

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON REED and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Newark, NJ

*Docket No. 98-2150; Submitted on the Record;
Issued February 10, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

The case has been on appeal previously.¹ In a November 19, 1993 decision, the Board found that appellant did not meet her burden of proof in establishing that intermittent periods of total disability between January 1 and June 21, 1991 were causally related to her October 26, 1990 employment injury. The Board affirmed the October 17, 1991 decision of the Office. In an accompanying letter, the Office stated that further medical treatment at the Office's expense was not authorized and prior authorization, if any, was terminated.

In letters dated June 30 and October 8, 1997, appellant requested payment of medical bills. In a November 28, 1997 response, the Office indicated that appellant's claims for recurrences of disability had been denied and, as part of that decision, further medical treatment at the Office's expense was not authorized and any prior authorization was terminated.

In a December 29, 1997 decision, appellant requested reconsideration. In a January 27, 1998 letter, appellant's attorney contended that the Board had not ruled on appellant's request for payment for medical treatment. He stated that most of the medical treatment had been completed by April 30, 1991, which was the date set by Dr. Gregory S. Gallick, a Board-certified orthopedic surgeon, as the date appellant had achieved maximum benefit from the treatment and could return to work. He contended that the treatment had occurred before the October 17, 1991 decision of the Office which denied her claim.

In a June 6, 1998 decision, the Office denied appellant's request for reconsideration as untimely and not establishing clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration.

¹ Docket No. 98-2150 (issued November 19, 1993). The history of the case is contained in the prior decision and is incorporated by reference.

Under section 8128(a) the Federal Employees' Compensation Act,² the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations³ which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."⁴ In *Leon D. Faidley, Jr.*,⁵ the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. The last merit decision in this case was the November 19, 1993 decision of the Board. As the Office did not receive the application for review until December 19, 1997, the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office may not deny an application for review based 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 is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.⁶

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 manifest 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 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, however, the evidence submitted must not only be of sufficient probative

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ 41 ECAB 104 (1989).

⁶ *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which 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."

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

⁸ *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 *Nelson T. Thompson*, 43 ECAB 919 (1992).

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 fundamental 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 on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

In this case, appellant sought payment of medical bills for medical treatment received in the period January 1 through April 30, 1991. However, before medical benefits can be paid, it must be established that the treatment given was for a condition causally related to a claimant's employment-related condition. In this case, appellant's claim for intermittent periods of disability during the period in question was denied. Appellant did not submit any evidence which established that the medical treatment provided was related to her employment injury and not for the alleged recurrences of disability which were denied. Appellant therefore has not established clear evidence of error.

The decision of the Office of Workers' Compensation Programs, dated June 6, 1998, is hereby affirmed.

Dated, Washington, D.C.
February 10, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² *Leon Faidley, Jr., supra* note 5

¹³ *Gregory Griffin, supra* note 6.