

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA I. GEARHART and DEPARTMENT OF DEFENSE,
NATIONAL SECURITY AGENCY, AIC/NCTR, WPAFB, Ohio

*Docket No. 97-2207; Submitted on the Record;
Issued May 17, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issue is whether the Office of Worker's Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On March 13, 1995 appellant, then an executive secretary, filed a claim for an occupational disease (Form CA-2) alleging that she first realized that her back condition was caused or aggravated by her employment on November 19, 1993. By decision dated June 28, 1995, the Office found the evidence of record sufficient to establish that the claimed event occurred at the time, place and in the manner alleged, but insufficient to establish that a medical condition resulted from the accepted trauma or exposure. In a February 28, 1997 letter, appellant, through her counsel, requested reconsideration of the Office's decision accompanied by correspondence from the Office and medical evidence. By decision dated May 5, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not establish 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.¹ Inasmuch as appellant filed her appeal with the Board on June 17, 1997, the only decision properly before the Board is the Office's May 5, 1997 decision, denying appellant's request for a review of the merits of its June 28, 1995 decision.

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a 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 Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. The Office 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.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).⁷

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁸ The Office issued its last merit decision in this case on June 28, 1995, wherein appellant's claim was denied on the grounds that the evidence of record was insufficient to establish that she sustained a medical condition due to the accepted trauma or exposure. Inasmuch as appellant's February 28, 1997 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁹ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.138(b)(1)-(2); *Thankamma Mathews*, 44 ECAB 788 (1993).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁶ 20 C.F.R. § 10.138(b)(2); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *Larry L. Lilton*, 44 ECAB 243 (1992).

⁹ *Gregory Griffin*, *supra* note 6.

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.¹⁰

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

In support of her request for reconsideration, appellant submitted a July 1, 1996 medical report of Dr. Homayoun Mesghali, a Board-certified orthopedic surgeon, revealing a history of appellant's medical treatment. Dr. Mesghali opined that based on an October 1, 1994 magnetic resonance imaging scan, appellant had preexisting arthritis in the cervical spine. He further opined that based on appellant's description of her job duties, repetitive motions and turning of the neck "could cause" aggravation of appellant's preexisting arthritic condition. Dr. Mesghali's opinion regarding causal relationship is speculative¹⁵ and insufficiently rationalized.

Inasmuch as the evidence submitted by appellant in support of her request for reconsideration does not manifest on its face that the Office committed error in the May 5, 1997 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (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); *Thankamma Mathews*, *supra* note 3; *Jesus D. Sanchez*, *supra* note 7.

¹¹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *Jesus D. Sanchez*, *supra* note 7.

¹⁴ *Leona N. Travis*, *supra* note 12.

¹⁵ See *Jennifer Beville*, 33 ECAB 1970 (1982); *Leonard J. O'Keefe*, 14 ECAB 42 (1962).

The May 5, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
May 17, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member