

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROXANNE L. SCHNELLE and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 03-1412; Submitted on the Record;
Issued August 28, 2003*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

On December 16, 1999 appellant, then a 43-year-old mark-up clerk, filed a claim for an occupational disease for pain in her left shoulder and upper extremity and hot and cold sensations and tenderness in her arm.

The Office accepted appellant's claim for left forearm tendinitis, under file number 090461036.

By letter dated March 20, 2001, the Office proposed to terminate appellant's compensation on the basis that she had no residuals of her accepted condition and could return to work.

By decision dated May 29, 2001, the Office terminated appellant's compensation, including further medical treatment, effective that date, on the basis that her accepted condition of left forearm tendinitis had resolved. The Office noted that the medical evidence appellant submitted in response to its proposed termination of compensation did not show that her herniated cervical disc was related to her employment.

Appellant requested a hearing, but withdrew the request to submit a new claim for an occupational disease of the cervical spine. On June 7, 2001 appellant filed a claim for an occupational disease for a herniated disc in her neck,¹ which the Office assigned file number 092011369. The Office denied this claim by decision dated September 17, 2001.

¹ On March 25, 2002 appellant filed a claim for an occupational disease for cervical disc displacement with radiculopathy. The Office determined that this was a duplicate of the claim filed on June 7, 2001.

By letter dated January 11, 2003, appellant, through her attorney, requested “reconsideration of the prior disallowance of the claim,” stating that appellant had submitted medical evidence indicating that she had both tendinitis of the left forearm and a herniated cervical disc, but the Office did not consider the claim for the disc. Her attorney contended that “any decision denying the claim is invalid because it did not fully consider all the body parts injured at the time of the incident.” This request for reconsideration listed both appellant’s file numbers: 09461036 and 092011369.

By decision dated March 7, 2003, the Office found that appellant’s January 11, 2003 request for reconsideration was not timely filed with regard to the Office’s May 29, 2001 decision and that the request for reconsideration did not present clear evidence that the May 29, 2001 decision was incorrect.

The only Office decision before the Board on this appeal is the Office’s March 7, 2003 decision denying appellant’s request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.607(a) and that it did not present clear evidence of error.² Since more than one year elapsed between the date of the Office’s most recent merit decision on May 29, 2001 and the filing of appellant’s appeal on May 5, 2003, the Board lacks jurisdiction to review the merits of appellant’s claim.³

The Board finds that appellant’s January 11, 2003 request for reconsideration was not timely filed.

Section 8128(a) of the Federal Employees’ Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) 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 Board has found that the imposition of this

² In response to appellant’s January 11, 2003 request for reconsideration, the Office issued a March 12, 2003 decision in file number 092011369, finding that appellant’s cervical spine condition was not causally related to her employment. Appellant appealed this decision to the Board, which, by decision dated July 29, 2003 affirmed the Office’s March 12, 2003 decision. A February 6, 2003 letter from the Office regarding appellant’s December 20, 2002 claim for a schedule award was informational and did not constitute a final, appealable decision.

³ 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 final decision being appealed.

one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁴

In the present case, the most recent merit decision by the Office was issued on May 29, 2001. Appellant had one year from the date of this decision to request reconsideration and did not do so until January 11, 2003. The Office properly determined that her application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows “clear evidence of error” on the part of the Office.⁵ 20 C.F.R. § 10.607(b) provides: “[The Office] will consider an untimely application for reconsideration 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.”

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ 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.¹¹

The January 11, 2003 request for reconsideration was not accompanied by any medical evidence addressing appellant’s condition of left forearm tendinitis. She contended that “any decision denying the claim is invalid because it did not fully consider all the body parts injured at

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁹ *See Leona N. Travis*, *supra* note 7.

¹⁰ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 4.

the time of the incident.” However, the claim for a cervical spine injury was adjudicated by the Office and the Board under a separate claim number. Appellant’s contention does not raise a substantial question as to the correctness of the Office’s May 29, 2001 decision terminating compensation for appellant’s left forearm tendinitis. She has not established clear evidence of error.

The March 7, 2003 decision of the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, DC
August 28, 2003

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member