

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

B.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Memphis, TN, Employer**

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**Docket No. 10-1335
Issued: February 8, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 12, 2010 appellant filed a timely appeal of a March 23, 2010 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. §§ 501.2(c) and 501.3, the Board has jurisdiction over the March 23, 2010 decision. The Board does not have jurisdiction over a decision on the merits of the claim.¹

ISSUE

The issue is whether the Office properly determined that appellant's March 4, 2010 application for reconsideration was untimely filed and failed to show clear evidence of error.

¹ The last merit decision was a Board decision dated March 25, 1993. The Board has jurisdiction over final decisions of the Office. See 20 C.F.R. § 501.2(c). For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

This is the eighth appeal in the case. The Office terminated appellant's compensation on the grounds that she refused an offer of suitable work in an April 17, 1992 decision and denied modification in a March 25, 1993 decision. In a decision dated October 1, 1998, the Board affirmed a January 12, 1996 Office decision finding that appellant's reconsideration request was untimely and failed to show clear evidence of error.² By decision dated January 23, 2003, the Board affirmed Office decisions dated April 26 and September 7, 2001 and April 11 and July 26, 2002, denying her requests for reconsideration as untimely and failing to establish clear evidence of error.³ In the next appeal, the Board affirmed an August 8, 2003 Office decision that found appellant's June 28, 2003 reconsideration request was untimely and failed to show clear evidence of error.⁴ By decision dated November 23, 2004, the Board affirmed decisions dated April 4 and May 17, 2004, finding that appellant's requests for reconsideration were untimely and failed to show clear evidence of error.⁵ In a decision dated December 27, 2007, the Office affirmed its decisions dated May 10 and 29, 2007, finding that appellant's applications for reconsideration were untimely and failed to show clear evidence of error.⁶ By decision dated January 6, 2009, the Board affirmed an April 4, 2008 Office decision again finding the request for reconsideration untimely and failing to show clear evidence of error.⁷ The last Board decision is dated February 16, 2010, and again the Board found appellant's application for reconsideration was untimely and failed to show clear evidence of error.⁸ The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

By letter dated March 4, 2010, appellant requested reconsideration. She referred to the March 3, 1993 letter from the Office to the employing establishment, arguing that the employing establishment's "response did not provide a copy of the job offer with the information requested" by the Office. Appellant argued that "the answer given by the employing establishment dated March 16, 1993 was not adequate for the information requested" and the job offer was invalid.

In a decision dated March 23, 2010, the Office found appellant's application for reconsideration was untimely and failed to show clear evidence of error.

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)

² Docket No. 96-2518 (issued October 1, 1998).

³ Docket No. 02-1814 (issued January 23, 2003).

⁴ Docket No. 03-2128 (issued October 30, 2003).

⁵ Docket No. 04-1529 (issued November 23, 2004).

⁶ Docket No. 07-1697 (issued December 27, 2007).

⁷ Docket No. 08-1420 (issued January 6, 2009).

⁸ Docket No. 09-1497 (issued February 16, 2010).

who receives an adverse decision.⁹ 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.”¹⁰

Section 8128(a) of the Act¹¹ does not entitle a claimant to a review of an Office decision as a matter of right.¹² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.¹³ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Act.¹⁴ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.¹⁵

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office’s denial, 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 on the Director’s own motion.¹⁶ 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.¹⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.¹⁸

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.605 (1999).

¹¹ 5 U.S.C. § 8128(a).

¹² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ 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.”

¹⁴ 5 U.S.C. §§ 8101-8193.

¹⁵ 20 C.F.R. § 10.607.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

¹⁷ *D.O.*, 60 ECAB ____ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁸ *Gregory Griffin*, 41 ECAB 458 (1990).

ANALYSIS

The last decision on the merits of the claim was dated March 25, 1993. Appellant's application for reconsideration was dated March 4, 2010. As this is more than one year after the merit decision, the application for reconsideration is untimely.

As noted, the case has been before the Board on several appeals. In her March 4, 2010 letter, appellant argued that the employing establishment did not respond to a March 3, 1993 Office letter with the requested information. She has previously raised this argument. In her April 30, 2007 reconsideration request, for example, appellant noted the March 3, 1993 Office letter and argued that the March 16, 1993 response from the employing establishment was inadequate. This evidence was before the Office prior to the May 10, 2007 Office decision, and the Board affirmed the Office decision on December 27, 2007. Appellant again argued in her January 21, 2009 application for reconsideration that the employing establishment did not provide the requested information in its March 16, 1993 response. This evidence was before the Office at the time of the May 12, 2009 Office decision, and the February 16, 2010 Board decision affirmed the May 12, 2009 Office decision.

Appellant has not offered new evidence with respect to her argument that the job offer was invalid. The March 25, 1993 Office decision explained that she had been advised by the Office on March 5, 1992 that the position of support assistant was found to be suitable, she was provided with an opportunity to respond, and she provided no response prior to the April 17, 1992 termination decision. The decision also stated that the employing establishment did not give a specific date of return to work because appellant had not responded to the job offer.

In order to establish entitlement to a merit review, appellant must establish clear evidence of error by the Office. She did not provide any probative evidence sufficient to establish clear evidence of error by the Office with respect to a termination of compensation based on refusal of suitable work. The clear evidence of error standard is a difficult standard to meet, as noted above and in prior Board decisions. The Board finds appellant has not submitted evidence sufficient to establish clear evidence of error by the Office in this case.

On appeal, appellant reiterates her argument that the job offer was invalid and the Office committed error. As the Board has explained, to establish clear evidence of error, there must be evidence of record that is positive, precise and explicit and must manifest on its face that the Office committed an error. The evidence in this case does not establish clear evidence of error.

CONCLUSION

The Board finds that appellant's application for reconsideration was untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 23, 2010 is affirmed.

Issued: February 8, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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