

FACTUAL HISTORY

On February 26, 2002 appellant, then a 41-year-old supervisory clerk, filed an occupational disease claim alleging that on March 20, 2001 she realized that she sustained an allergic reaction to dust and carpeting during the course of her federal employment. The Office assigned the case file number 16-2037764.

In a certificate to return to work dated April 18, 2001, a physician diagnosed allergic rhinitis and opined that appellant “may have [an] allergen in the environment at the workplace.”¹ He found that she could return to work on April 21, 2001.

Appellant submitted unsigned chart notes dated November 13 to December 10, 2001, which indicated that she received treatment during that time for a skin condition. She further submitted a memorandum from the employing establishment regarding changes that need to be made to the file room to improve air quality.

By decision dated November 18, 2002, the Office denied appellant’s claim on the grounds that the medical evidence did not establish that she sustained a medical condition caused by the employment exposure.

In a letter received by the Office on July 14, 2004, appellant requested reconsideration. She enclosed a letter dated November 22, 2002 in which she described her allergic reaction to the dust and mold in a file room. Appellant related that the employing establishment installed ventilators and cleaned the carpet after finding that the file room had excessive dust and mold. She indicated that she had used her own leave when she could not work due to an upper respiratory infection and rash resulting from exposure to allergens in the file room.

With her request for reconsideration, appellant again submitted chart notes dated November 20 to December 10, 2001 and the April 18, 2001 certificate to return to work. She also enclosed medical evidence relevant to her treatment from 2001 to 2004 for stress, hypertension and cardiac problems, and notes from occupational and physical therapists. Appellant further submitted certificates to return to work dated June 19 and August 2001.

By decision dated July 28, 2004, the Office denied appellant’s claim on the grounds that her request for reconsideration was untimely filed and failed to establish clear evidence of error.

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.² 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.³ When an application for review is

¹ The name of the physician is not legible.

² 5 U.S.C. §§ 8101-8193.

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

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.⁴ The 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.⁵ 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.⁶

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. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ 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's decision.⁸ 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.⁹

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. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁰ The last merit decision in this case was the Office's November 8, 2002 decision denying her claim on the grounds that the medical evidence

⁴ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁵ 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 decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁷ *Dorletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003); *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004).

⁸ *Id.*

⁹ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹⁰ *Veletta C. Coleman*, *supra* note 4; *Larry L. Lilton*, 44 ECAB 243 (1992).

was insufficient to establish that she sustained an allergic reaction causally related to the accepted employment exposure. As appellant's July 14, 2004 letter requesting reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, she must demonstrate "clear evidence of error" by the Office in denying her claim for compensation.¹¹

Appellant resubmitted chart notes dated November 20 to December 10, 2001 and the April 18, 2001 certificate to return to work. Evidence that duplicates evidence already of record, however, is insufficient to establish clear evidence of error.¹²

Appellant also submitted medical reports which indicated that she received treatment from 2001 to 2004 for stress, hypertension and a cardiac condition. The relevant issue in this case, however, is whether she sustained an allergic reaction caused or aggravated by factors of her federal employment. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹³

Regarding the reports from physical and occupational therapists, neither physical nor occupational therapists are "physicians" within the meaning of section 8101(2) and thus cannot render a medical opinion.¹⁴ As the pertinent issue in this case is medical in nature these reports are of no relevance and thus insufficient to establish clear evidence of error.¹⁵

Appellant also submitted certificates to return to work on June 19 and August 2001; however, as the certificates contained no diagnosis, findings on examination or opinion regarding causation, they are of little probative value and insufficient to establish clear evidence of error.¹⁶

The evidence submitted in support of appellant's untimely reconsideration request is either duplicative or irrelevant and thus insufficient to establish clear evidence of error. To establish clear evidence of error, the evidence must be of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹⁷ The evidence submitted on reconsideration fails to meet this standard.

On appeal appellant contended that she changed her address with the Equal Employment Opportunity Commission (EEOC) repeatedly but all information was sent to her old address. She also noted that she changed her address with the employing establishment. The Office,

¹¹ 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

¹² *George C. Vernon*, 54 ECAB ____ (Docket No. 02-1954, issued January 6, 2003).

¹³ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹⁴ 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357 (2000); *Jerre R. Rinehart*, 45 ECAB 518 (1994).

¹⁵ *Id.*

¹⁶ *Linda I. Sprague*, 48 ECAB 386 (1997).

¹⁷ *See Veletta C. Coleman*, *supra* note 4.

however, is part of the Department of Labor, which is a government entity separate from the EEOC and appellant's employing establishment. There is no evidence that appellant notified the Office of an address change until her untimely request for reconsideration on July 14, 2004. Appellant has not established any error on the part of the Office relative to the issuance of its decisions on her claim.

Appellant also argued on appeal that the medical evidence establishes that her asthma is related to her employment. Her lay opinion, however, is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.¹⁸

CONCLUSION

The Board finds that appellant's reconsideration request was untimely filed and failed to present clear evidence of error on the part of the Office. The Office thus properly denied further merit review.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 28, 2004 is affirmed.

Issued: January 10, 2005
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁸ *Gloria J. McPherson*, 51 ECAB 441 (2000).