

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of INGRID I. DINVALDS and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 01-1337; Submitted on the Record;
Issued January 22, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Appellant, a 60-year-old substitute mail clerk, filed a claim for benefits on May 26, 1998, alleging that she injured her neck while in the performance of duty on May 4, 1998.

By letter dated August 17, 1998, the Office advised appellant that it required additional factual and medical evidence to determine whether she was eligible for compensation benefits. The Office asked her to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her condition and an opinion as to whether her claimed condition was causally related to her federal employment. The Office requested that appellant submit the additional evidence within 30 days. She did not submit any additional evidence.

By decision dated September 17, 1998, the Office denied appellant's claim, finding that she failed to establish that her claimed neck injury was sustained in the performance of duty.

By letter dated October 3, 2000, appellant requested reconsideration of the September 17, 1998 decision. In support of her request, she submitted a September 28, 2000 report from Dr. Carol M. Loechinger, a chiropractor, who stated:

“After consultation, examination and x-ray review it is evident that [appellant] has had a rotation injury to the cervical spine. The rotation is evident at levels C6-7 and T1. [Her] soft tissue symptoms are a result of the rotation of these cervical segments. Review of x-rays taken on [September 7, 1996] prior to the injury of May 4, 1998 show a positional displacement matching her normal job movement, which was rotation to the right. X-rays taken after the accident reveal totally opposite rotation which is consistent with her description of the injury, she heard

a noise behind her and jerked her head around to the left, the noise happened again and she jerked again to the left. Immediately she felt soreness and tightness in her neck muscles. She continued to work her normal job duty rotating the neck to the right against the left rotation of the cervical segments after the injury.

“Continued insult to those injured tissues has caused a secondary fibroclitis of the muscle in the related dermatomes consistent with patient symptoms. [Appellant] now needs spinal manipulation to correct the rotation along with physiotherapy and consistent specific exercises to correct this condition. A treatment plan of [two times] a week for twelve weeks is recommended.”

By decision dated October 19, 2000, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error. The Office, therefore, denied appellant’s request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

The Board finds that the Office properly determined that appellant’s request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees’ Compensation Act¹ does not entitle an employee to a review of an Office decision as a matter of right.² This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of Compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).³ As one such limitation, the Office has stated

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advances a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

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.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁵

The Office properly determined in this case that appellant failed to file a timely application for review. Appellant requested reconsideration on October 3, 2000; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had 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.⁶ Office procedures state that the Office will reopen appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the application for review shows "clear evidence of error" on the part of the Office.⁷

To establish clear evidence of error, appellant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² 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's decision.¹³ The Board makes an independent determination of whether appellant has submitted clear evidence of error on the part

⁴ 20 C.F.R. § 10.607(b).

⁵ See cases cited *supra* note 2.

⁶ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2 -- 1602.3(b) (May 1991).

⁸ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ See *Jesus D. Sanchez*, *supra* note 2.

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 2.

of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁴

The Board finds that appellant's October 3, 2000 request for reconsideration fails to show clear evidence of error. The Office reviewed Dr. Loechinger's report, which, while generally relevant to the issue of whether appellant sustained a neck injury in the performance of duty on May 4, 1998, is not sufficient to *prima facie* shift the weight of the evidence in favor of appellant. The opinion of Dr. Loechinger, a chiropractor does not diagnose a subluxation by x-ray. Hence, Dr. Loechinger is not deemed a physician as defined in section 8101(2) of the Act and his report is not deemed to be medical evidence. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The October 19, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 22, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

¹⁴ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).