

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERRILL L. ROSS and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 03-1309; Submitted on the Record;
Issued July 10, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's January 28, 2003 request for reconsideration was untimely and failed to show clear evidence of error.

The case was before the Board on a prior appeal.¹ The Board noted that, by decision dated December 31, 1998, the Office terminated appellant's compensation on the grounds that she had refused an offer of suitable work as a limited-duty carrier. The Office denied modification by decision dated June 29, 1999. Appellant then submitted requests for reconsideration, which were denied without merit review of the case in decisions dated October 19, 1999 and July 5, 2000. The Board reviewed the nonmerit decisions and found that appellant had not submitted sufficient evidence to require reopening the claim for merit review under section 8128(a) of the Federal Employees' Compensation Act.

In a letter dated January 28, 2003, appellant again requested reconsideration of her claim. Appellant submitted additional medical evidence, including treatment notes from an attending physician, Dr. Carleton West.

By decision dated March 26, 2003, the Office determined that appellant's request for reconsideration was untimely. The Office denied the request for reconsideration on the grounds that it failed to show clear evidence of error.

The Board finds that the Office properly determined that appellant's January 28, 2003 request for reconsideration was untimely and failed to show clear evidence of error.

¹ Docket No. 00-2569 (issued June 25, 2001).

Section 8128(a) of the Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ 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.⁶ 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).⁷

The last decision on the merits of the claim in this case was dated June 29, 1999. Appellant requested reconsideration by letter dated January 28, 2003. Since this is more than one year after the June 29, 1999 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.⁸ In accordance with this holding, the Office has stated in its procedure manual that it 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 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."

⁵ 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) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

⁶ 20 C.F.R. § 10.607(a).

⁷ *See Leon D. Faidley, Jr.*, *supra* note 3.

⁸ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹⁰ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

In the present case, the employing establishment had offered appellant the position of limited-duty carrier in November 1998; appellant refused the offer on the grounds that the job duties were not within her physical restrictions. The January 28, 2003 request for reconsideration included additional evidence from Dr. West regarding appellant's knee condition. In a treatment note dated October 31, 2000, for example, Dr. West indicated that appellant had been involved in a motor vehicle accident in March 2000 and he diagnosed acute left knee contusion superimposed upon old, chronic internal derangement left knee problem. The relevant medical issue is whether the offered position was medically suitable; in other words, whether appellant was capable of performing the duties of the offered position. Dr. West does not discuss appellant's condition prior to the termination decision on December 31, 1998 or otherwise provide a probative medical opinion on the relevant issue. In a note dated December 6, 2002, Dr. West indicated that appellant continued to have intermittent recurrences of back and left knee pain that he felt was a manifestation of her underlying problems as a result of employment injuries. He does not discuss the offered position or appellant's ability to perform the position at that time. None of the evidence submitted addresses the relevant issues and is therefore of diminished probative value.

The clear evidence of error standard is a difficult standard to meet, requiring evidence of such probative value that it *prima facie* shifts the weight of the evidence in favor of appellant. The evidence submitted in this case is clearly not sufficient to establish clear evidence of error in the termination of appellant's compensation.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The decision of the Office of Workers' Compensation Programs dated March 26, 2003 is affirmed.

Dated, Washington, DC
July 10, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member