

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BRENDA ALLEN and U.S. POSTAL SERVICE,  
POST OFFICE, St. Louis, IL

*Docket No. 01-1643; Submitted on the Record;  
Issued April 17, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated December 2, 1999 was untimely filed and failed to present clear evidence of error.

This is the fifth appeal in the present case. In a June 28, 1983 decision, the Board affirmed the Office's decision dated January 14, 1985. The Board found that the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.<sup>1</sup>

In a letter dated October 7, 1991, appellant requested reconsideration of the Office decision dated February 16, 1984. She indicated that she continued to experience residual pain from her work-related injury of December 2, 1970 injury which has caused her mental and emotional stress.

In a letter dated November 20, 1991, the Office notified appellant that in order to reopen her case for reconsideration she must identify the grounds upon which such request is made and submit relevant medical evidence or legal contentions not previously considered. The Office provided appellant 30 days within which to submit additional evidence.

In response to the Office's letter, appellant noted that she did not receive adequate medical treatment. She requested the Office to review previous medical evidence which was part of the record.

In a decision dated January 9, 1992, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was cumulative in

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<sup>1</sup> Docket No. 85-934 (issued June 28, 1985).

nature and insufficient to warrant review of its prior decision. In an attached notice concerning her appellate rights, the Office advised appellant that additional requests for reconsideration were subject to the one-year time limitation.

By letter dated January 11, 1992, appellant indicated that she previously submitted medical evidence revealing that she required vascular surgery. She noted that she wished this evidence be considered by the Office.

In a letter dated February 4, 1992, the Office informed appellant that the issue in her case is medical in nature and that she must submit competent and relevant medical evidence in support of her claim.

In a letter dated December 2, 1999, appellant requested reconsideration of her claim. She noted that it had been 29 years since her work-related injury. Appellant indicated that she believed she was not treated fairly in the adjudication of her claim. She did not submit any additional evidence.

In a decision dated June 13, 2000, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

The only decision before the Board on this appeal is that of the Office dated June 13, 2000. Since more than one year elapsed from the date of issuance of the Board's June 28, 1985 merit decision to the date of the filing of appellant's appeal, June 6, 2001, the Board lacks jurisdiction to review this decision.<sup>2</sup>

The Board finds that the Office properly determined that appellant's request for reconsideration dated December 2, 1999 was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"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, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."<sup>3</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a)

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<sup>2</sup> See 20 C.F.R. § 501.3(d).

<sup>3</sup> 5 U.S.C. § 8128(a).

provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.<sup>4</sup>

In its June 13, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision was by issued by the Board on June 28, 1985 and appellant's request for reconsideration was dated December 2, 1999, which was more than one year after June 28, 1985. Accordingly, appellant's petition for reconsideration was not timely filed. She was properly advised of the one-year time limitation on January 9, 1992.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>5</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.<sup>6</sup>

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>8</sup> This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>9</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.<sup>10</sup>

In accordance with its internal guidelines and Board precedent, the Office properly performed 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. The Office stated that it had reviewed the evidence submitted by

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<sup>4</sup> 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>5</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>6</sup> *Annie L. Billingsley*, *supra* note 4.

<sup>7</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Cresenciano Martinez*, 51 ECAB \_\_ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

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.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to establish clear evidence of error.

The Board notes that appellant did not submit any evidence with her reconsideration request and concludes that appellant has not established clear evidence of error in this case. Appellant's reconsideration request indicated that she sustained a work-related injury 29 years ago. She further noted that she was not treated fairly in the adjudication of her claim. This statement does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.<sup>11</sup> Appellant submitted no new medical evidence to support her contentions.

Consequently, appellant has not established clear evidence of error on the part of the Office.

The decision of the Office of Workers' Compensation Programs dated June 13, 2000 is hereby affirmed.

Dated, Washington, DC  
April 17, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>11</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).