



affirmed a January 12, 1996 Office decision finding that appellant's reconsideration request was untimely and failed to show clear evidence of error.<sup>1</sup> 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 her requests for reconsideration as untimely and failing to establish clear evidence of error.<sup>2</sup> 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.<sup>3</sup> By decision dated November 23, 2004, the Board affirmed decisions dated April 4 and May 17, 2004, finding that appellant's requests for reconsideration were untimely and failed to show clear evidence of error. In a decision dated December 27, 2007, the Office affirmed its decisions dated May 10 and 29, 2007, finding that appellant's applications 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.

By letter dated January 28, 2008, appellant requested reconsideration before the Office. She stated that the March 25, 1993 decision was submitted in error. Appellant noted that she had submitted a May 22, 2003 report from Dr. L.D. Hutt, a clinical psychologist, stating that he had been misled regarding a 1992 job offer and would not have approved the offer. She also contended that the job offer was invalid and the Board had either ignored evidence or had not received the entire case record.

In a decision dated April 4, 2008, the Office found the application for reconsideration untimely. It further determined that the application did not show clear evidence of error by the Office and therefore appellant was not entitled to a merit review of her claim.

### **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.<sup>4</sup> The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."<sup>5</sup>

Section 8128(a) of the Act<sup>6</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>7</sup> This section vests the Office with discretionary authority to determine

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<sup>1</sup> Docket No. 96-2518 (issued October 1, 1998).

<sup>2</sup> Docket No. 02-1814 (issued January 23, 2003).

<sup>3</sup> Docket No. 03-2128 (issued October 30, 2003).

<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.605 (1999).

<sup>6</sup> *See supra* note 4.

<sup>7</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

whether it will review an award for or against compensation.<sup>8</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>9</sup> As one such limitation, it 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.<sup>10</sup> 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).<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>14</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>15</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>16</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>17</sup> 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.<sup>18</sup> 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

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<sup>8</sup> 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."

<sup>9</sup> 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, it 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) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

<sup>10</sup> 20 C.F.R. § 10.607(a).

<sup>11</sup> *See Leon D. Faidley, Jr., supra* note 7.

<sup>12</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>14</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>15</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>16</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>17</sup> *See Leona N. Travis, supra* note 15.

<sup>18</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

a substantial question as to the correctness of the Office decision.<sup>19</sup> 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.<sup>20</sup>

### **ANALYSIS**

As the last merit decision was dated March 25, 1993, appellant's January 28, 2008 application for reconsideration is untimely as it was filed more than one year after the merit decision. In the application for reconsideration, she contended that the Board did not consider the May 22, 2003 report from Dr. Hutt in its prior decision. A review of the record indicates that in the October 30, 2003 decision, the Board specifically addressed the May 22, 2003 report and explained why it did not establish clear evidence of error. With respect to the argument that the job offer was invalid, the Board previously considered the argument in its January 23 and October 30, 2003 decisions as well as the December 27, 2007 decision. Appellant submitted no additional relevant evidence. The Board finds that the January 28, 2008 application for reconsideration is untimely and fails to show clear evidence of error by the Office in terminating appellant's compensation for refusal of suitable work. Appellant is not entitled to a merit review of her claim.

### **CONCLUSION**

The Office properly denied merit review as appellant's application for reconsideration was untimely and failed to establish clear evidence of error by the Office.

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<sup>19</sup> *Leon D. Faidley, Jr., supra* note 7.

<sup>20</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 4, 2008 is affirmed.

Issued: January 6, 2009  
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