

**United States Department of Labor
Employees' Compensation Appeals Board**

MARY L. SEPULVEDA, Appellant)

and)

DEPARTMENT OF HEALTH & HUMAN)
SERVICES, INDIAN HEALTH SERVICE,)
Albuquerque, NM, Employer)

**Docket No. 04-375
Issued: April 20, 2004**

Appearances:
William C. Dean, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 28, 2003 appellant filed an appeal from June 16 and September 11, 2003 decisions of the Office of Workers' Compensation Programs, finding that her request for reconsideration was untimely filed and failed to demonstrate clear evidence of error by the Office. Pursuant to 20 C.F.R. § 501.3(d)(2), the Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal, the only decisions before the Board on this appeal are the September 11 and June 16, 2003 nonmerit decisions.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's reconsideration requests were untimely filed; (2) if so, whether the Office properly denied the reconsideration requests on the grounds that appellant failed to demonstrate clear evidence of error.

FACTUAL HISTORY

The case was before the Board on a prior appeal. The issue presented was whether the Office properly terminated appellant's compensation for wage loss effective January 13, 1998. In a decision issued April 18, 2001, the Board affirmed a September 7, 1999 Office decision, that denied modification of a January 13, 1998 termination decision.¹ By order dated May 3, 2001, the Board vacated the decision and scheduled the case for oral argument. Appellant filed a motion to cancel the oral argument and by order dated March 12, 2002, the Board reissued the April 18, 2001 decision.

In a letter dated April 3, 2003, appellant requested reconsideration of her claim. Appellant argued, as she had in a petition for reconsideration before the Board, that the Office had erred by not considering a May 25, 1997 report of Dr. H. Daniel Blackwood, a second opinion psychologist.

By decision dated June 16, 2003, the Office determined that appellant's April 4, 2003 request for reconsideration was untimely filed as it was more than one year after the last merit decision. The Office further determined that the request for reconsideration failed to show clear evidence of error.

In a letter dated July 22, 2003, appellant again requested reconsideration. She alleged that the evidence demonstrated clear evidence of error in that the Office had relied on the report of Dr. Willard Hunter, an orthopedic surgeon, selected as a second opinion referral physician. Appellant argued that Dr. Hunter was not qualified to be a second opinion referral physician as he had been placed on probation by the Arizona Board of Medical Examiners in 1992 and 1995; she resubmitted evidence regarding Dr. Hunter's probation.

In a decision dated September 11, 2003, the Office found that appellant's July 22, 2003 reconsideration request was untimely. The Office further denied the request for reconsideration on the grounds that appellant had not shown clear evidence of error by the Office.

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its

¹ Docket No. 00-382 (issued April 18, 2001). The Board denied a petition for reconsideration by order dated March 10, 2003.

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

discretionary authority under 5 U.S.C. § 8128(a).⁵ 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.⁶ 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).⁷

ANALYSIS -- ISSUE 1

The last decision on the merits of appellant's claim was March 12, 2002, when the Board affirmed the termination of compensation for wage loss effective January 12, 1998. Appellant's reconsideration requests were dated April 4 and July 22, 2003. Since appellant did not file a reconsideration request within one year of a merit decision, the requests are untimely.

LEGAL PRECEDENT -- ISSUE 2

The Board has held that even if a the reconsideration request is untimely, 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.⁸ 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. § 10.607(a), 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

⁵ 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 specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

⁶ 20 C.F.R. § 10.607(a).

⁷ *See Leon D. Faidley, Jr., supra* note 3.

⁸ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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.

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 an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office improperly denied merit review in the face of such evidence.¹⁶

ANALYSIS -- ISSUE 2

The April 4, 2003 reconsideration request raised the argument that the Office erred by not specifically discussing the May 25, 1997 report of psychologist Dr. Blackwood in its January 13, 1998 decision. This was not a situation, however, where the Office received a medical report shortly before issuing its decision and found that no relevant medical evidence had been submitted.¹⁷ In the instant case, the Office relied on the reports of Dr. Hunter and Dr. Frederick Green, a psychiatrist and neurologist, to terminate appellant's compensation. As the Office noted in its June 16, 2003 decision, Dr. Green had discussed Dr. Blackwood's findings in his report. Dr. Blackwood had opined that he agreed with the conclusions of an attending physician, Dr. Zimmer, without providing further explanation. The Office found that the weight of the evidence was represented by the reasoned opinions of Drs. Green and Hunter. The Board, in its March 12, 2002 decision, affirmed the Office's finding. The Board finds no evidence of error by the Office with respect to consideration of the report of Dr. Blackwood.

The July 22, 2003 reconsideration request raised an argument previously addressed by the Office regarding the qualifications of Dr. Hunter. The evidence indicates that on January 30, 1992 Dr. Hunter had been placed on probation by the Arizona Board of Medical Examiners for three years and was prohibited from prescribing certain controlled substances during the probationary period. On December 22, 1995 Dr. Hunter was again placed on probation. As the Board noted in its prior decision, there is no evidence that Dr. Hunter's license was revoked or that as of May 1997, he was not a licensed physician qualified to examine appellant and issue an opinion with respect to an orthopedic condition. The Board found that Dr. Hunter had provided a reasoned medical opinion on the issue presented and appellant has not submitted any evidence to establish clear evidence of error with respect to reliance on Dr. Hunter's report.

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

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁷ See *William A. Couch*, 41 ECAB 548 (1990).

CONCLUSION

The Board finds that appellant's requests for reconsideration were untimely filed. Moreover, appellant did not submit any evidence establishing clear evidence of error with respect to the termination of compensation for wage loss effective January 13, 1998. The Board accordingly finds that the Office properly refused to reopen the claim for merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 11 and June 16, 2003 are affirmed.

Issued: April 20, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member