

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELBA GONZALEZ and U.S. POSTAL SERVICE,
POST OFFICE, Tampa, FL

*Docket No. 02-1555; Submitted on the Record;
Issued April 3, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's February 13, 2002 decision denying appellant's request for a review on the merits of its November 9, 1998 decision. Because more than one year has elapsed between the issuance of the Board's May 5, 2000 decision and February 13, 2002, the date appellant filed her appeal with the Board, the Board lacks jurisdiction over the merits of the case.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulation provides 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.² 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.³ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁴ The Board has found

¹ See 20 C.F.R. § 501.3(d)(2). This case was previously before the Board in Docket No. 99-843 (issued May 5, 2000). The Board found that appellant failed to establish a recurrence of disability causally related to her April 27, 1996 employment injury or that she sustained an emotional condition while in the performance of duty.

² 20 C.F.R. § 10.606(b)(2).

³ 20 C.F.R. § 10.607(a).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁵

In its decision, the Office properly determined that appellant failed to file a timely request for reconsideration. The last merit decision was rendered by the Employees' Compensation Appeals Board on May 5, 2000 and appellant's request for reconsideration was dated September 11, 2001, more than one year after the May 5, 2000 decision by the Board.⁶

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁷ Office procedures provide 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ The one-year time period accompanies any merit decision, including a merit decision of the Board. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations* (Chapter 2.1602.3(b)(1) (May 1996).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

⁹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² *See Leona N. Travis*, *supra* note 10.

¹³ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.¹⁴ 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.¹⁵

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office reviewed the evidence submitted by appellant in support of her application for review and found that it did not clearly establish that the Office's prior decision was in error.

The underlying issues in this claim concern whether appellant sustained a recurrence of disability due to an accepted emotional condition and whether she sustained a new emotional condition injury. The recurrence was denied due to insufficient medical evidence. The new injury claim was denied because appellant failed to establish the condition resulted from a compensable employment factor.

In her September 11, 2000 reconsideration request, appellant reargued that it was an administrative error for her supervisor at the employing establishment to send her doctor a letter concerning her medical condition as he had no prior authorization or approval to contact the physician. She alleged her supervisor contacted her physician to get him to change a medical opinion on appellant's work restrictions. This argument was raised by appellant and considered by the Office and the Board in the adjudication of her claim. Appellant's contentions are not sufficient to establish clear evidence of error. Her argument is merely repetitious of evidence and argument previously raised. The fact that the Office did not construe this evidence to establish harassment or administrative error does not rise to the level of clear evidence of error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

The February 13, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 3, 2003

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member