

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA L. WOODS and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

*Docket No. 03-2128; Submitted on the Record;
Issued October 30, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error.

This is the third appeal of this case before the Board. By decision dated October 1, 1998,¹ the Board affirmed a January 12, 1996 Office decision finding that appellant's July 1, 1995 reconsideration request was untimely and failed to show clear evidence of error. In a decision dated January 23, 2003,² the Board affirmed Office decisions dated April 26 and September 7, 2001 and April 11 and July 26, 2002 which denied appellant's subsequent requests for reconsideration on the basis of untimeliness.

By letter dated June 28, 2003, appellant requested reconsideration. Appellant submitted a May 22, 2003 report from Dr. L.D. Hutt, a clinical psychologist, who asserted that the modified job offered to appellant, which Dr. Hutt approved on February 27, 1992, was medically unsuitable. Dr. Hutt, reiterating an assertion made on several previous occasions, alleged that he was misled by the employing establishment into believing that the job he approved was with the Army Corp of Engineers, when the job was actually with the employing establishment. Dr. Hutt stated that, because he had explicitly restricted appellant from working for the employing establishment, the job was unsuitable.

¹ Docket No. 96-2518 (issued October 1, 1998). The Office accepted that appellant sustained a generalized anxiety order with depressive features. On April 17, 1992 the Office terminated appellant's compensation finding that she refused an offer of suitable work.

² Docket No. 02-1814 (issued January 23, 2003). In this decision, the Board found that the case history provided in the Board's October 1, 1998 decision was incorporated by reference. This finding is applicable to the instant case as well.

By decision dated August 8, 2003, the Office denied reconsideration, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error.

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

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle an employee to a review of an Office decision as a matter of right.⁴ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

- (1) end, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ 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.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁷

The Office properly determined in this case that appellant failed to file a timely application for review. The Board issued its last merit decision pertaining to the termination of appellant's compensation for refusal of suitable work on March 25, 1993. Appellant requested reconsideration on June 28, 2003; therefore, appellant's reconsideration request was untimely as it was filed more than one year after the last merit decision.

In those cases where a request for reconsideration is not timely filed, the Board had held, however, that the Office must nevertheless undertake a limited review of the case to determine

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ 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, the Office 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 point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

⁶ 20 C.F.R. § 10.607(b).

⁷ *See Leon D. Faidley, Jr.*, *supra* note 4; *Rex L. Weaver*, 44 ECAB 535, 537 n. 5 (1993).

whether there is clear evidence of error pursuant to the untimely request.⁸ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵ The Board makes an independent determination of whether an appellant 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.¹⁶

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹⁷ In this case, appellant filed her request for an appeal on June 28, 2003, which was more than one year after the Board's March 25, 1993 termination decision. Thus, the only decision before the Board is the August 8, 2003 decision denying her request for reconsideration.

The Board finds that appellant's June 28, 2003 request for reconsideration failed to show clear evidence of error. The Office reviewed the evidence she submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant.

⁸ See *Rex L. Weaver*, *supra* note 7.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 4.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁷ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

The May 22, 2003 report from Dr. Hutt is cumulative and repetitive of reports he previously submitted. Dr. Hutt contends that he was unaware that the offered position would be administered by the employing establishment, in which case he would not have approved the position. This contention, however, raised by Dr. Hutt in reports dated January 26, 1995, January 25 and June 7, 2001, and was considered and rejected in previous Board decisions. The Office has previously explained that the offered suitable work position was not with the employing establishment, but rather was with the Corps of Engineers. Dr. Hutt's continued contentions that appellant should not work at the employing establishment therefore do not establish any error in the suitable work determination, but rather reveal an error in Dr. Hutt's understanding of the facts of this case. Dr. Hutt's May 22, 2003 report does not contain any additional factual or legal argument and is therefore insufficient to establish clear evidence that the offered job was medically unsuitable.

Moreover, appellant did not present any new medical evidence or evidence of legal error in her request letter. Appellant restates arguments she made previously; *e.g.*, that the offered job was inadequate and not medically suitable; that the employing establishment and the Office committed procedural errors in the processing and rendering of her decision. However, appellant has submitted no evidence of error in the Office's finding that the job offer was adequate and that it was available to her had she responded in a timely manner. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The decision of the Office of Workers' Compensation Programs dated August 8, 2003 is hereby affirmed.

Dated, Washington, DC
October 30, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member