

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERNETTA STEELE and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, Los Angeles, CA

*Docket No. 03-70; Submitted on the Record;
Issued February 20, 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 on the grounds that the request was untimely and failed to show clear evidence of error.

This case was previously before the Board.¹ By decision and order dated May 8, 2001, the Board affirmed the Office's December 17 and July 9, 1999 decisions, as modified,² finding that appellant had failed to establish that she sustained an injury on December 23, 1998 causally related to factors of her employment. The Board's May 8, 2001 decision is herein incorporated by reference.

On June 25, 2002 appellant requested reconsideration. She argued that, because the Board modified the Office's December 17 and July 9, 1999 decisions from a denial based on fact of injury to a denial based on insufficiency of the medical evidence, she did not have the opportunity to perfect her claim with regard to sufficiency of the medical evidence. Appellant also seemed to argue that the medical evidence of record was sufficient to establish causal relationship.

By decision dated July 22, 2002, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that her request was untimely and failed to present clear evidence of error.

¹ See Docket No. 00-1308 (issued May 8, 2001).

² The Office had denied appellant's claim on the grounds that she had not established that she experienced the claimed event at the time, place and in the manner alleged.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.³ As appellant filed her appeal with the Board on October 7, 2002, the only decision properly before the Board is the Office's July 22, 2002 decision denying appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.⁷ When an application for review is untimely, the Office undertakes a limited review to determine whether the untimely request demonstrates clear evidence of error.⁸

Appellant made her June 25, 2002 request for reconsideration more than one year after the last merit decision in this case. Her request is therefore untimely. The question for determination is whether the reconsideration request shows clear evidence of error.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was 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 that 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 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

³ 20 C.F.R. § 10.607.

⁴ 5 U.S.C. § 8128(a).

⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ *Jesus D. Sanchez* and *Leon D. Faidley, Jr.*, *supra* note 5. Compare 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.607(b).

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

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

¹¹ See *Jesus D. Sanchez*, *supra* note 5.

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

the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹³ 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.¹⁴

The Board finds that appellant's June 25, 2002 request for reconsideration fails to present clear evidence of error in the Office's merit decisions dated May 17 and July 9, 1999. Appellant argued that, because the Board modified the Office's December 17 and July 9, 1999 decisions from a denial based on fact of injury to a denial based on insufficiency of the medical evidence, she did not have the opportunity to perfect her claim with regard to sufficiency of the medical evidence. However, the record shows that, by letter dated February 9, 1999, the Office requested that appellant submit medical evidence, including medical evidence establishing causal relationship. Therefore, appellant was provided with an opportunity to perfect the defect in her claim regarding sufficiency of the medical evidence. She also seemed to argue that the medical evidence of record was sufficient to establish causal relationship. However, appellant's belief that the medical evidence was sufficient does not establish that the Office's prior decisions were clearly erroneous.

As appellant's untimely request for reconsideration failed to present clear evidence of error, the Board finds that the Office properly denied her request.

The decision of the Office of Workers' Compensation Programs dated July 22, 2002 is affirmed.

Dated, Washington, DC
February 20, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ *Leon D. Faidley, Jr., supra* note 5.

¹⁴ *Gregory Griffin, supra* note 5.