

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH J. LATIMER and U.S. POSTAL SERVICE,
POST OFFICE, Jacksonville, FL

*Docket No. 01-1224; Submitted on the Record;
Issued March 18, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for merit review on the grounds that her request was untimely filed and failed to present clear evidence of error.

In this case, the Office accepted that appellant sustained cervical and trapezius strains while in the performance of duty on November 5, 1995.

By decision dated April 21, 1997, the Office terminated appellant's benefits effective that day on the grounds that her injury-related total disability had ceased. By letter dated June 19, 1997, appellant requested reconsideration. In support of her request, appellant submitted two reports from Dr. Michael S. Scharf. In his April 25, 1997 report, Dr. Scharf noted that there was nothing he could do for appellant, that he was releasing her to return to light work and that "She is not to return here." In a May 8, 1997 report, he noted that appellant's work restrictions were permanent. By decision dated July 1, 1997, the Office denied modification of appellant's request for reconsideration on the grounds that the evidence submitted in support of her petition was insufficient to warrant modification.

By letter dated October 15, 1997, appellant again filed a request for reconsideration. By decision dated October 28, 1997, the Office denied her request for reconsideration on the grounds that the evidence submitted in support of her petition addressed neurological findings but did not provide an opinion with medical rationale concerning whether appellant's condition was related to her November 5, 1995 employment injury.

In a letter dated February 21, 2001, appellant again requested reconsideration. In support of her request, appellant submitted a September 25, 2000 report from Dr. Carlos A. Arce in which he found that appellant had cervical spondylosis at C5-6. By decision dated March 23, 2001, the Office denied her request for reconsideration on the grounds that the evidence submitted was irrelevant and did not demonstrate clear evidence of error.

The Board finds that the Office, in its March 23, 2001 decision, acted within its discretion in refusing to reopen appellant's case for merit review.

The only decision before the Board in this appeal is the Office's decision dated March 23, 2001 denying appellant's request for review of the merits of its July 1, 1997 decision denying her request for modification of its April 21, 1997 decision terminating her compensation benefits. Because more than one year has elapsed between the issuance of the Office's July 1, 1997 decision and April 3, 2001, the date of appellant's appeal, the Board lacks jurisdiction to review the July 1, 1997 decision.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant must submit an application for reconsideration which sets forth argument and contains evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office. To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of that decision.³ 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.⁴ 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.⁵

In its March 23, 2001 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on July 1, 1997, and appellant requested reconsideration by letter dated February 21, 2001, which was more than one year after July 1, 1997.

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 of the case to determine whether the application establishes "clear evidence of error." 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.⁶

¹ 20 C.F.R. § 501.3(d).

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 his own motion or application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(a).

⁴ 20 C.F.R. § 10.607(b); *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ 20 C.F.R. § 10.607(a).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

In this case, the evidence submitted by appellant does not establish clear evidence of error because 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. Dr. Arce's September 25, 2000 report found that appellant had cervical spondylosis of C5-6, a condition which the Office had not accepted as a result of her work-related injury. Thus this report is irrelevant to her claim. Consequently, the medical evidence failed to substantiate a clear evidence of error in the Office's July 1, 1997 decision.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, did not abuse its discretion in denying further review of the case.

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² See *Leon D. Faidley, Jr.*, *supra* note 5.

¹³ See *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

The March 23, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 18, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member