

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA G. MADDALENA and U.S. POSTAL SERVICE,
POST OFFICE, Hauppauge, NY

*Docket No. 03-371; Submitted on the Record;
Issued April 15, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

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

In this case, the Office accepted that on February 15, 1999, during the performance of duty, appellant sustained a lumbosacral strain. Following an April 19, 1999 hernia repair surgery for a separate work-related injury not connected with this claim, appellant returned to work in a limited-duty capacity on May 31, 1999. On November 2, 1999 appellant filed a Form CA-2a claim for recurrence of disability of October 7, 1999. By decision dated January 31, 2000, the Office denied the claim for recurrence of disability on the basis that the evidence did not establish either a change in the nature or extent of appellant's injury-related disability or a change in the nature and extent of her light-duty position. Appellant's subsequent requests for reconsideration were denied by decisions dated April 17 and October 2, 2000 on the basis that the evidence submitted was immaterial and insufficient to warrant review. Appellant thereafter appealed to the Board and was assigned Docket No. 01-835. On June 20, 2001 the Board granted appellant's request to withdraw her appeal and issued an order dismissing appeal.¹

By letter dated April 6, 2001 and postmarked the following day, appellant's attorney requested an extension of time to June 1, 2001, in which to request reconsideration. He advised that he recently been retained by appellant and have requested narrative reports from her attending physician, Dr. Richard Memoli and her chiropractor, Dr. James C. Pierce. The request for an extension of time was requested on the basis that both the physicians and he needed time to prepare appellant's case for submittal to the Office. By letter dated April 26, 2001, the Office advised that the Federal Employees' Compensation Act provides that reconsideration may be timely filed within one year of the decision being challenged, but there were no provisions to

¹ *Order Dismissing Appeal*, Docket No. 01-835 (issued June 20, 2001).

extend that time frame. Appellant was advised that additional evidence or argument may be submitted at any time.

On or about May 28, 2002 appellant filed a request for reconsideration. Additional medical evidence and arguments were submitted. By decision dated August 12, 2002, the Office denied appellant's request for reconsideration on the basis it was untimely filed and failed to demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the August 12, 2002 decision denying appellant's request for reconsideration. More than one year has elapsed between the date of the Office's most recent merit decision on October 2, 2000, which denied appellant's request for modification of its January 31, 2000 decision denying appellant's claimed recurrence of disability of October 7, 1999 and the filing of appellant's appeal on November 12, 2002. The Board lacks jurisdiction to review the merits of appellant's claim.²

The Board finds that the Office properly denied appellant's 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.³ 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).⁴

In its August 12, 2002 decision, the Office properly found that the request for reconsideration, dated May 28, 2002, was untimely as it was not within the one-year time limit for filing a request for reconsideration of the Office's October 2, 2000 decision.

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.⁵ 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.⁶

² 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

³ 20 C.F.R. § 10.607(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² 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.¹³

In support of her request for reconsideration, appellant submitted numerous copies of leave requests, her temporary limited-duty assignments, time analysis reports and duty status reports. The Board notes that appellant's recurrence claim was denied on the basis that appellant failed to establish a change in the nature of her work-related injury of lumbosacral sprain or a change in the nature of her light-duty position. The information appellant submitted is properly considered irrelevant or immaterial in nature as it has no bearing or is inconsequential to the issue in question. Medical evidence from Dr. Memoli, an orthopedic surgeon, in the form of duty status reports and progress notes was received along with copies of medical reports already of record and previously considered. Although in his duty status reports, Dr. Memoli diagnosed lumbar sprain with spasms, degenerative changes in the lumbar spine and bilateral lumbar radiculopathy and opined appellant's condition was permanent, these reports are of little probative value as Dr. Memoli failed to provide any medical rationale or explanation as to how those changes are the result of appellant's work injury.¹⁴ As such, these reports are insufficient to establish clear evidence of error in the Office's denial of appellant's recurrence claim. The evidence received on reconsideration also contains a copy of a September 26, 2001 letter from an Equal Employment Opportunity (EEO) Commission counselor, which references the

⁷ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *Jesus D. Sanchez*, *supra* note 4.

¹⁰ *Leona N. Travis*, *supra* note 8.

¹¹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 4.

¹³ *Gregory Griffin*, *supra* note 5.

¹⁴ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

proceedings of an initial interview between appellant and the EEO counselor, in which appellant led the counselor to believe that her situation or concern had been resolved and the request for counseling to be withdrawn apparently on the basis that appellant had been moved to a better working environment, which meets her physical requirements or limitations set forth by her private physician. The Board notes that there is no final EEO decision on the matter, this evidence is irrelevant to the issue at hand as it does not establish clear evidence of error that appellant's working conditions changed. Since the evidence appellant submitted with her request does not establish that the Office committed an error in its October 2, 2000 decision, it is insufficient to establish clear evidence of error.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied it.

In his brief on appeal, appellant's attorney states that the reconsideration request of May 28, 2002 contained a January 26, 2002 report from Dr. Memoli, as well as an August 2, 2001 report from Dr. Pierce, a chiropractor. However, only the first page of Dr. Memoli's January 26, 2002 report was received there is no record of any evidence from Dr. Pierce or a copy of the May 28, 2002 reconsideration request.

The August 12, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 15, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member