United States Department of Labor
Employees' Compensation Appeals Board

B.W., Appellant	)	
and	)	**Docket No. 07-1697**
	)	**Issued: December 27, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Memphis, TN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 4, 2007 appellant filed a timely appeal of decisions of the Office of Workers' Compensation Programs dated May 10 and 29, 2007, finding that her requests for reconsideration were untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal. Since the last merit decision was issued March 25, 1993, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant's requests for reconsideration were untimely and failed to show clear evidence of error.

FACTUAL HISTORY

This is the fifth 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.[1] 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 requests for reconsideration as untimely and failing to establish clear evidence of error.[2] 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.[3] By decision dated November 23, 2004, the Board affirmed decisions dated May 17 and April 4, 2004, finding that appellant's requests for reconsideration were untimely and failed to show clear evidence of error. The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

In a letter dated April 30, 2007, appellant requested reconsideration of her claim. She argued that the termination decisions were erroneous, as she was "never given any priority consideration for extended recovery time" and her physician restricted her from any employment with the employing establishment. Appellant also stated that the employing establishment did not provide the requested information prior to the March 25, 1993 merit decision. According to appellant, the job offer was invalid under Office regulations as there was no evidence "that shows when the job first became available to me and how long it would be available."

By decision dated May 10, 2007, the Office determined the application for reconsideration was untimely. The Office denied merit review on the grounds that appellant did not establish clear evidence of error.

In a letter dated May 18, 2007, appellant again requested reconsideration. She reiterated her argument that the job offer was not medically suitable and was not a valid job offer. Appellant submitted a portion of a federal employee publication regarding reemployment following an employment injury.[4]

By decision dated May 29, 2007, the Office again found appellant's application for reconsideration was untimely. The Office denied merit review of the claim on the grounds that the application did not show clear evidence of error by the Office.

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) who receives an adverse decision.[5] The employee shall exercise this right through a request to

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

[2] Docket No. 02-1814 (issued January 23, 2003).

[3] Docket No. 03-2128 (issued October 30, 2003).

[4] Department of Labor Publication CA-810 (rev. 2/94), A Handbook for Employee Agency Personnel.

[5] 5 U.S.C. § 8128(a).

the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[6]

Section 8128(a) of the Act[7] does not entitle a claimant to a review of an Office decision as a matter of right.[8] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[9] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[10] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[11] 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).[12]

The Board has held, however, 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.[13] 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.[14]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[15] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[16] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

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[6] 20 C.F.R. § 10.605 (1999).

[7] 5 U.S.C. § 8128(a).

[8] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] 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."

[10] 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; (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).

[11] 20 C.F.R. § 10.607(a).

[12] *See Leon D. Faidley, Jr.*, *supra* note 8.

[13] *Leonard E. Redway*, 28 ECAB 242 (1977).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[15] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[16] *See Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.[17] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[18] 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.[19] 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.[20] 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.[21]

ANALYSIS

The last merit decision is dated March 25, 1993. The applications for reconsideration in this case are dated April 30 and May 18, 2007. Since they are more than one year after the merit decision, they are untimely.

To require the Office to reopen the case for merit review, appellant must therefore show clear evidence of error by the Office. The April 30, 2007 application for reconsideration alleges error, but fails to provide probative evidence sufficient to establish clear evidence of error. Appellant alleges, for example, that the job offer was not medically suitable. The record indicates that her physician signed the job offer on February 27, 1992, indicating that she could perform the job duties. She asserts the job offer was invalid as it did not discuss availability. The Office received information from the employing establishment indicating that the job remained available and, as noted by the Office in its March 25, 1993 decision, appellant had an opportunity prior to termination of benefits to provide reasons for not accepting the position, but failed to provide reasons.

The May 18, 2007 application raises similar arguments without providing pertinent evidence supporting an allegation of error. The reference to a handbook for employing establishment personnel does not establish a procedural error with respect to termination based on refusal of suitable work pursuant to 5 U.S.C. § 8106(c). As noted above, the record contains evidence supporting medical suitability and availability of the position offered.

The Board accordingly finds that appellant has not submitted evidence establishing clear evidence of error by the Office. The Office properly denied the applications for reconsideration without merit review of the claim.

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[17] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[18] *See Leona N. Travis*, *supra* note 16.

[19] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[20] *Leon D. Faidley, Jr.*, *supra* note 8.

[21] *Gregory Griffin*, 41 ECAB 458 (1990).

CONCLUSION

The applications for reconsideration were untimely and failed to establish clear evidence of error by the Office. Therefore, the Office properly denied the applications for reconsideration without merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 29 and 10, 2007 are affirmed.

Issued: December 27, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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