

year has elapsed between the last merit decision and the filing of this appeal on December 17, 2003, the Board lacks jurisdiction to review the merits of appellant's claim.³

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

This is the third appeal in the present case. In the first appeal, the Board issued a decision⁴ on December 11, 1995 in which it affirmed the Office's January 25, April 8 and August 8, 1994 decisions, as modified to reflect that appellant had no disability after March 10, 1993 due to her February 9, 1992 left thumb injury.⁵ The Board found that the well-rationalized opinion of Dr. Anthony S. Unger, a Board-certified orthopedic surgeon who served as an impartial medical specialist, showed that appellant had no disability after March 10, 1993, due to her February 9, 1992 employment injury. In the second appeal, the Board issued a decision⁶ on February 26, 2003 affirming the Office's April 2 and June 1, 2001 decisions on the grounds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) because her applications for review were not timely filed and failed to present clear evidence of error.⁷ The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

³ See *supra* note 1. The record also contains a February 26, 2003 nonmerit decision of the Board which was issued less than one year prior to appellant's filing of the present appeal on December 17, 2003. In March 2003 appellant filed a petition for reconsideration of the Board's February 26, 2003 decision under 20 C.F.R. § 501.7(a). On July 30, 2003 the Office issued an order denying her petition for reconsideration. The matter adjudicated in the Board's February 26, 2003 decision is *res judicata* and is not subject to further consideration by the Board. See 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant submitted additional evidence after the Office's August 18, 2003 decision, including a September 4, 2003 statement and numerous medical reports, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

⁴ Docket No. 95-802 (issued December 11, 1995).

⁵ The Office had accepted that appellant sustained employment-related left thumb tendinitis on February 9, 1992. The Office determined that appellant was entitled to disability compensation for this injury until June 1, 1992. The case number for this injury is A25-398729. In its December 11, 1995 decision, the Board also affirmed the Office's April 8 and June 9, 1994 decisions on the grounds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after February 19, 1992 due to her December 2, 1986 right hand and wrist injury. This injury (case number A25-297044) is not the subject of the present appeal.

⁶ Docket No. 01-1766 (issued February 26, 2003).

⁷ Appellant argued that the Office improperly relied on the opinion of Dr. Unger, but the Board noted that it had already determined that the opinion of Dr. Unger justified the termination of appellant's disability compensation related to her February 9, 1992 left thumb injury and appellant's argument would not clearly show that the Office erred in relying on this opinion. The Board also performed a limited review of medical reports submitted by appellant and determined that they were not relevant as they merely described appellant's left wrist and hand problems without indicating that her February 9, 1992 left thumb injury continued to cause disability.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁸ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁹ 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.¹⁰ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.¹¹

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. 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."¹² 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁴ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ This entails a limited review by the Office of how the

⁸ 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.606(b)(2).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹² *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (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 an error (for example, proof that a schedule award was miscalculated). Evidence such as a 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...."

¹⁴ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁵ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁶ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁷ *See Leona N. Travis*, *supra* note 15.

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.¹⁸ 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.¹⁹

ANALYSIS

In its August 18, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision of record is the Board's December 11, 1995 decision and appellant's request for reconsideration was dated June 7, 2003, more than one year after December 11, 1995.²⁰

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decisions were in error.

The Board finds that appellant's application for review does not raise a substantial question as to the correctness of the Office's prior merit decisions and is insufficient to demonstrate clear evidence of error. In connection with her application for review, appellant submitted a lengthy statement dated June 7, 2003. In this statement, appellant argued that her June 7, 2003 reconsideration request was timely because it was filed within one year of the Board's February 23, 2003 decision. However, the Board notes that this argument has no validity as the one-year period for requesting reconsideration begins on the date of the original Office decision and only also accompanies a decision of the Board if that decision is a merit decision.²¹ The February 23, 2003 decision of the Board was a nonmerit decision denying appellant's request for reconsideration and, as noted above, the last merit decision of the Board was dated December 11, 1995. Appellant's June 7, 2003 reconsideration request was filed more than one year after December 11, 1995.

In her June 7, 2003 statement, appellant also claimed that the Office improperly terminated her compensation effective March 10, 1993 based on the opinion of Dr. Unger, a Board-certified orthopedic surgeon who served as an impartial medical specialist. She asserted that Dr. Unger did not provide rationale for his opinion and claimed he inconsistently stated that she continued to have residuals of her left thumb injury but also stated that she had fully

¹⁸ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁹ *Leon D. Faidley, Jr.*, *supra* note 11.

²⁰ See *supra* notes 2 and 3 and accompanying text.

²¹ See *supra* note 2.

recovered from her injuries. Appellant alleged that the reports of Dr. Rida N. Azer, an attending Board-certified orthopedic surgeon, showed that she had disability after March 10, 1993 due to her February 9, 1992 employment injury, left thumb tendinitis. She claimed that Dr. Azer provided a consistent assessment of her condition over the years and that Dr. Azer's diagnosis was "compatible" with those of Dr. Unger and Dr. Kenneth Cho, a Board-certified orthopedic surgeon who served as an Office referral physician.²² The Board notes that these arguments are not directly relevant to the main issue of the present case, *i.e.*, whether appellant had disability after March 10, 1993 due to her February 9, 1992 employment injury. This issue is medical in nature and should be resolved through the submission of medical evidence. Appellant's mere assertions regarding the sufficiency of the evidence of record would not show that the weight of the medical evidence regarding the relevant issue of the present case should have rested with Dr. Azer rather than with Dr. Unger. Therefore, appellant's argument would not clearly show that the Office erred in its prior decisions.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

²² The opinion of Dr. Cho created a conflict in the medical evidence with that of Dr. Azer and necessitated the referral to Dr. Unger. Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member