

**United States Department of Labor
Employees' Compensation Appeals Board**

G.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Biloxi, MS, Employer)

Docket No. 06-1523
Issued: October 17, 2006

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 20, 2006 appellant filed a timely appeal of a June 22, 2005 nonmerit decision of the Office of Workers' Compensation Programs finding her May 30, 2005 request for reconsideration was untimely filed and did not present clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board's jurisdiction is limited to final decisions issued within one year of the filing of the appeal. As the last decision on the merits of the claim was the Board's May 13, 2003 decision, the only decision on appeal is the June 22, 2005 nonmerit Office decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This is the third appeal before the Board. By decision dated May 13, 2003, the Board affirmed an October 9, 2002 decision by an Office hearing representative, who affirmed the denial of appellant's claim that her high blood pressure was aggravated by factors of her federal employment. It also affirmed a December 24, 2002 decision denying further merit review.¹ On August 20, 2003 the Board denied appellant's petition for reconsideration on the grounds that no error of fact or law had been cited.² In the second appeal, the Board issued a June 17, 2004 decision which affirmed a November 13, 2003 Office decision denying her request for reconsideration.³

In a letter dated July 6, 2004, appellant requested the Office to reconsider her claim.

By decision dated August 2, 2004, the Office issued a nonmerit decision denying appellant's request for reconsideration on the grounds that she neither raised substantive legal questions nor submitted new and relevant evidence.

In a letter dated May 30, 2005, appellant requested the Office to reconsider her claim and submitted an August 26, 2002 memorandum by Molly M. Gremmels, a supervisor, which had previously been submitted and considered.

By decision dated June 22, 2005, the Office issued a nonmerit decision denying appellant's request for reconsideration. The Office found that appellant's May 30, 2005 request for reconsideration was not timely file as it was not filed within one year of the Board's May 13, 2003 merit decision and did not demonstrate 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.⁴ 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.⁵ 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.⁶ The Office procedures state

¹ Docket No. 00-382 (issued May 13, 2003).

² Docket No. 00-382 (*petition for recon. denied*, issued August 20, 2003).

³ Docket No. 04-789 (issued June 17, 2004).

⁴ 5 U.S.C. §§ 8101-8193. The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB ____ (Docket No. 04-208, issued March 18, 2004).

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

⁶ *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

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.⁷ 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifested on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.¹⁵

⁷ 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).

⁸ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ See *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Jesus D. Sanchez supra* note 6.

¹² See *Leona N. Travis, supra* note 10.

¹³ See *Nelson T. Thompson, supra* note 8.

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁵ See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS

The most recent merit decision was the Board's May 13, 2003 decision affirming the denial of her claim.¹⁶ Appellant requested reconsideration on May 30, 2005. As this was more than one year from the date of the Board's decision, it was untimely.

The question for determination is whether appellant's untimely request for reconsideration demonstrates clear evidence of error on the part of the Office in its October 9, 2002 merit decision, which the Board affirmed on May 13, 2003. Appellant's May 30, 2005 request for reconsideration fails to demonstrate clear evidence of error on the part of the Office. The Office had denied appellant's claim that her high blood pressure was aggravated by factors of her federal employment. In support of her request, appellant submitted an August 26, 2002 memorandum by Ms. Gremmels which had previously been submitted to the record and considered by the Office hearing representative in an October 9, 2002 decision. Nothing in appellant's May 30, 2005 request for reconsideration establishes that the Office's October 9, 2002 decision was clearly erroneous in denying her claim that her high blood pressure was employment related.

Because appellant's May 30, 2005 request for reconsideration does not establish, on its face, that the Office hearing representative's October 9, 2002 decision was erroneous, the Board will affirm the Office's June 22, 2005 decision not to reopen her case for a review on the merits. Appellant's untimely request does not warrant such action.

CONCLUSION

The Board finds that the Office properly determined that appellant's May 30, 2005 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 22, 2005 is affirmed.

Issued: October 17, 2006
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