

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BERNICE SWEET and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS AFFAIRS MEDICAL CENTER, Miami, FL

*Docket No. 02-424; Submitted on the Record;  
Issued November 14, 2002*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's October 26, 2001 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On February 17, 1986 appellant, then a 51-year-old hospital ward attendant, filed a notice of traumatic injury alleging that she was hit by a patient and fell and injured her knee. The Office accepted appellant's claim for right knee contusion and strain, internal derangement of the right knee and a lumbar strain and paid appellant compensation benefits for total disability from work.<sup>1</sup>

The Office requested that appellant's attending physician, Dr. Roberto A. Moya, a Board-certified orthopedic surgeon, submit a current narrative medical report indicating whether appellant's 1986 work-related injury had resolved and whether she could work a limited-duty job. Dr. Moya stated, in a December 8, 1999 report, that appellant could not perform the sedentary position of gatekeeper/security clerk presented by the Office and could not work in any capacity.

The Office referred appellant to Dr. Georges Boutin, a second opinion physician and Board-certified orthopedic surgeon. In a report received on August 17, 2000, Dr. Boutin opined that appellant's right knee and lower back injury had resolved. He noted some degenerative arthritis in the knee and back but indicated that this was due to normal progression and age.

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<sup>1</sup> The Office decision accepting appellant's claim is not found in the record but is mentioned by the Office in the record. The Office also noted that hypertension and degenerative arthritis were not accepted conditions related to appellant's 1986 work injury.

Dr. Boutin stated that appellant should be able to perform the sedentary job described by the Office.

By decision dated August 24, 2000, the Office issued a notice of proposed termination of appellant's compensation benefits based on Dr. Boutin's August 17, 2000 report.

Appellant submitted medical reports from Dr. Moya dated August 24, 2000 in which he again stated that appellant was unable to work.

By decision dated September 28, 2000, the Office terminated appellant's compensation benefits finding that her injury-related conditions and disability had resolved.

By letter dated September 26, 2001, appellant requested reconsideration and submitted a notice of an upcoming deposition by Dr. Moya.

By decision dated October 18, 2001, the Office denied appellant's request for reconsideration.

By letter dated October 26, 2001, appellant requested reconsideration. In support of her request, she submitted a transcript of Dr. Moya's October 5, 2001 deposition, Dr. Moya's resume and a September 11, 2001 report from Dr. Moya in which he reiterated that appellant continues to have back and knee problems and is unable to work in any capacity.

By decision dated November 26, 2001, the Office denied appellant's request for reconsideration, as appellant's request was untimely.

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.<sup>2</sup> Since more than one year has elapsed between the issuance of the Office's September 28, 2000 decision and January 8, 2002, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the September 28, 2000 decision and any preceding decisions. Therefore, the only decisions before the Board are the Office's October 18 and November 26, 2001 nonmerit decisions denying appellant's applications for review of its September 28, 2000 decision.

The Board finds that the Office acted within its discretion in its October 18, 2001 decision by refusing to reopen appellant's case for further consideration of the merits of her claim.

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not give a claimant the right upon request or impose a requirement upon the Office to review a final decision of the Office awarding or denying compensation. Section 8128(a) of the Act, which pertains to review, vests the Office with the discretionary authority to determine whether it will review a claim

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

<sup>3</sup> 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

following issuance of a final Office decision. The Office, through regulations, has placed limitations on the exercise of that discretion.

To require the Office to reopen a case for merit review, section 10.606 provides that a claimant may obtain a review of the merits of his or her claim by written request to the Office identifying the decision and setting forth arguments or submitting evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>4</sup> When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.<sup>5</sup>

In support of her September 26, 2001 request for reconsideration, appellant's representative alleged that there was a conflict in medical opinion between appellant's treating physician and Dr. Boutin and claimed that Dr. Boutin's opinion was not based on objective medical evidence and was "clearly wrong." Appellant's representative also submitted a notice of deposition of Dr. Moya, which was never received by the Office. The Board notes that appellant's compensation benefits were terminated because the medical evidence of record did not support that appellant had any continuing work-related disability. Since the underlying issue in this case is medical in nature, appellant's arguments regarding a conflict in medical opinion without supporting evidence and a notice of an upcoming deposition are immaterial. Appellant submitted no new or relevant medical evidence with her September 26, 2001 request for reconsideration, thus the Office properly denied appellant's application for review.

The Board also finds that the Office acted within its discretion in denying appellant's October 26, 2001 request for reconsideration as untimely filed and lacking clear evidence of error.

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.<sup>6</sup> 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).<sup>7</sup>

The Office properly found, by its November 26, 2001 decision, that the one-year time limit for filing a request for reconsideration of the Office's September 28, 2000 decision expired on September 28, 2001 and that the request for reconsideration dated October 26, 2001 was untimely.

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<sup>4</sup> *Id.*

<sup>5</sup> 20 C.F.R. § 10.608(a).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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.<sup>8</sup> 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>11</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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 a review in the face of such evidence.<sup>16</sup>

In this case, appellant submitted a transcript of an October 5, 2001 deposition of Dr. Moya, Dr. Moya's resume and a September 11, 2001 report from Dr. Moya in which he restates his opinion that appellant is unable to work. The evidence submitted by appellant does not show that the Office committed an error, nor does it raise a substantial question as to the correctness of the Office's decision. Dr. Moya's resume is irrelevant in establishing clear evidence of error on the part of the Office since it is personal in nature and the September 11, 2001 medical report duplicates his earlier opinions already found in the record. In the deposition taken on October 5, 2001, Dr. Moya discusses appellant's work-related injury and indicates that

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<sup>8</sup> *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>10</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> *Jesus D. Sanchez*, *supra* note 7.

<sup>13</sup> *Leona N. Travis*, *supra* note 11.

<sup>14</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>15</sup> *Leon D. Faidley, Jr.*, *supra* note 7.

<sup>16</sup> *Gregory Griffin*, *supra* note 8.

he has been treating her since 1986 up until her last examination on September 11, 2001. He opines that the current arthritis in her lower back and right knee is causally related to the 1986 work injury. Although the information in Dr. Moya's deposition is relevant to the underlying issue in this case, it does not show that the Office committed an error or raised a substantial question concerning the correctness of the Office's decision terminating appellant's compensation benefits. As noted earlier, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>17</sup>

As appellant's request was untimely filed and does not demonstrate clear evidence of error, the Office properly denied it.

The November 26 and October 18, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
November 14, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>17</sup> *Leona N. Travis, supra* note 11.