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<b>F.K., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 08-526</b>
	)	<b>Issued: August 18, 2008</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS ADMINISTRATION MEDICAL</b>	)	
<b>CENTER, San Francisco, CA, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

On December 21, 2007 appellant filed a timely appeal from the November 8, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her untimely request for reconsideration and finding that it failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated April 27, 2001 and the filing of this appeal on November 2, 2007, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2) but the Board has jurisdiction over the nonmerit issue.

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

## **FACTUAL HISTORY**

On May 1, 1980 appellant, then a 39-year-old nurse, filed a traumatic injury claim alleging that she injured her back that day while lifting a patient. The Office accepted the claim for a lumbosacral strain, which was later updated to a ruptured disc.<sup>1</sup> By letter dated July 14, 1998, it expanded appellant's claim to include multiple level disc disease and placed her on the periodic rolls for temporary total disability. Appellant's claim was later expanded again to include the condition of sciatic.

On August 17, 1998 Dr. Edward T. Kelley, a second opinion Board-certified orthopedic surgeon, opined that appellant was capable of working eight hours with restrictions.

Appellant was offered a position as a clerk with the employing establishment, a position which the Office found to be suitable to her work capabilities and she was given appropriate notice to accept the position. She did not return to work and the Office found that her reasons for refusing the position were not justified. The Office also informed appellant that none of the medical evidence she submitted supported that she was unable to perform the duties of the offered position or that she was totally disabled.

Accordingly, in a decision dated July 26, 1999, the Office terminated appellant's compensation benefits for the reason that she had refused an offer of suitable employment.

On December 8, 1999 appellant requested reconsideration. In support of her request, she submitted reports documenting her enrollment in a pain management program. In a January 28, 2000 letter, appellant again requested reconsideration and contended that she was unable to perform the offered position. Specifically, she contended that the physical requirements of the position were outside her restrictions.

By decision dated March 2, 2000, the Office denied appellant's request for modification of the termination of her claim.

By letter dated April 17, 2000, appellant requested reconsideration. It found the medical evidence was insufficient to establish that she was unable to perform the duties of the offered position or that she was unable to commute to work.

In a letter dated April 17, 2000, appellant requested reconsideration and submitted an April 6, 2000 report by Dr. Adrian Bartoli, a treating Board-certified anesthesiologist, and a May 6, 1999 report by Dr. Norman W. Wall, an examining osteopathic anesthesiology resident, and Dr. Wendye Robbins, a treating Board-certified anesthesiologist, in support of her request.

By decision dated May 5, 2000, the Office denied appellant's request for modification of the termination of her claim. It found the medical evidence contained in the record at the time of the decision supported the termination of her benefits.

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<sup>1</sup> By decision dated September 1, 1983, the Office issued a loss of wage-earning capacity determination.

On May 15, 2000 appellant requested reconsideration, which was denied in a merit decision on May 19, 2000.

By letter dated July 28, 2000, appellant requested reconsideration. She contended that she was physically incapable of performing the offered position or commute to the job due to her pain. Appellant contends that she was unable to perform the duties of the offered position, which was supported by reports from treating physicians. She also argues that she sustained a recurrence of total disability in March 1999 and that the Office mishandled her claim by not assigning a case manager to facilitate her treatment or coordinate her care.

In a letter dated March 8, 2001, appellant requested reconsideration and that her compensation be reinstated and submitted evidence in support of her claim.

By merit decision dated April 27, 2001, the Office denied appellant's request for modification of the termination of her claim.

Subsequent to the April 27, 2001 decision, the Office continued to receive treatment notes and medical reports from appellant's treating physicians regarding her condition.

On January 25, 2006 appellant filed a claim for compensation for the period April 17, 2005 to the present. She noted that, as of April 25, 2005, she receives disability compensation from the state of California. On May 4, 2006 the Office informed appellant that it was unable to process her claim. Appellant was informed that her compensation had been terminated effective July 26, 1999 pursuant to 5 U.S.C. § 8106 as she had refused an offer of suitable work. It noted that the last merit decision was on April 27, 2001, which denied her request for modification. Appellant was informed that the Office had not received any further appeal request.

On May 31, 2006 the Office accepted that appellant sustained consequential injuries of a left ankle sprain and left ganglion cyst due to her May 15, 2005 fall.

In a letter dated July 31, 2007 and received on August 13, 2007, appellant filed a request for reconsideration. She contended that the Office failed to consider the worsening of her condition in July 1997 and April 2005. Appellant also contended that the Office erred in terminating her compensation in 1999 based on her refusal of an offer of suitable work. She stated, "[w]ho is a better judge in the matter, you or the physicians who are caring for me?" Appellant also contended that at the time of the termination the Office failed to consult her physician about the offered position or send a copy of the job description for his review. In support of her claim, she submitted reports dated April 24 and July 31, 2007 report by Dr. Laura N. Sciaroni, a treating Board-certified orthopedic surgeon, and a June 20, 2007 report by Dr. Robert Minkowsky, a treating Board-certified internist.

By decision dated November 8, 2007, the Office denied appellant's request for reconsideration as it found that it was untimely filed and failed to establish clear evidence of error.<sup>2</sup>

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act<sup>3</sup> 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. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.<sup>4</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.<sup>5</sup> 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.<sup>6</sup>

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. 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.<sup>8</sup>

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<sup>2</sup> The Board notes that, following the November 8, 2007 nonmerit decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

<sup>3</sup> 5 U.S.C. §§ 8101 *et seq.*

<sup>4</sup> 20 C.F.R. § 10.605.

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> *See Alberta Dukes*, 56 ECAB 247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

<sup>8</sup> *See Alberta Dukes*, *supra* note 7.

### ANALYSIS

The Office properly determined appellant's application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.<sup>9</sup> However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>10</sup> The last merit decision in this case was the Office's April 27, 2001 decision, which denied appellant's request for modification of the July 26, 1999 decision terminating her wage-loss compensation because she had refused an offer of suitable work. As appellant's letter dated July 31, 2007, which was received by the Office on August 13, 2007, was submitted more than one year after the last merit decision of record, it was untimely.

As appellant's request was filed more than one year after the Office's April 27, 2001 decision, she must demonstrate clear evidence of error on the issue which was decided by the Office. In support of her request for reconsideration, appellant submitted medical reports by Drs. Sciaroni and Minkowsky and reiterated her arguments with regard to how the Office weighed the medical evidence and its management of her case. Specifically, she contested the Office decision terminating her compensation in 1999 based on her refusal of an offer of suitable work as she and her treating physicians were a better judge of her physical ability than the Office. In addition, appellant contends that the Office erred by failing to provide a copy of the job description to her treating physician for review. The Board finds that appellant's complaints and arguments pertaining to the Office's determination that the offered job was suitable based upon the report by Dr. Kelley are not sufficient to *prima facie* shift the weight and raise fundamental questions as to the correctness of the December 10, 1995 termination decision. Additionally, appellant has not demonstrated any error in the Office's issuance of the July 26, 1999 decision terminating compensation for failure on her part to accept an offer of suitable work. As the new physician's reports offered no new evidence on the issues in question, which was whether the Office properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work, they are not sufficient to raise a substantial question as to the correctness of the Office's decision and, thus, do not substantiate clear evidence of error.<sup>11</sup> Accordingly, the Board finds that the arguments and evidence submitted by appellant are insufficient to demonstrate clear evidence of error.

### CONCLUSION

The Office properly refused to reopen appellant's claim for reconsideration on the merits on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

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<sup>9</sup> D.E., 59 ECAB \_\_\_\_ (Docket No. 07-2334, issued April 11, 2008).

<sup>10</sup> D.G., 59 ECAB \_\_\_\_ (Docket No. 08-137, issued April 14, 2008); *Veletta C. Coleman*, 48 ECAB 765 (1993).

<sup>11</sup> *Thankamma Mathews*, 44 ECAB 764 (1993).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 8, 2007 is affirmed.

Issued: August 18, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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