

¹ The Board notes that the record contains a September 11, 2003 Office decision with respect to a request for reconsideration. This decision is null and void, as it involves the same issues currently on appeal and was issued after the Board took jurisdiction over the case. *See Douglas E. Billings*, 41 ECAB 880 (1990).

the case for reconsideration of the merits of the claim on the grounds that the request for reconsideration did not demonstrate clear evidence of error.

FACTUAL HISTORY

The case was before the Board on a prior appeal. The Office terminated appellant's compensation for wage loss in a decision dated January 13, 1998, finding that the weight of the evidence was represented by the second opinion referral physicians, Dr. Willard Hunter, a Board-certified orthopedic surgeon, and Dr. Frederick Green, Jr., Board-certified in psychiatry and neurology. By decisions dated April 13 and June 24, 1998 and September 7, 1999, the Office denied modification of the termination.

The Board reviewed the evidence and, by decision dated April 18, 2001, affirmed the September 7, 1999 Office decision.² On May 3, 2001 the Board vacated its decision on the grounds that appellant had requested an oral argument. By order dated March 12, 2002, the Board cancelled the oral argument, pursuant to appellant's request and reissued the April 18, 2001 decision.

By letter dated April 4, 2003, appellant, through her representative, requested reconsideration of her claim. She argued that the Office had failed to consider the report of Dr. Daniel Blackwood, a psychologist, and cited the case of *William A. Couch*³ in support of his argument.

In a decision dated June 16, 2003, the Office determined that appellant's request for reconsideration was untimely. In addition, the Office found that the request was denied on the grounds that it did not show clear evidence of error by the Office.

LEGAL PRECEDENT -- Issue 1

Section 8128(a) of the Federal Employees' Compensation 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

² Docket No. 00-382.

³ 41 ECAB 548 (1990).

⁴ 5 U.S.C. § 8128(a).

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

discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulations, 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 review 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

ANALYSIS -- Issue 1

The Board reissued its decision on the merits of the claim by order dated March 12, 2002. Appellant's request for reconsideration was dated April 4, 2003. Since this was more than one year after the Board's decision, the reconsideration request is untimely pursuant to 20 C.F.R. § 10.607(a).

LEGAL PRECEDENT -- Issue 2

With respect to an untimely request for reconsideration, the Board has held 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 manifested 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

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."

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; 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).

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 independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.¹⁸

ANALYSIS -- Issue 2

Appellant argued that the Office erred because it did not consider the May 25, 1997 report of Dr. Blackwood, a psychologist, and contended that the case of *William A. Couch* was dispositive in this case. The Board finds this argument is without merit.

In *Couch*,¹⁹ the Office received a probative medical report which was submitted in response to a request from the Office, four days prior to the issuance of its decision. It was evident from the decision that the Office failed to consider the evidence and the case was remanded to the Office. In the present case, the May 25, 1997 report from psychologist Dr. Blackman was submitted, along with the reports of his associates Drs. Hunter and Green, several months prior to the issuance of the Office's decision. The psychiatrist, Dr. Green, noted the findings of Dr. Blackman and Dr. Green provided a reasoned medical opinion on the issues presented. The Office found, and the Board has concurred, that Drs. Hunter and Green represented the weight of the medical evidence. The Office's failure to specifically mention Dr. Blackman's report in its decisions does not establish that it was overlooked. Under the circumstances of this case, the detailed report of the psychiatrist Dr. Green was of greater probative value and it was this report that the Office discussed in its decision. The Board finds no evidence that the Office erred in failing to discuss Dr. Blackman's report in this case. As noted above, the "clear evidence of error" standard requires that appellant raise a substantial question as to the correctness of the Office decision. In this case, appellant did not meet this standard and the Office properly denied the request for reconsideration without merit review of the claim.

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.

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

¹⁹ *Supra* note 3.

CONCLUSION

The Board finds that appellant's April 4, 2003 request for reconsideration was untimely and failed to show clear evidence of error by the Office. The Office properly denied the request for reconsideration without merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 16, 2003 is affirmed.

Issued: February 12, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member