

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNETTA BAYLESS and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, TX

*Docket No. 03-775; Submitted on the Record;
Issued September 24, 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 determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Appellant, a 56-year-old manual distribution clerk, filed a Form CA-2 claim for benefits on July 10, 2000, alleging that she sustained left carpal tunnel syndrome causally related to factors of her employment. She noted that the claim was not filed within 30 days after December 4, 1990, the date she stated that she first realized her alleged left carpal tunnel syndrome was causally related to her federal employment. Appellant explained that she had been preoccupied at that time with a claim based on right carpal tunnel syndrome, which was filed in October 1995 but was not accepted by the Office until March 1998.

By decision dated February 28, 2001, the Office denied her claim, finding that her claim, based on an alleged left carpal tunnel condition, was not filed in a timely manner pursuant to section 8122.¹ The Office noted that appellant's last exposure to employment factors was on August 25, 1989, she became aware of a relationship between the claimed condition and her employment on December 4, 1990 and the evidence of record did not support a finding that her immediate superior had actual knowledge of the injury within 30 days of the date of injury. By letter dated March 26, 2001, appellant requested an oral hearing, which was held on July 19, 2001. By decision dated October 3, 2001, an Office hearing representative affirmed the previous Office decision.

¹ 5 U.S.C § 8122 provides that an original claim for compensation of disability or death must be filed within three years after the injury or death unless the immediate supervisor had actual knowledge of the injury within 30 days. In a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware or by the exercise of reasonable diligence should have been aware of the causal relationship of the compensable disability to his employment. *See Delmont J. Thompson*, 51 ECAB 155 (1999).

By letter dated October 22, 2002, appellant requested reconsideration of the October 3, 2001 Office decision. She stated in her letter that her left carpal tunnel syndrome was a latent injury for which she inadvertently failed to provide the proper paperwork and documentation for the first few years following its occurrence. Appellant advised that she originally sustained right carpal tunnel syndrome in May 1989, for which she had initially filed a Form CA-1. When she was subsequently advised by the Office that her condition was an occupational disease which required her to file a Form CA-2, she filed a claim for right carpal tunnel syndrome on October 24, 1995, but also noted on the claim form that the repetitive motion which caused the right carpal syndrome also affected her left hand, wrist, arm and shoulder. Appellant also claimed that she had informed someone in authority that she had sustained left carpal tunnel syndrome, a fact which was indicated in her file, but that she was unable to obtain the relevant documentation from the employing establishment. She attached a copy of the Form CA-2 dated October 24, 1995 with her letter. Appellant did not submit any additional medical evidence with her request.

By decision dated October 28, 2002, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit evidence sufficient to establish clear evidence of error. The Office, therefore, denied her request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle an employee to a review of an Office decision as a matter of right.³ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

The Office, through its regulation, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ As one such limitation, the Office has stated

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 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 a review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

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.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁶

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on October 3, 2001. Appellant requested reconsideration on October 22, 2002; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁷ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹⁰ Evidence which 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 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.¹³ 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's decision.¹⁴ The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the

⁵ 20 C.F.R. § 10.607(b).

⁶ See cases cited *supra* note 2.

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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 3.

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

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr.* *supra* note 3.

part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.¹⁵

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.¹⁶ In this case, appellant filed her request for an appeal on February 3, 2003, which was more than one year after the Office's October 3, 2001 merit decision denying her claim based on untimeliness. Thus, the only decision before the Board is the October 28, 2002 decision denying her request for reconsideration.

The Board finds that appellant's October 22, 2002 request for reconsideration failed to show clear evidence of error. She did not submit any medical opinion evidence with her request. In addition, appellant did not present any evidence of error in her request letter. She admitted, in her July 10, 2000 Form CA-2, that she became aware that her alleged left carpal tunnel syndrome was causally related to employment factors as of December 4, 1990; however, the record reflects that she waited 10 years before she actually filed a claim. Appellant argued in her request letter that she did not file a claim for compensation because, at first, she inadvertently filed a Form CA-1 for benefits based on traumatic injury instead of a Form CA-2 for occupational disease, which she did not file until October 24, 1995; this claim was processed for right carpal tunnel syndrome only, which appellant became aware of prior to feeling pain in her left side. She also alleged that she was unable to process a claim for left carpal tunnel syndrome because she was unable to obtain documentation from the employing establishment indicating that she had informed management of her condition in a timely manner and because she was preoccupied with her claim for right carpal tunnel syndrome at that time. Although the October 24, 1995 Form CA-2 appellant included with her request does contain a reference to the effect repetitive motion was having on both her right and left upper extremities, this is not sufficient to demonstrate any error on the part of the Office. Consequently, appellant has not met her burden to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁶ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

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

Dated, Washington, DC
September 24, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member