

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARLENE HUNTER and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Tampa, FL

*Docket No. 02-621; Submitted on the Record;
Issued October 29, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

This case has been before the Board previously.¹ By decision dated September 20, 2001, the Board found the case not in posture for a decision because the Office in its October 14, 1999 decision had erroneously failed to consider Dr. Arthur Kirkpatrick's August 18, 1999 deposition,² which was submitted in support of appellant's August 25, 1999 request for reconsideration.³ The Board remanded the case to the Office to consider Dr. Kirkpatrick's deposition and then to issue an appropriate decision in accordance with section 10.607 of the Code of Federal Regulations.⁴

¹ On April 20, 1993 the Office accepted that appellant's contusion of her left great toe and lumbar strain, were sustained while in the performance of duty on May 29, 1992. On March 3, 1994 the Office terminated her compensation benefits on the grounds that she had no medical residuals based on her work-related injuries. Appellant's July 24, 1996 request for reconsideration resulted in the Office's October 16, 1996 merit decisions.

² In its October 14, 1999 decision, the Office noted that it "was unable to locate" Dr. Kirkpatrick's report. However, the record included his report with a date stamp of September 7, 1998.

³ Dr. Kirkpatrick stated that appellant's reflex sympathetic dystrophy was causally related to her injuries.

⁴ 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application 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.

By decision dated October 15, 2001, the Office found that appellant's August 25, 1999 request for reconsideration was not timely filed under 20 C.F.R. § 10.607, as it was not filed within one year of the last merit decision dated October 16, 1996.⁵ The Office further found that, upon consideration of Dr. Kirkpatrick's deposition, appellant's request failed to present clear evidence of error, as it did not establish that the termination decision was in error.

The Board finds that the Office properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a) and that the application failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's October 15, 2001 decision denying appellant's request for a review on the merits of the October 16, 1996 decision denying modification of the March 3, 1994 decision terminating compensation benefits. Because more than one year has elapsed between October 16, 1996, the date of the Office's last merit decision and January 29, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 16, 1996 decision.⁶

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.⁷ 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).⁸

The Office properly found in its October 15, 2001 decision, that appellant's August 25, 1999 request for reconsideration of its October 16, 1996 decision exceeded the one-year time limit for filing a request for reconsideration and that, therefore, the August 25, 1999 request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.⁹ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing

⁵ The Federal Register dated November 25, 1998 advised that effective January 4, 1999, certain changes to 20 C.F.R. Parts 1 to 399 would be implemented. The regulation for filing a request for reconsideration within one year at the time of the Office's June 19, 2000 decision was 20 C.F.R. § 607(a). The Board notes, however, that the Office's reliance on the old regulation is harmless error as both the old and new regulation require appellant to file a reconsideration within one year of the date of the Office decision in question and thus it does not affect the ultimate result in this case.

⁶ 20 C.F.R. § 501.3(d)(2). The Office denied reconsideration on April 7 and May 21, 1997 and August 3 1998.

⁷ 20 C.F.R. § 10.607(a).

⁸ *Nancy Marcano*, 50 ECAB 110 (1998).

⁹ *Id.*

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.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷

The evidence submitted by appellant in support of her request for reconsideration may be sufficient to establish a conflict in medical opinion on the issue of whether appellant's disability from work ended no later than March 3, 1996. Although this evidence is supportive of a consequential injury of reflex sympathetic dystrophy, it is not sufficiently probative to shift the weight of the evidence in appellant's favor.¹⁸ The evidence is not probative in that Dr. Kirkpatrick, who found that appellant's reflex sympathetic dystrophy was causally related to the May 29, 1992 work-related injury, initially examined appellant on September 30, 1997, a full five years after the work-related injury. Further, he noted that it was "within reasonable medical probability" that the work-related injury of May 29, 1992 caused appellant's reflex sympathetic dystrophy. The Board notes that, while medical opinions may be construed as being of equal weight and that a conflict may exist, this is not sufficient to establish clear evidence of error. A conflict in medical opinion does not establish that the Office's decision was erroneous because in

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹¹ *Nancy Marcano*, *supra* note 8.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Dr. Allen E. Lewis.

such cases the weight of the evidence rests with neither side of the conflict. The Board finds that appellant has failed to submit clear evidence of error such that the Office did not abuse its discretion in denying further merit review of her claim.¹⁹

The October 15, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 29, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹⁹ *Fidel E. Perez*, 48 ECAB 663 (1997).