

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

The case is on appeal to the Board for the third time. In the first appeal, by decision dated December 8, 1997,² the Board found that appellant had not established either that she had a disability causally related to her employment injury or that she was entitled to a schedule award. The Board determined that special weight was to be accorded to the opinion of Dr. Martin H. Welch, the impartial medical specialist, on the issue of whether appellant sustained a permanent impairment causally related to her work injury. Because Dr. Walsh found zero percent impairment attributable to appellant's work injury, the Board found that appellant was not entitled to a schedule award. The Board further found that appellant failed to establish that she sustained an emotional condition in the performance of duty. Accordingly, the Board affirmed the Office's decisions of September 26, 1994 and January 11, 1995. In the second appeal, by decision dated June 2, 2000,³ the Board affirmed an October 16, 1998 decision of the Office which denied appellant's request for review of the merits of her claim. The law and the facts surrounding these appeals are set forth in the Board's decisions and are hereby incorporated by reference.⁴

Following the Board's June 2, 2000 decision, on September 11, 2000 the Office received an undated letter from appellant requesting reconsideration. By nonmerit decision dated September 19, 2000, the Office found that the evidence submitted for reconsideration was insufficient to require a reopening of the case.

In a September 26, 2000 letter, appellant requested that the September 19, 2000 decision be set aside. In an October 17, 2000 letter, the Office advised appellant to pursue her appeal rights. The Office further acknowledged that the additional information appellant had sent by certified mail on September 11, 2000 was received in the case file after the September 19, 2000 decision had been issued. In an October 18, 2000 report of telephone call, the Office advised appellant that it would treat her September 26, 2000 letter as a reconsideration request.

By decision dated October 25, 2000, the Office denied further review of the claim on the grounds that appellant's September 26, 2000 reconsideration request was untimely filed and did not establish clear evidence of error. In a December 14, 2000 letter, appellant requested reconsideration of the October 25, 2000 decision. By decision dated February 9, 2001, the

² Docket No. 95-1315 (issued December 8, 1997).

³ Docket No. 99-890 (issued June 2, 2000).

⁴ Appellant's claims were accepted for exposure to fumes/vapors and for aggravation of bronchial asthma. Appellant's concurrent conditions of chronic asthma and pulmonary disease were not accepted as causally related to her employment injury.

Office denied further review of the claim on the grounds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error.

By decision dated June 26, 2002, the Board issued an order remanding case to the Office for reconstruction as the case record before the Board was incomplete.⁵

In a decision dated February 5, 2003, the Office denied further review of the claim on the grounds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error. On April 10, 2003 appellant filed an appeal with the Board and requested oral argument that was scheduled for May 12, 2004. By letter dated April 6, 2004, appellant withdrew her request for an oral argument and requested a review on the record. The present appeal follows.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.⁶ 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.⁷ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁸ Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁹ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. A right to reconsideration within one year also accompanies any

⁵ Docket No. 01-1521 (issued June 26, 2002). The Board notes that although the order remanding case specified that the Office issue a *de novo* decision following reconstruction, this instruction was erroneously issued as the Board did not have merit jurisdiction.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 20 C.F.R. § 10.607 (1999); *see also Alan G. Williams*, 52 ECAB 180 (2000).

⁸ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁹ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b) (1999).

¹⁰ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

subsequent merit decision on the issues.¹¹ The last merit decision in this case was the December 8, 1997, Board *de novo* review of the issues concerning whether appellant had any disability attributable to the employment injury, her entitlement to a schedule award and whether she developed an emotional condition in the performance of duty. As appellant's December 14, 2000 letter requesting reconsideration was submitted more than one year after the last merit decision of record, the Board's December 8, 1997 decision, it was untimely.

As appellant's request was filed more than one year after the Board's December 8, 1997 decision, appellant must demonstrate "clear evidence of error" on the issue which was decided by the Office. 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 be manifest on its face that the Office committed an error. 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 on the part of the Office. 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. 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 erred in denying merit review in the face of such evidence.¹²

In support of her request for reconsideration, appellant submitted a seven-page statement. Appellant argued that there was no time limit, in which to request reconsideration and that the Office was required to perform a merit review to any new evidence provided. As previously noted, the Office, through regulation, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). One such limitation is that 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.¹³ In those cases where a request for review is not timely filed, Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application shows "clear evidence of error" on the part of the Office.¹⁴ A one-year time limit exists in which to file a request for reconsideration. Moreover, merit review to any new evidence submitted is dependant upon when the application for review was filed and thus, does not warrant an automatic merit review as a matter of right. Thus, appellant's arguments pertaining to time limitations and merit review lack merit.

¹¹ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

¹² *John Crawford*, 52 ECAB 395 (2001); *Pete F. Dorso*, 52 ECAB 424 (2001).

¹³ 20 C.F.R. § 10.607 (1999).

¹⁴ *See* 20 C.F.R. § 10.607(b).

Appellant also argued that once a causal relationship is established, it cannot be unincorporated. While a claimant must establish a causal relationship between her injury and factors of her federal employment to be entitled to benefits under the Act, the ultimate hope is that the claimant will make a full recovery from the accepted employment condition. When there are no longer any residuals from an accepted condition, a claimant is deemed to have fully recovered from the accepted employment condition. In this case, the Office found and the Board affirmed in its December 8, 1997 decision, that appellant had fully recovered from her accepted employment conditions. Unfortunately, the record reflects that appellant has preexisting underlying medical conditions, which are not employment related, which continue to be troublesome. The fact that work activities may have produced pain or discomfort revelatory of an underlying condition does not raise an inference of causal relation.¹⁵

Appellant further discussed her opinion on the medical evidence of record. The Board has held that evidence of the nature of any disabling condition and its relationship to a particular employee's work can only be given by a physician fully acquainted with the relevant facts and circumstances of the employment injury and the medical findings.¹⁶ As a lay person, appellant is not competent to render a medical opinion and, therefore, her opinion has no probative value on a medical issue.¹⁷ Moreover, the evidence of record to which appellant refers has been previously considered and reviewed by the Office in its October 25, 2000 decision denying reconsideration or by the Board in its December 8, 1997 decision on the merits and was deemed either not sufficient to warrant a merit review or to create a new conflict with the opinion of Dr. Walsh, the impartial medical specialist.

Accordingly, the Board finds that the arguments submitted by appellant in support of her application for review do not raise a substantial question as to the correctness of the Office's prior merit decision of September 26, 1994, which the Board had affirmed on December 8, 1997 and thus is insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits of her claim on the grounds that it was untimely filed and failed to show clear evidence of error.

¹⁵ See *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹⁶ See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁷ See *James A. Long*, 40 ECAB 538 (1989).

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member