



on February 2, 2003 and underwent arthroscopic surgery on February 5, 2003. On September 25, 2003 the Office accepted the claim for aggravation chondromalacia left knee and paid appropriate benefits. On October 15, 2003 appellant returned to work full time in a limited-duty position with restrictions.

On May 7, 2004 appellant's representative indicated that appellant got her license as a registered nurse during late 2002 or early 2003 but the employing establishment continued to employ her as a licensed practical nurse. He requested that she be compensated at the registered nurse rate of pay with the eight percent retention bonus as her restrictions due to the work-related injury were permanent.

By decision dated November 19, 2004, the Office determined that appellant's position of practical nurse, effective October 15, 2003, fairly and reasonably represented her wage-earning capacity. The Office additionally found that appellant was not entitled to compensation for wage loss as her actual earnings met or exceeded the current wages of the position held when injured.

On May 6, 2005 appellant filed a Form CA-7, claim for compensation, for the eight percent retention bonus for wages lost from January 1, 2004 and continuing. In a June 1, 2005 letter, the Office indicated that her claim could not be processed as it had issued a zero percent loss of wage-earning capacity determination on November 19, 2004. Appellant was advised to follow her appeal options from the November 19, 2004 decision.<sup>1</sup>

On June 2, 2005 appellant requested reconsideration. By decision dated September 19, 2005, the Office denied her June 2, 2005 request for reconsideration of its November 19, 2004 decision as her letter neither raised substantive legal questions nor included any new or relevant evidence. It noted that the record was void of any information documenting that the employing establishment had a retention bonus, what a retention bonus was, and any evidence which indicated that appellant was eligible or entitled to such a retention bonus, if it existed.<sup>2</sup>

In a November 17, 2005 letter, which the Office received on November 21, 2005, appellant requested reconsideration of the Office's September 19, 2005 decision. In support of her claim that the employing establishment had a retention bonus, a June 19, 2002 letter from appellant, which indicated her understanding of a retention allowance, and copies of Standard

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<sup>1</sup> The record reflects that, on February 4, 2005, appellant claimed a schedule award for her left knee condition and on June 2, 2005 filed a CA-7 form claiming a schedule award. In numerous letters, both appellant and her representative inquired about the status of her schedule award claim. On November 22, 2006 the Office advised her that additional evidence regarding the claimed schedule award was needed. Appellant and her representative continued to inquire about the status of her schedule award claim and submitted duplicative copies of evidence previously of record, including a November 13, 2003 report from Dr. Geoffrey B. Higgs, an orthopedic surgeon and appellant's treating physician, indicating that she reached maximum medical improvement on November 13, 2003 and had 10 percent impairment of her left leg. She also requested, in a December 26, 2006 letter, a change in her treating physician from Dr. Higgs to Dr. Thomas Loughram. The Office subsequently began receiving reports from Dr. Loughram. On May 11, 2007 the Office advised appellant that her claim for a schedule award could not be processed without a current impairment rating. As there is no final Office decision on her schedule award claim, the Board does not have jurisdiction over this issue. 20 C.F.R. § 501.2(c).

<sup>2</sup> The Office originally issued a September 12, 2005 decision denying reconsideration.

Form 50-B, notification of personnel action, dated November 30, 2003 and September 30, 2005 were submitted.

On June 15, 2006 appellant's representative noted that this was his second request for reconsideration of the Office's September 19, 2005 decision. In a letter dated June 21, 2006, the Office indicated that it had issued a decision dated June 12, 2005 in response to appellant's request for reconsideration of the Office's November 19, 2004 decision.<sup>3</sup>

On June 27, 2006 appellant's representative again inquired as to the status of his November 17, 2005 request for reconsideration of the Office's September 19, 2005 decision. In a February 15, 2007 letter, he again requested reconsideration. Duplicative copies of material previously of record were resubmitted.

By decision dated May 11, 2007, the Office denied appellant's February 15, 2007 request for reconsideration without a merit review, finding that she had not timely requested reconsideration and had failed to submit evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office committed an error and appellant did not present clear evidence of error.

#### **LEGAL PRECEDENT**

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>4</sup> The Office 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.<sup>5</sup> The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark, or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used.<sup>6</sup>

The Office 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.<sup>7</sup> Office regulations and procedure 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

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<sup>3</sup> The record does not contain any Office decision dated June 12, 2005.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 20 C.F.R. § 10.607(b); *Gladys Mercado*, 52 ECAB 255 (2001).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

<sup>7</sup> *See* 20 C.F.R. § 10.607(b); *Cresenciano Martinez*, 51 ECAB 322 (2000).

part of the Office.<sup>8</sup> To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. 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 in the most recent merit decision. To show clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error.<sup>11</sup>

### ANALYSIS

In a May 11, 2007 decision, the Office denied appellant's request for further review of the merits of her claim on the grounds that her February 15, 2007 reconsideration request was untimely filed and failed to demonstrate clear evidence of error of its November 19, 2004 wage-earning capacity determination. The Board notes, however, that the Office never acted on appellant's November 17, 2005 reconsideration request, which it received on November 21, 2005.<sup>12</sup> Thus, the May 11, 2007 decision is premature at this time.

The last merit decision of record was the Office's November 19, 2004 wage-earning capacity determination. Appellant's reconsideration letter dated November 17, 2005 was not added to the record until November 21, 2005 but the envelope bearing the letter was not retained by the Office. Chapter 2.1602.3(b)(1) of the Office's procedure manual provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope. As the Office did not retain the envelope for appellant's November 17, 2005 letter, Office procedures state that, when there is no evidence to establish the mailing date, the date of the letter itself should be used. For this reason, the Board finds that appellant's reconsideration request was filed on November 17, 2005 and therefore constituted a timely reconsideration filed within one year of the Office's November 19, 2004 decision.

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<sup>8</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (January 2004). Office procedure further provides that 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. *Id.* at Chapter 2.1602.3c.

<sup>9</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>10</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>11</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>12</sup> Contrary to the Office's statement in its June 21, 2006 letter, the record contains no June 12, 2005 Office decision.

The Board will set aside the Office's May 11, 2007 decision denying appellant's reconsideration request as untimely and failing to show clear evidence of error as premature and will remand the case to the Office for the purpose of exercising its discretionary authority under 5 U.S.C. § 8128(a) with respect to appellant's timely November 17, 2005 reconsideration request. On remand, the Office shall consider appellant's timely November 17, 2005 reconsideration request, along with any argument or evidence submitted in support thereof, and shall determine whether appellant may obtain review of the merits of her claim under the relevant standards for a timely reconsideration request.<sup>13</sup> After such development as it deems necessary, the Office shall issue an appropriate decision regarding appellant's claim.

### **CONCLUSION**

The Board finds that the Office's May 11, 2007 decision denying appellant's February 15, 2007 reconsideration request on the grounds that it was untimely filed and failed to demonstrate clear evidence of error is premature. The case is remanded to the Office for proper consideration of appellant's timely November 17, 2005 reconsideration request, including any argument or evidence submitted in support thereof.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs decision dated May 11, 2007 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: February 15, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>13</sup> 20 C.F.R. § 10.606.