

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEVERLY A. RAMIREZ and U.S. POSTAL SERVICE,
POST OFFICE, City of Industry, CA

*Docket No. 02-2276; Submitted on the Record;
Issued February 12, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

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

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was untimely and did not demonstrate clear evidence of error.

The only decision before the Board on this appeal is the Office's June 6, 2002 decision denying appellant's request for reconsideration of his case on its merits. Because more than one year has elapsed between the issuance of the Office's December 22, 2000 merit decision denying appellant's claim for a left hip condition and August 30, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the December 22, 2000 decision.¹

To obtain a review of a case on its merits under 5 U.S.C. § 8128(a) a claimant must meet the following requirements:

“(b) The application for reconsideration, including all supporting documents, must:

(1) Be submitted in writing;

(2) Set forth arguments and contain evidence that either:

(i) Shows that [the Office] erroneously applied or interpreted a specific point of law;

¹ See 20 C.F.R. § 501.3(d)(2).

(ii) Advances a relevant legal argument not previously considered by [the Office]; or

(iii) Constitutes 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 The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees’ Compensation Act.⁴ When a claimant fails to meet one of the above-mentioned standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁵

The Office, through regulations, has imposed limitations on the exercise of its authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. However, the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error.

To establish clear evidence of error, a claimant has to submit evidence relevant to the issue which was decided by the Office.⁶ The evidence has to 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 determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request to determine whether the new evidence demonstrated 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

² 20 C.F.R. § 10.606(b)(1), (2)

³ 20 C.F.R. § 10.607(a).

⁴ *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ See 20 C.F.R. § 10.608(b).

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

and raise a substantial question as to the correctness of the Office decision.¹¹ The Board makes an independent determination as to 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.¹²

In its June 6, 2002 decision, the Office determined that appellant failed to file a timely application for review. The Branch of Hearings and Review rendered its decision on December 22, 2000, and mailed it on December 27, 2000, tolling the one-year time limitation period, and appellant's request for reconsideration was dated January 24, 2002, which was clearly more than one year after December 27, 2000. Therefore appellant's request for reconsideration of her case on its merits was untimely filed.

In support of her section 8128(a) merit reconsideration request appellant submitted a December 6, 2001 medical report from Dr. John B. Dorsey, a Board-certified orthopedic surgeon, which reviewed appellant's history, diagnosed residuals of right wrist sprain/strain and residuals of left hip contusion with synovitis,¹³ and opined that appellant's diagnosed conditions arose from her accepted work injury.¹⁴ Also previously submitted to the record were several progress reports from 2001 from Dr. Michael P. Rubinstein, a Board-certified orthopedic surgeon and appellant's treating physician, which noted that appellant had continuing wrist pain and which diagnosed right wrist sprain with flexor carpi tendinitis and right lateral epicondylitis. No left hip problem was identified. Additionally appellant's representative argued that the medical evidence considered in the December 22, 2000 decision was wrongly interpreted.¹⁵

The Office conducted a limited review of this evidence and determined that it did not demonstrate clear evidence of error in the December 22, 2000 decision. The Board finds that the medical reports and argument do not establish clear evidence of error in the December 22, 2000 decision as they merely note that appellant was continuing with medical treatment for multiple complaints and that she disagreed with the December 22, 2000 decision findings. This evidence is not sufficient to demonstrate that she sustained a left hip condition during a fall on September 20, 1999. No clear evidence of error on the part of the Office was identified. The Office properly found that this evidence was not relevant to the issue of the December 22, 2000 decision.

¹¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹³ Dr. Dorsey's rationale for this statement was merely that it was reasonable to assume that the hip condition arose from the fall as appellant had no other injuries to the hip or wrist prior or subsequent to the work incident. This is not acceptable rationale. See *Thomas R. Horsfall*, 48 ECAB 180 (1996); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996); *Kimper Lee*, 45 ECAB 565 (1994); *Leon D. Faidley, Jr.*, *supra* note 11 ("It [i]s related because appellant was asymptomatic prior to the incident.")

¹⁴ Even if, Dr. Dorsey's report was sufficient to warrant further medical development or action if it had been submitted prior to the December 22, 2000 decision, it still does not constitute evidence which on its face shows that the Office made an error in that decision.

¹⁵ The Office found that it was unrationalized and therefore insufficient to support appellant's claim.

As the medical reports from Drs. Rubinstein and Dorsey are not rationalized and not relevant to the issue decided by the Office in its December 22, 2000 merit decision, they are insufficient to establish clear evidence of error in the December 22, 2000 decision. The Board finds that the Office did not abuse its discretion in denying further review of appellant's case on its merits.

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 6, 2002 is hereby affirmed.

Dated, Washington, DC
February 12, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member