

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSIE M. HARRIS and U.S. POSTAL SERVICE,
MARINA MAIL PROCESSING CENTER, Marina Del Ray, CA

*Docket No. 03-1683; Submitted on the Record;
Issued February 25, 2004*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) in its July 17, 2002 decision; and (2) whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error in its January 21, 2003 decision.

On September 26, 1991 appellant, then a 49-year-old mail handler, filed an occupational disease claim alleging that she first became aware of her carpal tunnel syndrome of the right wrist and a cervical spine spasm on September 12, 1991. Appellant alleged that she first realized that her conditions were caused or aggravated by her federal employment on September 23, 1991. She stopped work on September 26, 1991.

On January 13, 1992 the Office accepted appellant's claim for right hand extensor tendinitis. The Office subsequently expanded the acceptance of her claim to include aggravation of cervical disc disease.

On January 10, 1994 appellant returned to work as a rehabilitated mail handler. By decision dated June 30, 1994, the Office found that appellant's actual wages as a modified mail handler fairly and reasonably represented her wage-earning capacity.

On June 24, 2000 appellant stopped work due to a nonemployment-related cardiac condition. She underwent triple vessel bypass surgery on July 7, 2000. Appellant filed several claims for compensation for the period September 18, 2000 through January 11, 2001 based on her cardiac condition.

By decision dated February 7, 2001, the Office denied appellant's claims on the grounds that her temporary total disability during the claimed period was due to a nonemployment-related cardiac condition. In an undated letter received by the Office on July 20, 2001, she requested reconsideration. Appellant contended that she was entitled to compensation for three days a

week because she was receiving such compensation beginning in July 1999 until she was awarded a schedule award covering the period March 1 through September 14, 2000. She stated that she did not file claims for compensation for the heart surgery she underwent on July 7, 2000 because it was not related to her accepted employment injury.

Appellant's request was accompanied by medical reports from Dr. Roy H. Simon, Board-certified in anesthesiology and pain management, addressing her disability for work due to her heart surgery and ability to work two days a week. She submitted correspondence from the Office indicating that she was not entitled to receive compensation for leave without pay due to her heart surgery while receiving compensation pursuant to a schedule award because it was not related to her accepted employment injury. Appellant also submitted the Office's February 7, 2001 decision and correspondence from the employing establishment providing a work schedule for two days a week.

In an August 23, 2001 decision, the Office denied appellant's request for reconsideration of her claim on the grounds that the evidence submitted was irrelevant and immaterial in nature, and, thus, insufficient to warrant review of its prior decision. Subsequent to the Office's decision, the Office received medical reports from Dr. William H. Dillin, a Board-certified orthopedic surgeon and appellant's treating physician, and Edgar G. Hussain, a physical therapist, regarding appellant's cervical spine and medical treatment.

By letter dated February 4, 2002 and received by the Office on April 18, 2002, appellant requested reconsideration contending that an accompanying rationalized medical report from Dr. Dillin was sufficient to establish that she was only capable of working two days a week. The Office received an additional medical report from Dr. Dillin and a report from Dr. Ralph A. Gambardella, a Board-certified orthopedic surgeon, regarding appellant's cervical spine and medical treatment.

By decision dated July 17, 2002, the Office found that appellant's request for reconsideration was timely filed but denied her request for a merit review of her claim on the grounds that the evidence submitted was cumulative in nature and, thus, insufficient to warrant review of its prior decision. In a letter dated October 5, 2002, appellant requested reconsideration reiterating that she was entitled to compensation for three days a week accompanied by duplicate evidence, correspondence from the Office regarding her schedule award and the employing establishment concerning her modified mail handler position, a disability certificate from Dr. Christakis Christodoulou, a Board-certified internist and an insurance claim form.

By decision dated January 21, 2003, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed within the one-year time limitation and failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a) in its July 17, 2002 decision.¹

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.³ 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 reconsideration within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

In her February 4, 2002 request for reconsideration, appellant argued that she was entitled to compensation for three days because she was receiving wage-loss compensation until the Office granted her a schedule award and prior to her heart surgery on July 7, 2000. The Office, however, previously considered and rejected appellant's argument. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁵ Thus, appellant's contention is repetitious and insufficient to require a reopening of the case for a merit review.

In support of her request for reconsideration, appellant submitted Dr. Dillin's August 6, September 17 and November 12, 2001 and January 21, April 9 and June 21, 2002 medical reports finding that she had cervical degenerative disc disease and cervical myofascial syndrome. Dr. Dillin noted that appellant worked two days a week and stated that she could continue to work with the restriction of no heavy lifting. Appellant also submitted Dr. Gambardella's May 1, 2002 report revealing that she could work with the restriction of no heavy lifting. The reports of Drs. Dillin and Gambardella are irrelevant because they failed to address the relevant issue in this case, whether appellant was disabled for work during the period September 18, 2000 through January 11, 2001 due to her September 12, 1991 employment injury.

¹ As appellant filed her appeal on June 23, 2003, the Board has jurisdiction to review the January 21, 2003 and July 17, 2002 denials of reconsideration. As more than one year elapsed between the filing of the appeal and the last merit decision of February 7, 2001, the Board does not have jurisdiction over the merits of the case. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

² 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(1)-(2).

⁴ *Id.* at § 10.607(a).

⁵ *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

The treatment notes of Mr. Hussain, appellant's physical therapist, are of no probative value as a physical therapist is not considered to be a "physician" under the Act and, therefore, is not competent to give a medical opinion.⁶

Accordingly, the Board finds that appellant did not raise any substantive legal questions, and failed to submit any relevant and pertinent new evidence not previously reviewed by the Office. The Office properly denied the claim for review of the merits in its July 17, 2002 decision.

The Board further finds that the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) on the grounds that it was not timely filed and failed to present clear evidence of error in its January 21, 2003 decision.

Section 8128(a) of the Act⁷ does not entitle a claimant to a review of an Office decision as a matter of right.⁸ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.⁹ 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).¹⁰

In denying appellant's October 5, 2002 request for reconsideration, the Office properly determined that appellant failed to file a timely request for reconsideration. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹¹ The last merit decision in this case was issued on February 7, 2001 denying appellant's claim for compensation for the period September 18, 2000 through January 11, 2001. Appellant's October 5, 2002 request for reconsideration was made more than one year later. The Board finds that appellant's request for reconsideration was untimely filed.

Section 10.607(a) is unequivocal in setting forth the time limitation period and does not indicate that late filing may be excused by extenuating circumstances. The Office properly determined that appellant failed to file a timely application for review.

⁶ 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

⁷ 5 U.S.C. § 8128(a).

⁸ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *See cases cited supra* note 7.

¹¹ *Larry L. Litton*, 44 ECAB 243 (1992).

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is a clear evidence of error pursuant to the untimely request.¹² Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹⁴ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

The issue for purposes of establishing clear evidence of error in this case is whether appellant has established an error in the Office's February 7, 2001 determination that she was not entitled to compensation for the period September 18 through January 11, 2001.

As previously found, appellant's argument that she is entitled to compensation for three days was previously considered by the Office and, thus, insufficient to warrant a merit review of the claim. Similarly, Dr. Dillin's September 17, 2001 report and Dr. Simon's June 8, 1999 work capacity evaluation indicating that appellant could work two days a week with certain physical

¹² *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996); *see also* 20 C.F.R. § 10.607(b).

¹⁴ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁵ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ *Jesus D. Sanchez*, *supra* note 8.

¹⁷ *Leona N. Travis*, *supra* note 15.

¹⁸ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁹ *Leon D. Faidley, Jr.*, *supra* note 8.

²⁰ *Gregory Griffin*, *supra* note 12.

restrictions, which were submitted by appellant in support of her untimely request for reconsideration, are insufficient to warrant a merit review of the claim as they were previously of record and considered by the Office.²¹

Appellant submitted documents regarding the employing establishment's job offer for the position of modified mail handler, a copy of a description of the offered position and an insurance claim form. She also submitted Dr. Christodoulou's July 26, 2000 disability certificate finding that appellant was totally disabled for work from June 24 through October 1, 2000 due to her heart surgery. This evidence is irrelevant in establishing clear evidence of error on the part of the Office because it did not address whether appellant was disabled during the claimed period due to her accepted employment injury.

Similarly, the Office's March 9, 2000 decision granting appellant a schedule award for an additional nine percent permanent impairment of her right upper extremity is irrelevant in establishing clear evidence of error on the part of the Office inasmuch as the Office's February 7, 2001 decision addressed disability and not permanent impairment. Appellant has not submitted any evidence raising a substantial question as to the correctness of the Office's February 7, 2001 decision. The evidence submitted does not establish clear evidence of error such that the Office improperly denied further merit review of the claim.

The January 21, 2003 and July 17, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
February 25, 2004

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

²¹ See cases cited *supra* note 5.