

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TAMMY Y. THURMOND and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 03-465; Submitted on the Record;
Issued June 24, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's October 17, 2001 request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On August 12, 1998 appellant, then a 31-year-old mailhandler, filed a traumatic injury claim indicating that she sustained a fractured left toe on August 7, 1998, when a forklift ran over her foot. Appellant stopped work on August 7, 1998. The Office accepted appellant's claim for a fracture of the left great toe and a puncture wound of the right foot. Additionally, the Office authorized surgical repair of appellant's left fractured toe. On November 1, 1998 appellant resumed work in a light-duty sedentary position.

In a decision dated October 4, 1999, the Office terminated appellant's benefits on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from her August 7, 1998 employment injury.¹ The Office also found that as appellant had no residuals from her injury, she was not entitled to an award for permanent or partial impairment.² The Office based its determination on the February 9, 1999 report of Dr. Charles W. Mercier, a Board-certified orthopedist and Office referral physician. He found that appellant had reached maximum medical improvement, required no further medical treatment and could return to work without restrictions.

Appellant requested a hearing and in a decision dated February 11, 2000, the Office hearing representative reversed the October 4, 1999 decision terminating benefits. The hearing representative found that there was an unresolved conflict of medical opinion between the Office referral physician, Dr. Mercier, and appellant's treating physician, Dr. Mitchell L. Goldflies, a

¹ On July 16, 1999 the Office issued a notice of proposed termination of benefits.

² Appellant filed a claim for a schedule award on June 23, 1999.

Board-certified orthopedist. The case was remanded to the Office for further medical development.

The Office referred appellant to Dr. George Holmes, a Board-certified orthopedic surgeon and impartial medical examiner. In a report dated May 10, 2000, he indicated that appellant reached maximum medical improvement on February 9, 2000, had no residuals of her work injury and was capable of working without restrictions.

In a decision dated May 11, 2000, the Office terminated appellant's benefits on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from her August 7, 1998 employment injury after February 9, 2000. The Office also found that as appellant had no residuals from her injury, she was not entitled to a schedule award for permanent partial impairment.

On October 12, 2000 appellant requested an oral hearing. The Office in a decision dated January 22, 2001, denied appellant's request as untimely. The hearing representative found that the issues in the case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

By letter dated October 17, 2001, appellant requested reconsideration. She indicated that she had been experiencing tremendous pain, swelling and numbness in the affected areas. Appellant further noted that she disagreed with the impartial medical examiner's determination. However, she did not submit any additional medical evidence with her October 17, 2001 request for reconsideration.

By decision dated December 28, 2001, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

The Board finds that the Office properly determined that appellant's October 17, 2001 request for reconsideration was untimely filed and she failed to demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁶ One such limitation is that the application for

³ 5 U.S.C. § 8128(a).

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 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 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607 (1999).

reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁷

In this case, the one-year time limitation began to run the day the Office issued its May 11, 2000 decision, as this was the last merit decision in the case.⁸ As appellant's request for reconsideration was dated October 17, 2001, her request was not timely filed within one year of May 11, 2000.

In those instances, when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office in its "most recent merit decision."⁹ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹¹ The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.¹² Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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

Appellant did not submit any additional medical evidence with her October 17, 2001 request for reconsideration. She only submitted a statement indicating that she had been experiencing tremendous pain, swelling and numbness in the affected areas. Appellant also noted her disagreement with the impartial medical examiner's May 10, 2000 findings. Her allegation of ongoing symptoms and her stated disagreement with the impartial medical examiner's findings are insufficient to establish clear evidence of error on the part of the Office in issuing the May 11, 2000 decision terminating benefits. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

⁷ 20 C.F.R § 10.607(a) (1999).

⁸ See *Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

⁹ 20 C.F.R § 10.607(b) (1999).

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

The December 28, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 24, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member