

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ZAIDA ANDERSON and U.S. POSTAL SERVICE,  
GENERAL MAIL FACILITY, Miami, Fla.

*Docket No. 96-1476; Submitted on the Record;  
Issued June 24, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for further merit review of her claim on the grounds that her request was untimely and failed to show clear evidence of error.

On March 7, 1990 appellant, then a 28-year-old letter sorting machine clerk, filed a claim for compensation benefits alleging that on February 28, 1990 she sustained an injury to her back and neck when she was casing mail.

By decision dated April 24, 1990, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that she had sustained any medical condition or disability causally related to factors of her federal employment.

By letter dated November 17, 1992, appellant, through her representative, requested reconsideration of the denial of her claim and submitted a July 20, 1992 report from Dr. Antonio M. Gordon.

By decision dated July 26, 1994, the Office denied appellant's request for reconsideration on the grounds that her request was untimely filed and failed to present clear evidence of error.

By letter dated July 25, 1994, received by the Office on August 12, 1994, appellant requested reconsideration of the denial of her claim.

By decision dated August 22, 1994, the Office denied appellant's request for reconsideration.

By letter dated October 1, 1994, appellant requested reconsideration of the denial of her claim and resubmitted the July 20, 1992 report from Dr. Gordon which had previously been submitted and considered by the Office.

By decision dated December 7, 1994, the Office denied appellant's request for further merit review of her claim on the grounds that her request was untimely filed and failed to present clear evidence of error.

By letter dated January 31, 1996, appellant requested reconsideration of the denial of her claim. She submitted no new evidence.

By decision dated February 7, 1996, the Office denied appellant's request for further merit review of her claim on the grounds that the request was untimely submitted and failed to show clear evidence of error.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim, on the grounds that her untimely request did not demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> As appellant filed her appeal with the Board on April 15, 1996, the only decision properly before the Board is the Office's February 7, 1996 decision denying appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</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, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>5</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>6</sup>

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<sup>1</sup> 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *pet. for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>4</sup> *Jesus D. Sanchez* and *Leon D. Faidley, Jr.*, *supra* note 3. Compare 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> See *Gregory Griffin* and *Leon D. Faidley, Jr.*, *supra* note 3.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.<sup>7</sup> In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set

forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>8</sup>

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

In this case, appellant filed her most recent request for reconsideration by letter dated January 31, 1996.<sup>9</sup> This was clearly more than one year after the Office's April 24, 1990 merit decision was issued and thus the application for review was not timely filed. In accordance with its internal guidelines and with Board precedent, the Office properly found that the request was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error which would warrant reopening appellant's case for merit review under 5 U.S.C. § 8128(a) notwithstanding the untimeliness of her application.

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

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<sup>7</sup> *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (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 Office's denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case...."

<sup>9</sup> As noted above, appellant filed three earlier untimely requests for reconsideration between 1992 and 1994.

<sup>10</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> *See Jesus D. Sanchez*, *supra* note 3.

<sup>13</sup> *See Leona N. Travis*, *supra* note 11.

<sup>14</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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.<sup>15</sup> 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.<sup>16</sup>

In this case, appellant submitted no evidence in support of her request for reconsideration. Therefore, she has failed to demonstrate clear evidence of error in the Office's April 24, 1990 merit decision denying appellant's claim.

The February 7, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
June 24, 1998

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>15</sup> *Leon D. Faidley, Jr., supra* note 3.

<sup>16</sup> *Gregory Griffin, supra* note 3.