U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of CAROL F. COOKE and DEPARTMENT OF THE ARMY, FITZSIMMONS MEDICAL CENTER, Aurora, CO

*Docket No. 02-1158; Submitted on the Record;*
*Issued April 8, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to demonstrate clear evidence of error.

On May 15, 1985 appellant filed a claim alleging that she sustained an injury to her left knee in the performance of duty. The Office accepted a left knee sprain and left medial meniscal degenerative disc disease. Appellant stopped working on December 10, 1999 and filed a notice of recurrence of disability (Form CA-2a) on May 4, 2000. By decision dated July 12, 2000, the Office denied the claim for a recurrence of disability. In a decision dated December 18, 2000, the Office denied appellant's request for a hearing.

On December 12, 2001 appellant hand delivered to the Office a request for reconsideration dated February 15, 2001, along with accompanying evidence.

By decision dated March 7, 2002, the Office determined that the request was untimely and the evidence failed to show clear evidence of error.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.[1] As appellant filed her appeal on March 12, 2002, the only decision over which the Board has jurisdiction of this appeal is the March 7, 2002 decision, denying her request for reconsideration.

The Board finds that the Office properly determined that appellant's request was untimely and failed to show clear evidence of error.

[1] *See* 20 C.F.R. § 501.3(d).

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] 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.[6] 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).[7]

Appellant does not dispute that she hand delivered a request for reconsideration on December 12, 2001. She contends that the reconsideration request was timely because she had faxed the request to the Office on March 21, 2001. The record does not, however, establish receipt by the Office on or about March 21, 2001. Appellant submitted a facsimile log that indicates that a fax transmission was sent on March 21, 2001; the Board notes that the telephone number recorded on the transmission log did not appear to be a current telephone number for the Denver district office.[8] Moreover, there is no evidence in the record that the Office received any documents on March 21, 2001. It was not until December 12, 2001 that actual receipt of the reconsideration request can be established. The Board, accordingly, finds that the date of the reconsideration request in this case is December 12, 2001. Since this is more than one year after the July 12, 2000 decision, it is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[9] In accordance with this holding, the Office has stated, in its procedure manual, that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation

[2] 5 U.S.C. § 8128(a).

[3] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] 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."

[5] 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 evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[6] 20 C.F.R. § 10.607(a).

[7] *See Leon D. Faidley, Jr.*, *supra* note 3.

[8] The telephone number recorded was (303) 844-1338. The record indicates that on February 3, 2001 appellant had sent a fax to the district office at (720) 264-3044.

[9] *Leonard E. Redway*, 28 ECAB 242 (1977).

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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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 is not of sufficient probative value to establish clear evidence of error. The medical issue in the case was whether appellant had established a recurrence of disability in December 1999, causally related to her employment injury. None of the medical evidence submitted clearly addresses this issue.[18] For example, in a report dated September 20, 2000, Dr. Douglas Dennis, an orthopedic surgeon, indicated that appellant had arthroscopic surgery, without discussing an employment-related disability. In a report dated March 16, 2001, Dr. Mark Malyak stated that appellant had been treated for left knee osteoarthritis that likely was a consequence of blunt trauma from a fall in 1985. He noted that she had not worked since December 10, 1999, due to knee pain, without providing a reasoned medical opinion with respect to an employment-related disability as of that date.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[11] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[14] *See Leona N. Travis*, *supra* note 12.

[15] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[16] *Leon D. Faidley, Jr.*, *supra* note 3.

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

[18] The Board notes that the record contains evidence received after March 7, 2002. The Board is limited to review of evidence that was before the Office at the time of the decision on appeal. 20 C.F.R. § 501.2(c).

The clear evidence of error standard is a difficult standard to meet. The evidence in this case is not of sufficient probative value to *prima facie* shift the weight of the evidence in appellant's favor. Accordingly, the Office properly denied the request for reconsideration in this case.

The decision of the Office of Workers' Compensation Programs dated March 7, 2002 is affirmed.

Dated, Washington, DC
April 8, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member