

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELEAN M. JACKSON and DEPARTMENT OF THE AIR FORCE,
AIR FORCE SYSTEMS COMMAND, EGLIN AIR FORCE BASE, FL

*Docket No. 98-61; Submitted on the Record;
Issued August 10, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused 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 this case, the Office accepted that on July 14, 1992 appellant sustained a right shoulder strain and a temporary aggravation of cervical degenerative disc disease while assisting patients in the performance of her duties as a nursing technician. She was released to regular duty on February 22, 1993, but did not return to work. Appellant resigned from her position on April 22, 1993, and continued to submit Forms CA-8 requesting wage-loss compensation. In a merit decision dated March 25, 1993, the Office denied appellant's claim for wage-loss compensation benefits beyond February 22, 1993, on the grounds that the medical evidence of record established that she could return to work as of that date. On appeal to the Board, the Board determined that the medical evidence does not establish disability from work due to residuals of appellant's accepted shoulder injury, but that the case was not in posture for a decision with respect to appellant's cervical condition. The Board remanded the case for the Office to determine the effect of appellant's employment-related aggravation of her preexisting cervical degenerative disease on her ability to work. After a period of medical development, the Office issued a merit decision dated July 3, 1996, in which it determined that the employment-related aggravation of appellant's cervical condition was temporary and further found that there was no objective medical evidence to establish that her right shoulder condition or temporary aggravation of her degenerative disc disease were still active and causing disability.

In a letter dated and postmarked August 8, 1997, appellant requested review of the Office's July 3, 1996 decision. Appellant stated that she had requested review, in writing, approximately six months earlier but when she called on August 8, 1997 to inquire as to the status of her claim, she was told that no request for review had been received by the Office. In support of her August 8, 1997 request, appellant submitted a Social Security Administration

decision dated May 23, 1996 finding her disabled for work and a psychiatric review technique form of the same date. In a decision dated September 16, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's September 16, 1997 decision denying appellant's request for a review on the merits. Because more than one year has elapsed between the issuance of the Office's most recent merit decision, issued July 3, 1996 and September 24, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the Office's merit 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: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.³ 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.⁴ 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.⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

In its September 16, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on July 3, 1996. As appellant's request for reconsideration was dated August 8, 1997,

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

³ 20 C.F.R. §§ 10.138(b)(1), (2).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

more than one year after the July 3, 1996 decision, appellant's request for reconsideration of her case was untimely filed.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. § 10.138(b)(2), 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 be 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

⁷ In her August 8, 1997 letter, appellant asserted that she had previously submitted a written request for reconsideration to the Office. The record file, however, contains no evidence of a prior request.

⁸ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁹ 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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such as 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 on the Director's own motion."

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

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

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

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

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

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 6.

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 merit review in the face of such evidence.¹⁶

In the present case, with her request for reconsideration of the July 3, 1996 decision, appellant submitted a Social Security Administration decision dated May 23, 1996 which determined that appellant was entitled to disability compensation, pursuant to the Social Security Act, commencing July 14, 1992, and an OHA Psychiatric Review Technique Form of the same date, indicating that appellant has a depressive disorder. With respect to the Social Security Administration decision, the Board has previously determined that the jurisdiction of the Office and the Board extends to the determination of disability under the Act. The findings of other administrative agencies are not determinative with regard to proceedings under the Act, which is administered by the Office and the Board.¹⁷ In addition, as appellant's claim was never accepted by the Office for an emotional or psychiatric condition, the psychiatric evidence submitted is not relevant to the issue in this case, whether appellant had any disability for work due to her accepted shoulder or cervical condition, and thus is insufficient to establish clear evidence of error on the part of the Office in its July 3, 1996 merit decision, as the Office properly ascertained.¹⁸

As this evidence does not raise a substantial question as to the correctness of the July 3, 1996 Office decision or shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

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 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.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

¹⁷ *Donald E. Ewals*, 45 ECAB 111 (1993).

¹⁸ *Barbara A. Weber*, 47 ECAB 163 (1995).

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 16, 1997 is hereby affirmed.

Dated, Washington, D.C.
August 10, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member