

the incident and did not return. On November 6, 1989 the Office accepted that appellant sustained a cervical and lumbosacral strain. In a decision dated January 27, 1994, the Board found that the Office improperly terminated benefits effective March 7, 1993,¹ and compensation was reinstated.

On November 29, 2004 appellant began part-time employment as a bank teller. By decision dated March 14, 2005, the Office reduced her compensation effective February 20, 2005 based upon her actual earnings.

By letter dated May 16, 2006, appellant requested reconsideration. She submitted no new evidence with her request, but contended that the reduction in compensation caused her hardship, that she was not working at this time, that she was an evacuee of Hurricane Katrina and still had trouble with her back.

By decision dated June 8, 2006, the Office denied appellant's request for reconsideration. It found that the request was untimely filed and did not demonstrate clear evidence of error.²

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

“The Secretary of Labor may review an award for or against compensation at any time on [her] 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.”

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 an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. 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).⁴

¹ Docket No. 93-1980 (issued January 27, 1994). The facts and the history, as stated in the prior appeal, are incorporated by reference.

² To the extent that appellant is seeking modification of the March 14, 2005 wage-earning capacity, the Office did not adjudicate this issue and it is not presently before the Board on appeal.

³ 5 U.S.C. § 8128(a).

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

The Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must undertake a limited review to determine whether the application shows clear evidence of error.⁵ 20 C.F.R. § 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 [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.”

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ It is not enough merely to show that the evidence could be construed to produce a contrary conclusion.⁸ 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.⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical evidence 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.¹⁰ 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.¹¹

ANALYSIS

The most recent merit decision by the Office was issued on March 14, 2005. Appellant had one year from the date of that decision to request reconsideration but did not do so until May 16, 2006. The Board finds that the Office properly determined that appellant’s application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office also properly found that appellant’s request for reconsideration did not demonstrate clear evidence of error. In order to establish clear evidence of error, the newly submitted evidence must be relevant to the issue which was decided by the Office and must be

⁵ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *Id.*

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Leon D. Faidley, Jr.*, *supra* note 4.

¹¹ *Gregory Griffin*, *supra* note 5.

positive, precise and explicit that the Office committed an error. Appellant presented no new evidence with her request for reconsideration. Instead, she merely argued that she currently was in a bad financial situation and that she still had back pain. This is not sufficient to show that the Office committed clear evidence of error in making its decision to reduce her compensation benefits based on her actual earnings as a bank teller.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 8, 2006 is affirmed.

Issued: January 16, 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