

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEGGY E. CARSON and DEPARTMENT OF DEFENSE,
DEFENSE COMMISSARY AGENCY, Fort Jackson, SC

*Docket No. 02-1813; Submitted on the Record;
Issued December 4, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the April 19, 2002 decision denying appellant's request for reconsideration. Since more than one year has elapsed between the date of the Office's most recent merit decision on March 13, 2001, awarding appellant a five percent schedule award for the left lower extremity, and the filing of appellant's appeal on June 26, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.¹

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it 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.² The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).³

The Office properly found, by its April 19, 2002 decision, that the one-year time limit for filing a request for reconsideration of the Office's March 13, 2001 decision expired on March 13,

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

² 20 C.F.R. § 10.607(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

2002, and that the request for reconsideration dated March 15, 2002 was untimely. Appellant contends that an earlier letter dated April 27, 2001 was a request for reconsideration, however, the Board notes that the letter was not received by the Office until March 18, 2002.⁴

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁵ 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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² 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.¹³

In the present case, appellant submitted the April 27, 2001 letter in support of her March 15, 2002 request for reconsideration and argued that the Office did not properly consider

⁴ The letter is date-stamped March 18, 2002.

⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁷ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *Jesus D. Sanchez*, *supra* note 3.

¹⁰ *Leona N. Travis*, *supra* note 8.

¹¹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 3.

¹³ *Gregory Griffin*, *supra* note 5.

a September 13, 2000 medical report from an independent medical examiner in rendering the March 13, 2001 decision. The Board notes that 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.¹⁴ Appellant also disagreed with the Office's denial of wage-loss compensation and stated that the independent medical examiner incorrectly calculated the impairment of the extremities in arriving at his impairment rating. The Board finds that these arguments merely disagree with the outcome of the Office's decisions and with the physician's impairment rating and do not demonstrate that the Office committed an error.

Appellant did not submit any new evidence which raised a substantial question as to the correctness of the Office's March 13, 2001 decision awarding her a five percent schedule award for the left lower extremity.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied it.

The April 19, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 4, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹⁴ *Leona N. Travis, supra* note 8.