

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. WELLINGTON and DEPARTMENT OF THE ARMY,
AVIATION & MISSILE COMMAND, Redstone Arsenal, AL

*Docket No. 03-1794; Submitted on the Record;
Issued September 9, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error.

This is the second appeal of this case before the Board. Appellant, a 39-year-old supply clerk, filed a claim for benefits on February 18, 2000, alleging that she injured her lower back on September 3, 1999 while bending over to pick up a box. By decision dated April 27, 2000, the Office denied appellant's claim, finding that she failed to establish fact of injury. In a nonmerit decision dated July 31, 2000, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision. In a decision dated September 27, 2001,¹ the Board affirmed the April 27 and July 31, 2000 Office decisions.

In a letter received by the Office on February 5, 2003, appellant's attorney requested reconsideration. Appellant submitted a magnetic resonance imaging (MRI) scan dated June 23, 2000; a July 3, 2001 treatment report from Dr. Larry M. Parker, a Board-certified orthopedic surgeon and numerous treatment notes from 1999 through 2001.

By decision dated April 10, 2003, the Office denied reconsideration, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error.

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.

¹ Docket No. 01-181 (issued September 27, 2001).

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 regulations, 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 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 granted 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 Board issued a decision in this case on September 27, 2001. This was the last merit decision in this case. Appellant requested reconsideration on February 5, 2003; therefore, appellant's reconsideration request was 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-

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

⁵ 20 C.F.R. § 10.607(b).

⁶ *See Leon D. Faidley, Jr.*, *supra* note 3; *Rex L. Weaver*, 44 ECAB 535, 537 (1993).

⁷ *See Weaver*, *supra* note 6.

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

The Board finds that appellant's February 5, 2003 request for reconsideration failed to show clear evidence of error. The Office reviewed the evidence she submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant.

The report from Dr. Parker merely stated findings on examination and noted appellant's complaints of low back pain. Dr. Parker did not indicate whether appellant's current low back condition was causally related to her 1999 work incident. The other treatment records submitted likewise recount appellant's complaints, but offer no medical rationale explaining causal relationship between appellant's alleged work injury and the diagnosed conditions. The lack of rationalized medical evidence establishing causal relationship was the basis for the denial of appellant's claim. The evidence submitted in February 2003 in support of the request for reconsideration does not establish clear evidence of error.

Moreover, appellant did not present any evidence of legal error in her request letter. Appellant's representative restates appellant's history of alleged injury, but offered no evidence

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.

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

of error in the denial of appellant's claim. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The decision of the Office of Workers' Compensation Programs dated April 10, 2003 is hereby affirmed.

Dated, Washington, DC
September 9, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member