

FACTUAL HISTORY

On August 30, 1973 appellant, then a 38-year-old substitute clerk, filed a traumatic injury claim alleging that she injured her back while pushing a rack in the performance of her federal duties. The claim was accepted for a lumbosacral strain. Appellant received wage-loss compensation until January 9, 1996 after it was determined that appellant no longer had residuals of the accepted injury. Her compensation was terminated, based upon the report of an impartial medical examiner, Dr. Bender.

This case previously has been before the Board. In a May 29, 2002 decision, the Board found that the Office had not abused its discretion in denying appellant a merit review as her request for reconsideration was untimely and failed to present clear evidence of error.² The last merit review in this case was a denial of modification on April 22, 1997.

In a May 28, 2003 letter, appellant, through her representative, requested reconsideration and submitted medical records from the Wright Patterson Air Force Base Medical Center spanning many office visits from 1998 onward for a variety of medical conditions including flu, bronchitis, knee pain and back pain. Appellant also submitted a new report from appellant's treating physician, Dr. Steve Wunder, an orthopedist. In his May 15, 2003 report, Dr. Wunder reviewed appellant's medical history and stated that she remained disabled due to chronic low back syndrome. He added that he believed that appellant had chronic lumbosacral strain and that appellant's work injury led to some degree of arthritis and scoliosis.

In an August 21, 2003 decision, the Office denied appellant a merit review finding that appellant's request was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ 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.⁴ 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.⁵ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁶ The Board has found

² Docket No. 01-1300 (issued May 29, 2002).

³ 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).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

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.⁷

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, 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.”⁸ 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ 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....”

¹⁰ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ *See Leona N. Travis*, *supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 7.

¹⁶ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

ANALYSIS

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

In its August 21, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on April 22, 1997 and appellant's request for reconsideration was dated May 28, 2003, more than one year after April 22, 1997.

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 was insufficient to clearly show that the Office's prior decision was in error.

The Board 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 decision and is insufficient to demonstrate clear evidence of error.

The many medical progress notes from the Wright Patterson Air Force Base Internal Medicine Clinic chronicle appellant's medical complaints from 1998 onward. Many of these medical visits were for conditions such as the flu which had no possible relationship to her employment injury some 30 years previously. While some complaints of "back pain" were noted intermittently in these records, there is no rationalized medical opinion provided regarding the cause of the back pain or whether it caused disability. These unrationalized medical records are not sufficient to establish clear evidence of error in the Office's 1996 decision to terminate compensation benefits.

The May 15, 2003 report from Dr. Wunder essentially reviews her medical history. The Board notes initially that, while Dr. Wunder noted that appellant had chronic lumbosacral strain, he does not address how this condition is causally related to the accepted injury which occurred some 30 years earlier. Dr. Wunder did state that appellant remained disabled due to chronic low back syndrome and added that he believed appellant's work injury led to some degree of arthritis and scoliosis. This report is insufficient to meet the high standard of clear evidence of error. This report merely offers an opinion regarding appellant's current condition and causal relationship which is couched in indefinite and speculative terms. It does not clearly attribute appellant's condition to her accepted injury some 30 years earlier. Furthermore, Dr. Wunder's opinion does not address appellant's condition at the time of the 1996 termination. Dr. Wunder's report is clearly insufficient to establish clear evidence of error as it does not overcome the weight of the evidence given to the impartial medical examiner, Dr. Bender, who evaluated appellant contemporaneously with the termination of benefits.

CONCLUSION

The Office did not abuse its discretion in denying appellant a merit review as her request for reconsideration was untimely and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 21, 2003 decision by the Office of Workers' Compensation Programs is affirmed.

Issued: July 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member