

case. Appellant stated that she sustained severe pain starting in her hand traveling up her arm into her shoulder and neck. In response to an Office request for further information, appellant stated in a November 17, 1992 letter, that her “condition was caused by work factors over a period of more than one workday,” and cited repetitive casing and lifting, in addition to the September 22, 1992 incident, as the cause of her condition.

By letter dated December 9, 1992, the Office advised appellant that it had accepted her claim for right shoulder tendinitis in case file number 130995970. By decision dated March 8, 1994, the Office terminated appellant’s compensation on the basis that she no longer had any residuals causally related to her accepted work injury.

By letter dated May 12, 2003, appellant requested reconsideration in case file number 130995970. Appellant contended that the injury she sustained on September 22, 1992 was more than tendinitis and was still a problem that prevented her from doing her job as a letter sorting machine operator. Appellant also alleged that she was never returned to work by her treating physicians and that the employing establishment refused to reasonably accommodate her.

By decision dated August 12, 2003, the Office found that appellant’s request for reconsideration was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

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

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

The Office, through regulation, 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).¹

The Office, however, 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

¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

must nevertheless undertake a limited review to determine whether the application shows “clear evidence of error” on the part of the Office.² 20 C.F.R. § 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.³ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁴ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ 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.⁷ 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.⁸ 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.⁹

ANALYSIS

In the present case, the most recent merit decision by the Office on appellant’s right shoulder condition was issued on March 8, 1994. Appellant had one year from the date of this decision to request reconsideration and did not do so until May 12, 2003. 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).

Appellant’s May 12, 2003 request for reconsideration did not demonstrate clear evidence of error in the Office’s March 8, 1994 decision to terminate her compensation. The arguments in

² *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

³ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁴ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁵ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ *See Leona N. Travis*, *supra* note 4.

⁷ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *Leon D. Faidley, Jr.*, *supra* note 1.

⁹ *Gregory Griffin*, *supra* note 2.

appellant's May 12, 2003 letter that she was still disabled and that additional conditions should have been accepted by the Office address questions that are determined by medical evidence. Appellant did not submit any medical or other evidence to support her May 12, 2003 request for reconsideration. Appellant's contention that the employing establishment did not accommodate her is irrelevant to the Office's termination of her compensation on the basis that she had no employment-related residuals. Appellant's May 12, 2003 request for reconsideration did not raise a substantial question as to the correctness of the Office decision.

CONCLUSION

Appellant's May 12, 2003 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member