

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JANICE M. HATCHER and U.S. POSTAL SERVICE,  
POST OFFICE, Houston, TX

*Docket No. 03-1611; Submitted on the Record;  
Issued October 20, 2003*

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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 request for reconsideration on the grounds that her request was untimely filed and failed to show clear evidence of error.

The only decision before the Board on this appeal is the Office's March 5, 2003 decision denying appellant's request for reconsideration of her case on its merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the issuance of the Office's May 1, 1995 merit decision terminating appellant's compensation effective February 28, 1995, and June 7, 2003, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the May 1, 1995 decision.<sup>1</sup>

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 OWCP erroneously applied or interpreted a specific point of law;
  - (ii) Advances a relevant legal argument not previously considered by OWCP; or

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> The evidence has to be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>7</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>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</sup> 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.<sup>10</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>11</sup> 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.<sup>12</sup>

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<sup>2</sup> 20 C.F.R. § 10.606(b)(1), (2).

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> *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).

<sup>5</sup> See 20 C.F.R. § 10.608(b).

<sup>6</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>9</sup> See *Leona N. Travis*, *supra* note 7.

<sup>10</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

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

In its March 5, 2003 decision, the Office properly determined that appellant failed to file a timely request for reconsideration. The Office rendered its last merit decision on May 1, 1995 and appellant's request for reconsideration was postmarked June 7, 2003, which was more than one year after May 1, 1995. Therefore appellant's request for reconsideration was untimely filed.

In support of her reconsideration request, appellant submitted a detailed argument on why her file should be reopened, why her claim for recurrence of disability should be accepted, and why she was entitled to a schedule award.<sup>13</sup> Appellant claimed that she was never given a limited-duty position, that she was never redirected to work on the first floor, and that her medical condition had deteriorated over 14 years.

Appellant also submitted a copy of a Form CA-7 claim for compensation dated August 31, 2001, a Form CA-2a claim for recurrence dated September 27, 1994, a copy of her original claim October 19, 1993 form, and an August 20, 2001 report from Dr. Thaddeus W. Hume, a Board-certified orthopedic surgeon, who stated that appellant had been under his care for a number of years, that she had had arthroscopic surgery for a torn meniscus, and that she had aggravated her degenerative joint disease. He noted that her arthritis had progressed over the years, that her job required that she stand and walk frequently which had aggravated her arthritis of both knees, and that she had developed severe degenerative osteoarthritis in her knees which significantly impaired her ability to stand and walk. Dr. Hume opined that appellant's condition was progressive and permanent.

The Office conducted a limited review of this evidence and determined that appellant's statement identifying activities and physical problems did not establish clear evidence of error in the May 1, 1995 decision. The Office noted that no recurrence of injury had been accepted as being employment-related such that she would be entitled to compensation, and that the medical evidence merely supported that she had severe degenerative osteoarthritis of both knees.

The Board finds that the statement, the claim forms, and the medical report did not establish clear evidence of error in the May 1, 1995 decision. This evidence indicates that appellant received medical treatment for arthritic complaints. This evidence is not sufficient to demonstrate that appellant continued to be disabled due to her October 19, 1993 right knee contusion and aggravation of degenerative joint disease, on or after February 28, 1995.

No clear evidence of error on the part of the Office was identified. The Office, therefore, found that this evidence was not pertinent and was irrelevant to the issue of the Office's May 1, 1995 merit decision.

The evidence is also immaterial as the medical report from Dr. Hume diagnosed severe osteoarthritis of both knees that was aggravated by standing and walking, but provided no rationale relating this condition to appellant's accepted employment injuries. As this report is unrationalized and does not provide any medical discussion of appellant's accepted work-related conditions, it is insufficient to establish clear evidence of error. The Board consequently finds

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<sup>13</sup> Appellant's claim had been accepted for on October 19, 1993 right knee contusion and later accepted for aggravation of degenerative joint disease.

that the Office did not abuse its discretion in denying further review of appellant's case on its merits.

The decision of the Office of Workers' Compensation Programs dated March 5, 2003 is hereby affirmed.

Dated, Washington, DC  
October 20, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member