



that the Office properly denied her request for reconsideration.<sup>1</sup> The facts and the circumstances of the case are set forth in the Board's prior decision and incorporated herein by reference.<sup>2</sup>

Appellant submitted reports from Dr. Edwin J. Larson, a Board-certified family practitioner, dated December 30, 2002 to December 2, 2006, who treated her for sinusitis, bronchitis, upper respiratory infection, cellulites of the face, an insect bite and back pain. On December 30, 2002 Dr. Larson noted appellant's history of depression and on August 4, 2004 he treated her for back pain and panic disorder. Also submitted was a report from Dr. Zenon Bednarski, Board-certified in emergency medicine, dated April 27, 2004. He treated appellant for arthralgia of multiple joints and abscess of the face.

On January 8, 2007 appellant filed a CA-2a, recurrence of disability claim. She submitted a report from Dr. Tom Lawry, a psychologist, dated January 4, 2007, who noted that appellant was treated for recurrent severe depression. Dr. Lawry advised that appellant experienced symptoms consistent with post-traumatic stress disorder and panic attacks.

In a letter dated February 22, 2007, the Office advised appellant that her recurrence of disability claim could not be processed. The Office noted that appellant's original emotional condition claim was denied by the Office on December 7, 2004 and this decision was affirmed by the Board on August 17, 2005. Appellant was informed that she could not file a recurrence of disability when the original claim was denied by the Office.

In an undated letter, received by the Office on April 5, 2007, appellant requested reconsideration. She asserted that she established the merits of her claim but the Office denied compensation based on the timeliness of the filing. Appellant indicated that she was on medication at the time.

By decision dated May 22, 2007, the Office denied reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

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<sup>1</sup> The Board found that appellant retired on January 16, 1999 and did not file her claim until August 11, 2004 which was over three years after she was last exposed to work factors.

<sup>2</sup> Docket No. 05-881 (issued August 17, 2005).

## LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”<sup>3</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.<sup>4</sup>

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>5</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.<sup>6</sup>

Evidence that 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.<sup>8</sup> This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>9</sup> The Board makes an independent

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>5</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>6</sup> *Annie L. Billingsley*, *supra* note 4.

<sup>7</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of the Office.<sup>10</sup>

### ANALYSIS

In its May 22, 2007 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on January 5, 2005 which was affirmed by the Board in a merit decision on August 17, 2005. Appellant's request for reconsideration was received on April 5, 2007 which was more than one year after August 17, 2005. Accordingly, her request for reconsideration was not timely filed.

The Board finds that appellant has not established clear evidence of error on the part of the Office. In a note received April 5, 2007, appellant asserted that she established the merits of her claim but her claim was denied based on the timeliness of the filing. She indicated that she was on medication at the time. The Board notes that, to the extent that appellant may be asserting that her medication rendered her incompetent to file a timely claim, her assertion does not establish clear evidence of error in the Office's denial. The Board has held that it is the employee's burden to show that she is incompetent for a given period by submitting medical evidence stating that her condition was such that she was not capable of filling out a form or of otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the time limitation requirements.<sup>11</sup> The medical reports of record do not show that appellant had any medical condition that rendered her incapable of performing these or similar tasks such that she would be considered incompetent within the meaning of the Act. Appellant submitted reports from Dr. Larson dated December 20, 2002 to December 2, 2006, Dr. Bednarski dated April 27, 2004 and Dr. Lawry dated January 4, 2007. These reports do not address the underlying deficiency in the claim, the timeliness of her claim under 5 U.S.C. § 8122(a).

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office's decision. Consequently, the Office properly denied appellant's reconsideration request as her request does not establish clear evidence of error.

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<sup>10</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathew*, 44 ECAB 765, 770 (1993).

<sup>11</sup> *Linda J. Reeves*, 48 ECAB 373 (1997).

**CONCLUSION**

The Office properly determined that appellant's request for reconsideration received on April 5, 2007 was untimely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 22, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 12, 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