

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

GLORIA J. THOMPSON, Appellant)
and) Docket No. 04-500
DEPARTMENT OF THE NAVY, NAVAL AIR) Issued: June 8, 2004
STATION, Jacksonville, FL, Employer)

)

Appearances:

*Gloria J. Thompson, pro se
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On December 9, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated October 17, 2003, denying reconsideration. The only decision before the Board on this appeal is the Office's October 17, 2003 decision denying his request for a review on the merits of its September 13, 2001 decision. Because more than one year has elapsed between the issuance of the Office's September 13, 2001 decision and December 9, 2003, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the September 13, 2001 decision.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for a 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.

¹ See 20 C.F.R. § 501.3(d)(2).

FACTUAL HISTORY

On February 1, 1999 appellant, then a 48-year-old medical record technician, filed a traumatic injury claim (Form CA-1), alleging that she injured her neck, back, shoulder and arm in the performance of her federal duties. The claim was accepted for sprain of the neck, thoracic region, lumbosacral, shoulder and arm. On March 1, 2000 appellant filed a recurrence claim related to shoulder pain that was denied in a June 6, 2000 decision. On June 6, 2000 the Office denied appellant's claim for recurrence of disability. On May 21, 2001 an Office hearing representative set aside the June 6, 2000 decision and remanded the case for further development of the medical evidence. Thereafter the Office again denied the recurrence claim by decision dated September 13, 2001. This case has been before the Board previously. In a March 12, 2003 decision, the Board affirmed a September 30, 2002 decision by the Office, finding that the evidence submitted was insufficient to warrant merit review of the claim. The facts and findings of the Board's decision are hereby incorporated by reference.²

In a September 6, 2003 letter, appellant requested reconsideration and noted that she underwent surgery to repair a rotator cuff tear on her right shoulder on February 25, 2003. In support of her request, she submitted the results of a June 28, 2002 magnetic resonance imaging (MRI) scan. The MRI revealed a tear of the supraspinatus tendon at its central insertion suggesting either a partial thickness tear or an obliquely oriented full thickness tear with a small amount of associated subacromial/subdeltoid bursal fluid. The MRI report also provided a history of a shoulder injury in April. The record also contains a July 29, 2002 report from Dr. James Gallentine, an orthopedist, who wrote that appellant was referred for right shoulder pain that dated back to a fall at work. He noted that she had trouble reaching over her head, sleeping on her side and difficulty reaching behind her head. Dr. Gallentine diagnosed supraspinatus tendon tear. Appellant also submitted the results of x-rays taken by Scripps South Bay Imaging Center on March 23, 2000 that include at C4-5, a fairly pronounced central disc protrusion effacing the ventral subarachoid space and touches the ventral aspect of the cord with no significant lateralization. No neural foraminal stenosis was detected.

In an October 17, 2003 decision, the Office denied reconsideration, finding that appellant's claim was not timely and failed to establish clear evidence of error. The Office also noted that the medical evidence submitted was duplicitous or failed to causally relate appellant's right shoulder condition to her accepted injury.

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 regulation 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) constitute relevant and

² Docket No. 03-207 (issued March 12, 2003). (The decision is not in the record, but is located in the docket section of the file)

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).

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 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

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 October 17, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision in this case was on September 13, 2001 and her request for reconsideration was dated September 6, 2003, more than one year after September 13, 2001.

The Office, however, may not deny an application for review solely on the ground 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

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).

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).

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

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 the case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his 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 decision was in error. Specifically, the Office found that the medical evidence failed to causally relate appellant's right shoulder condition to the February 1, 1999 accepted injury. In addition, the Office noted that the June 28, 2002 MRI scan report stated that appellant's shoulder injury was caused by an injury in April.

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. While the medical evidence appellant submitted establishes that she had a right shoulder condition, it does not causally relate her condition to the accepted injury or discuss a recurrence of disability. The September 13, 2001 decision denied appellant's claim for a recurrence of disability as of March 2000 and appellant did not submit evidence of such probative value that it demonstrated clear evidence of error in the Office's decision.

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).

CONCLUSION

The Office properly refused 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.

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 8, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member