

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

A.R., Appellant

and

**DEPARTMENT OF THE NAVY,
Philadelphia, PA, Employer**

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**Docket No. 07-466
Issued: October 15, 2007**

Appearances:

Appellant, pro se

No appearance, for the Director

Oral Argument September 13, 2007

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 8, 2006 appellant filed a timely appeal of an August 23, 2006 decision of the Office of Workers' Compensation Programs finding that her request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal. Since the last merit decision was issued on August 3, 2004, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant's August 5, 2006 application for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

Appellant filed a claim on April 24, 2003 alleging that she sustained injuries on December 4, 2000 when she was pushed against a wall and door frame. By decision dated August 3, 2004, the Office denied the claim on the grounds that appellant was not a federal employee under 5 U.S.C. § 8101(1), at the time of the alleged incident. It indicated that a notice

of personnel action (Form SF-50), dated October 23, 2000 established that appellant was removed from federal employment effective October 24, 2000.

On October 6, 2004 appellant requested reconsideration of her claim. By decision dated January 20, 2005, the Office determined that the application for reconsideration was insufficient to warrant merit review of the claim.¹

In a letter dated August 5, 2006, appellant requested reconsideration of her claim. She argued that the SF-50 was issued by the Naval Center for Acquisition Training (NCAT) in Mechanicsburg, Pennsylvania and that NCAT was not her employer and had no authority to terminate her employment. Appellant stated that her duty station was in Philadelphia, Pennsylvania with Naval Inventory Control Point. She submitted an Equal Employment Opportunity (EEO) Commission letter dated September 6, 2005 stating that the reference docket number was being closed because the employing establishment had no record of a formal complaint being filed by appellant.

By decision dated August 23, 2006, the Office determined that appellant's application for reconsideration was untimely filed. It further determined that she did not show clear evidence of error and therefore the application was denied.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.² The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."³

Section 8128(a) of the Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulations,

¹ Appellant filed an appeal with the Board which was docketed as No. 05-1054. By order dated May 16, 2006, the Board granted appellant's motion to dismiss the appeal.

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.605 (1999).

⁴ 5 U.S.C. § 8128(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 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."

has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁷ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.⁸ 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).⁹

The Board has held, however, that 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.¹⁰ 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.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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.¹⁷ The Board makes an

⁷ 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; or (2) advancing a relevant legal argument not previously considered by the Office of Workers' Compensation Programs; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

⁸ 20 C.F.R. § 10.607(a).

⁹ *See Leon D. Faidley, Jr.*, *supra* note 5.

¹⁰ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹² *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁵ *See Leona N. Travis*, *supra* note 13.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 5.

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.¹⁸

ANALYSIS

The application for reconsideration was dated August 5, 2006. The last decision on the merits of the claim for compensation was dated August 3, 2004. Since the application was filed more than one year after the merit decision, it is properly found to be untimely filed.

The underlying claim in this case was denied on the grounds that appellant was not a federal employee pursuant to 5 U.S.C. § 8101(1) at the time of the alleged employment injury on December 4, 2000. In her August 5, 2006 application for reconsideration, appellant argued that she was a federal employee on December 4, 2000 because the SF-50 that purported to remove her from employment effective October 24, 2000 was invalid. According to appellant, the SF-50 was issued by NCAT, who was not her employer and had no authority to remove her from federal employment.

Appellant does not, however, provide any evidence to support her argument. The record contains an SF-50 from the Department of the Navy dated October 23, 2000 that identifies appellant and her position as logistics management specialist. The personnel action taken was removal from employment effective October 24, 2000 for failure to follow procedures, falsification of time and attendance records, unprofessional behavior and providing misleading employment information. Appellant provided no evidence to establish that the personnel action was invalid. The EEO letter submitted does not address the issue and provides no relevant information to the issue presented. There is no evidence to establish that the Office clearly erred in relying on the October 23, 2000 SF-50 to determine that appellant was not a federal employee on December 4, 2000.

The Board accordingly finds that the August 5, 2006 application for reconsideration was untimely and failed to show clear evidence of error by the Office. The Office therefore properly denied the application for reconsideration without merit review of the claim.

CONCLUSION

The August 5, 2006 application for reconsideration was untimely filed and failed to show clear evidence of error.

¹⁸ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 23, 2006 is affirmed.

Issued: October 15, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board