

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FRANCES L. SMITH and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Poplar Bluff, MO

*Docket No. 03-628; Submitted on the Record;  
Issued July 2, 2003*

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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 it was untimely filed and failed to present clear evidence of error.

On January 10, 1974 appellant, then a 50-year-old cook, filed an occupational disease claim alleging that on April 26, 1973 she realized her torn tendons in her right shoulder and arm were employment related.<sup>1</sup> The Office accepted the claim for tear of the right shoulder rotator cuff<sup>2</sup> and subsequently placed appellant on the periodic rolls.<sup>3</sup>

On January 14, 1998<sup>4</sup> the employing establishment offered appellant the position of desk clerk/greeter, in accordance with the medical restrictions outlined by Dr. Steven C. Winters, an attending Board-certified orthopedic surgeon, with a subspecialty in hand surgery.

In a letter dated January 21, 1999, the Office advised appellant that she had been offered a position as a desk clerk/greeter with the employing establishment, which the Office found suitable to her work capabilities. The Office noted that the position remained available and advised appellant that she had 30 days from the date of the letter to either accept the position or provide an explanation for refusing it.

Appellant submitted a February 10, 1999 report by Dr. Raymond A. Ritter, Jr., an attending Board-certified orthopedic surgeon, who concluded that she could not work eight hours a day at any activity.

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<sup>1</sup> Appellant resigned from the employing establishment effective November 30, 1973.

<sup>2</sup> The Office authorized repair of the right shoulder rotator cuff which occurred on January 31 and July 10, 1974.

<sup>3</sup> Appellant received schedule awards for a total of 40 percent permanent loss of use of right arm.

<sup>4</sup> The year 1998 appears to be a typographical error and the correct date should be January 14, 1999.

In an April 13, 1999 report, Dr. James P. Emanuel, a second opinion Board-certified orthopedic surgeon, concluded that appellant was capable of greeting customers. He, however, indicated that appellant would be unable to perform any type of activity which required reaching or using her arms away from her body.

On July 29, 1999 the employing establishment offered appellant the position of desk clerk/greeter working four hours a day, in accordance with the medical restrictions outlined by Dr. Emanuel.

In a letter dated August 9, 1999, the Office advised appellant that she had been offered a position as a desk clerk/greeter with the employing establishment, which the Office found suitable to her work capabilities. The Office noted that the position remained available and advised appellant that she had 30 days from the date of the letter to either accept the position or provide an explanation for refusing it.

Appellant refused the position on September 7, 1999 on the basis that she was physically unable to perform any position.

On September 27, 1999 appellant was referred to Dr. Marvin Mishkin, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Winters and Dr. Emanuel on the issue of whether appellant was capable of working a limited-duty position with restrictions.

In a report dated October 18, 1999, Dr. Mishkin concluded that appellant was capable of working as a desk clerk/greeter but not on a full-time basis. His work tolerance limitations indicated that appellant could work two to four hours a day.

On November 19, 1999 the Office advised appellant that she had been offered a position as a desk clerk/greeter with the employing establishment, which the Office found suitable to her work capabilities. The Office noted that the position remained available and advised appellant that she had 30 days from the date of the letter to either accept the position or provide an explanation for refusing it.

By decision dated January 18, 2000, the Office terminated appellant's compensation benefits on the grounds that she failed to accept an offer of suitable work as a desk clerk/greeter. In a letter dated February 1, 2000, appellant requested a hearing.

By decision dated June 14, 2000, the hearing representative set aside the January 18, 2000 decision and remanded for the Office to obtain clarification from Dr. Mishkin on the issue of whether appellant is capable of working 20 hours a week as a desk clerk.

On July 31, 2000 Dr. Mishkin checked "yes" that he had reviewed the position of desk clerk and that appellant was capable of performing the duties of this position four hours a day, five days a week.

On August 21, 2000 the employing establishment offered appellant the position of desk clerk/greeter working four hours a day.

By letter dated August 22, 2000, the Office noted that appellant had been offered the position of desk clerk/greeter by the employing establishment which was found to be suitable to her capabilities. The Office informed appellant that she had 30 days from the date of the letter to accept the offered position or provide an adequate explanation for refusing the position. The Office advised appellant of the penalty provision of 5 U.S.C. § 8106.

On September 18, 2000 appellant refused to accept the position offered on the basis that she did not have the physical capability to perform the position.

By letter dated September 22, 2000, the Office informed appellant that her reason for refusing the offered position was found not to be justified. The Office advised appellant that she had 15 days to accept the position and that no additional reasons for refusing the position would be accepted. She did not respond.

By decision dated October 11, 2000, the Office finalized the termination of appellant's compensation on the basis that she refused an offer of a suitable job.

In a letter dated November 2, 2000, appellant requested a hearing before an Office hearings representative.

By decision dated August 31, 2001, an Office hearing representative affirmed the October 11, 2000 decision terminating appellant's benefits for refusing a suitable job. The Office hearing representative found that appellant was offered a light-duty position within the work restrictions set forth by Dr. Mishkin, the impartial medical examiner and that her reasons for refusing such work were unacceptable.

Appellant requested reconsideration in a letter dated September 6, 2002. By decision dated October 24, 2002, the Office denied appellant's reconsideration request as untimely filed and found that the evidence submitted presented no clear evidence of error on the part of the Office.

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

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.<sup>5</sup> As appellant filed her appeal on January 14, 2003 the only decision over which the Board has jurisdiction on this appeal is the October 24, 2002 decision, denying appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act<sup>6</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>7</sup> This section vests the Office with

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<sup>5</sup> See 20 C.F.R. § 501.3(d).

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

discretionary authority to determine whether it will review an award for or against compensation.<sup>8</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>9</sup> 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.<sup>10</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>11</sup>

In this case, appellant's letter requesting reconsideration is dated September 6, 2002. The merit decision of the hearing representative is dated August 31, 2001. Since appellant's request for reconsideration was made more than one year after the Office decision, it is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision, upon presentation of new evidence that the decision was erroneous.<sup>12</sup> In accordance with this holding, 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(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>13</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>14</sup> The evidence must be positive, precise, explicit and must be manifest on its face that the Office committed an error.<sup>15</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>16</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>17</sup> This entails a limited review by the Office of

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<sup>8</sup> Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

<sup>9</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606.

<sup>10</sup> 20 C.F.R. § 10.607(a).

<sup>11</sup> *See Leon D. Faidley, Jr., supra* note 7.

<sup>12</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (February 2002); *see also* 20 C.F.R. § 10.607(b).

<sup>14</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>15</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>16</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>17</sup> *See Leona N. Travis, supra* note 15.

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.<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup>

The Board further finds that the evidence submitted by appellant, in support of her request, does not raise a substantial question as to the correctness of the Office's August 31, 2001 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In this regard, the Board finds that the undated letter by Dr. L.J. Plunkett, Jr., an attending Board-certified family practitioner, who concluded that appellant was totally disabled is insufficient to support her burden of proof. He failed to provide any rationale explaining why appellant continued to be totally disabled due to her accepted employment injury or why she was incapable of performing the duties of the offered position. Thus, it cannot be said that this report raises a substantial question as to the correctness of the Office's prior decisions.<sup>21</sup>

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's August 31, 2001 decision, she has failed to establish clear evidence of error. Therefore, the Office did not abuse its discretion in denying a merit review of her claim.

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<sup>18</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>19</sup> *Leon D. Faidley, Jr.*, *supra* note 7.

<sup>20</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>21</sup> See *Theron J. Barham*, 34 ECAB 1070 (1983) (where the Board found that a vague and unrationalized medical opinion on causal relationship had little probative value).

The decision dated October 24, 2002 of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
July 2, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member