

²⁵ *Daniel Deparini*, 44 ECAB 657 (1993) (findings of the Social Security Administration are not determinative of disability under the Act).

²⁶ 5 U.S.C. § 8122(d)(2).

²⁷ *Paul S. Devlin*, 39 ECAB 715, 726 (1988).

are therefore irrelevant. Thus, appellant has failed to establish clear evidence of error in denying her occupational disease claim.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The April 25 and February 16, 2001 and October 17, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
May 9, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member