

**United States Department of Labor
Employees' Compensation Appeals Board**

AUGUSTA ANN KIRK, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Toledo, OH, Employer**

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**Docket No. 03-2088
Issued: January 26, 2004**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On August 25, 2003 appellant filed a timely appeal from the nonmerit decision of the Office of Workers' Compensation Programs dated July 1, 2003. Because more than one year has elapsed between the last merit decision, the Office's July 15, 1999 decision and the filing of this appeal on August 25, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

This is the fourth appeal in the present case. In the first appeal,¹ the Board issued a decision on October 2, 1998 in which it affirmed the October 1, 1996 decision of the Office on the grounds that appellant had not met her burden of proof to establish that she sustained a recurrence of disability on or after June 3, 1993 causally related to her April 7, 1993 employment injury.² In the second appeal,³ the Board issued a decision on January 2, 2001 in which it affirmed the July 15, 1999 decision of the Office on the grounds that appellant still had not established that she sustained a recurrence of disability on or after June 3, 1993 causally related to her April 7, 1993 employment injury. In these decisions, the Board found that the medical reports of record, including the reports of Dr. Ted Barber, an attending Board-certified neurologist, were not sufficient to establish appellant's claim. In the third appeal,⁴ the Board issued a decision on May 23, 2002 in which it affirmed the April 27 and June 28, 2001 decisions of the Office on the grounds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). The facts and circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

By letter dated April 5, 2003, appellant again requested reconsideration of her claim. In support of her request, appellant submitted a February 19, 2003 report in which Dr. Barber stated that appellant's "present problem of back pain is proximately related" to the April 7, 1993 employment injury. He noted that appellant reported no pain prior to April 7, 1993 and consistently complained of the same pain after that date and related it to the April 7, 1993 injury. In a report dated March 19, 2003, Dr. Barber stated that appellant had sciatica, with aggravation by movement, confirmed by a September 11, 2002 computerized tomography (CT) scan, which caused pain in her back and lower extremities. He noted that appellant did not have such pain prior to April 7, 1993, but had it after that date. Dr. Barber indicated that the April 7, 1993 injury was "the direct cause of the sciatica." Appellant also submitted a copy of the September 11, 2002 CT scan which showed facet arthrosis at L1-2, L4-5 and L5-S1.

¹ Docket No. 97-631 (issued October 2, 1998).

² On April 7, 1993 appellant, then a 51-year-old letter carrier, sustained an employment-related acute lumbosacral strain and a right knee strain. Appellant began working in a limited-duty position for the employing establishment after April 7, 1993. She stopped work and was terminated from the employing establishment effective June 3, 1993. Appellant alleged that she sustained a recurrence of disability on June 3, 1993 causally related to her April 7, 1993 employment injury.

³ Docket No. 99-2541 (issued January 2, 2001).

⁴ Docket No. 01-2130 (issued May 23, 2002).

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁵ 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.⁶ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.⁷ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁸

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁹ Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹² Evidence which 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 This entails a limited review by the Office of how the

⁵ 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).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁹ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

¹¹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹² *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

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.¹⁵ 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.¹⁶

ANALYSIS

In its July 1, 2003 decision, the Office properly determined that appellant failed to file an untimely application for review. The Office rendered its last merit decision on July 15, 1999 and appellant's request for reconsideration was dated April 5, 2003, more than one year after July 15, 1999.

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decisions were in error.

In support of her untimely reconsideration request, appellant submitted a February 19, 2003 report in which Dr. Barber, an attending Board-certified neurologist, stated that her "back pain" was related to the April 7, 1993 employment injury because she reported no pain prior to April 7, 1993 and consistently complained of the same pain after that date and related it to the April 7, 1993 injury. However, this report would not show that the Office erred when it denied appellant's claim that she sustained an employment-related recurrence of disability on or after June 3, 1993 because it lacks relevance due to the fact that it does not contain an opinion that appellant was unable to perform her limited-duty position when she stopped work. Moreover, Dr. Barber's opinion is merely based on appellant's complaints of pain.¹⁷ In a report dated March 19, 2003, Dr. Barber stated that appellant had sciatica, confirmed by a September 11, 2002 CT scan, which caused pain in her back and lower extremities and asserted that it was caused by the April 7, 1993 injury. He again stated that appellant did not have pain prior to April 7, 1993, but had it after that date. This report would not show clear evidence of error because it has not been accepted that appellant sustained work-related sciatica and the report also does not show that appellant was unable to perform her limited-duty position.¹⁸ The Board

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 8.

¹⁷ The Board has held that the fact that a condition manifests itself or worsens during a period of employment or that work activities produce symptoms revelatory of an underlying condition does not raise an inference of causal relationship between a claimed condition and employment factors. *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹⁸ Appellant also submitted a copy of the September 11, 2002 CT scan, but the report does not provide any opinion on the cause of appellant's condition.

therefore finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decisions and is insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her application for review was not timely filed and failed to present clear evidence of error. The reports of Dr. Barber submitted by appellant did not show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member