

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY A. BINGHAM and U.S. POSTAL SERVICE,
POST OFFICE, Roseville, MI

*Docket No. 02-1504; Submitted on the Record;
Issued February 28, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

On August 31, 2000 appellant, then a 44-year-old city carrier, filed an occupational disease claim, alleging that factors of employment caused a partial vaginal prolapse, which necessitated bladder suspension surgery that was performed on June 15, 2000. She indicated that she had had a hysterectomy and bladder suspension surgery in 1999 and returned to work with lifting restrictions but that her condition worsened, which necessitated further surgery. She was off work from June 14 to August 16, 2000, when she returned with a lifting restriction of 10 pounds and limited bending, stooping, twisting and pushing. In support of her claim, she submitted reports from Dr. Daniel J. Greene, who is Board-certified in obstetrics and gynecology and Dr. Anil Kumar, a urologist.

By decision dated December 12, 2000, the Office denied the claim, finding the medical evidence insufficient to establish that appellant's condition was causally related to factors of employment. The Office further noted that appellant had not responded to a development letter, purportedly mailed to her by the Office on September 20, 2000. On December 12, 2001 appellant's representative requested reconsideration, arguing that the employing establishment violated medical restrictions. She submitted evidence in this regard and further contended that appellant did not receive the September 20, 2000 development letter.

In a decision dated March 26, 2002, the Office denied appellant's reconsideration request, finding that it had not been filed within one year of the December 12, 2000 merit decision and did not show clear evidence of error. The instant appeal follows.

The Board finds that the Office abused its discretion in failing to reopen appellant's case for merit review.

The only decision before the Board is the March 26, 2002 decision of the Office denying appellant's request for reconsideration of the December 12, 2000 decision. Because more than one year had elapsed between the issuance of this decision and May 10, 2002, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the December 12, 2000 Office decision.¹

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² The Office 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 When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴ 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. 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.⁵

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

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607; *see also* *Alan G. Williams*, 52 ECAB ____ (Docket No. 99-1082, issued December 19, 2000).

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ See *Gladys Mercado*, 52 ECAB ____ (Docket No. 00-898, issued February 12, 2001). Section 10.607(b) provides: "[the Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence or 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." 20 C.F.R. § 10.607(b) (1999).

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.⁶

The Board initially notes that, contrary to the contention of the Office, the case record before the Board does not contain a development letter dated September 20, 2000. The Board further finds that appellant's request for reconsideration was timely.

In the instant case, the letter requesting reconsideration is dated December 12, 2001. The record does not contain an envelope with a postmark date. If the postmark is not available, the date of the letter is the date of filing.⁷ Therefore, December 12, 2001 is the date of the request for the purposes of determining timeliness.

In the March 26, 2002 decision, the Office noted that the last merit decision was dated December 12, 2000 and found that appellant's request dated December 12, 2001, was untimely filed and that she failed to establish clear evidence of error. The Board has long held that a claimant has a full year to request reconsideration. In *John B. Montoya*, the Board found that, with respect to a June 19, 1990 merit decision, the time period began to run on the day after the decision and appellant had until June 19, 1991 to request reconsideration.⁸ In *David Shuler*, a February 20, 1998 request for reconsideration of a February 20, 1997 Office merit decision was held to be timely.⁹

Accordingly, the Board finds that in this case appellant had until December 12, 2001 to request reconsideration of the December 12, 2000 Office decision.¹⁰ Since appellant's reconsideration request was filed on December 12, 2001, it is considered timely. The application of the "clear evidence of error" standard to the evidence submitted is appropriate only for untimely reconsideration requests. The case will, therefore, be remanded to the Office for review of the evidence under the proper standard of review and an appropriate decision.

⁶ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁷ See *Willie H. Walker, Jr.*, 45 ECAB 126 (1993); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(b) (May 1996).

⁸ 43 ECAB 1148, 1152 (1992).

⁹ Docket No. 98-1965 (issued February 22, 2000).

¹⁰ Chapter 2.1602(3)(b)(1) of the Office's procedure manual states that the one-year period begins on the date of the original decision. To the extent that the Office may be interpreting its procedures to reach the conclusion that appellant had until December 11, 2001 to request reconsideration, this is not consistent with Board precedent.

The March 26, 2002 decision of the Office of Workers' Compensation Programs is hereby vacated and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
February 28, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member