

FACTUAL HISTORY

This is appellant's third appeal before the Board. In the first instance, the Board dismissed the appeal of a November 9, 1998 Office decision denying modification of an October 22, 1997 termination of compensation benefits at appellant's request to enable her to request reconsideration before the Office.² In the second appeal, on February 7, 2002 the Board found that the Office had properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a). The Board found that the Office did not abuse its discretion when it refused to conduct a merit review of the Office's nonmerit April 7, 2000 decision denying appellant's request for reconsideration.³

To summarize the case, the Office accepted that appellant sustained a right shoulder contusion, a right leg contusion, right trapezius strain, right knee strain and a scalp contusion after falling in the ladies rest room and striking her head against the wall and floor and right medial epicondylitis after pulling on a heavy metal door on January 8, 1997. She received appropriate compensation benefits and on October 22, 1997 the Office terminated appellant's compensation benefits effective that date on the grounds that she had recovered from all accepted conditions. Appellant's requests for modification were denied on September 11 and October 22, 1997, February 18, May 6 and November 9, 1998 and her request for reconsideration under 5 U.S.C. § 8128(a) was denied on April 7, 2000. The Board affirmed the April 7, 2000 Office decision on February 7, 2002. By decision dated November 21, 2002, the Office denied appellant's request to reopen her case or further review on its merits on the grounds that it was untimely filed and lacked clear evidence of error.

On August 7, 2003 appellant requested reconsideration of the November 21, 2002 decision. In support, she submitted several letters requesting copies of her case record and a March 22, 2003 personal statement claiming that she was handicapped and had not received appropriate medical treatment. Appellant claimed that she sustained post-concussion syndrome which interrupted her ability to think and concentrate, that it caused blurred vision and caused depression.

By decision dated November 6, 2003, the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that it was untimely filed, as it was not filed within one year of the last merit decision and lacked clear evidence of error.

² Docket No. 99-757 (issued February 25, 2000).

³ Docket No. 01-1240 (issued February 7, 2002).

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ 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) provide 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).⁵

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 must nevertheless undertake a limited review to determine whether the application shows “clear evidence of error” on the part of the Office.⁶ Title 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.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

⁴ Title 5 U.S.C. § 8128(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

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

⁹ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ *See Leona N. Travis*, *supra* note 8.

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

ANALYSIS

The Board finds that appellant failed to establish clear evidence of error.

On August 7, 2003 appellant requested reconsideration. As this request was not within one year of the most recent Office merit decision dated November 9, 1998, the Board finds that the request was untimely filed.¹⁴ The Office then proceeded to conduct a limited review to determine whether the evidence appellant submitted demonstrated clear evidence of error on the part of the Office.

In support of her reconsideration request, she submitted several letters requesting copies of her case record, correspondence with the Office and her Congressional representative and a March 22, 2003 personal statement claiming that she was handicapped and had not received appropriate medical treatment. This evidence was reviewed on its face by the Office to determine whether it revealed clear evidence of error. The Office found that it did not establish clear evidence of error.

The Board finds that these pieces of evidence do not address the issue of clear evidence of error or demonstrate clear evidence of error on the part of the Office in issuing its decision. None of the evidence was relevant to the issue of termination decided by the Office or was positive, precise and explicit and manifest on its face that the Office committed error. None of it raised a substantial question concerning the correctness of the Office's decision and is insufficient to *prima facie* shift the weight of the medical evidence in appellant's favor and does not raise a substantial question as to the correctness of the report. The evidence is not medical in nature and, accordingly, does not address the threshold issue of whether the Office properly terminated appellant's compensation benefits. In this regard, the letters requesting copies of her case were of a personal nature and have no value in demonstrating clear evidence of error as they are merely requests for Office action regarding paperwork. Neither does the correspondence with the Office and appellant's Congressional representative, as they also do not address the issue decided by the Office. Her individual statement claiming that she was handicapped and had not received appropriate treatment has no value in demonstrating clear evidence of error in the Office's decision

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

¹² *Leon D. Faidley*, *supra* note 5.

¹³ *Gregory Griffin*, *supra* note 6.

¹⁴ The Board notes that the Office incorrectly characterized the Board's November 21, 2002 decision as a merit decision when it actually affirmed the Office's April 7, 2000 denial of a merit review. The most recent merit decision of the Office was the November 9, 1998 denial of modification.

as it merely gives her point of view and does not address the issue before the Office. Likewise, appellant's allegation that she sustained post-concussion syndrome is irrelevant to the issue decided by the Office.

The Board finds that the evidence submitted does not address the threshold issue and, therefore, does not demonstrate any positive, precise and explicit evidence of manifest error on the face of the Office's decision and, therefore, the Board finds that appellant has not demonstrated clear evidence of error in the Office's last merit decision of November 9, 1998, which would warrant a reopening of her case for further merit review.

CONCLUSION

The Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) as being untimely filed and presenting no clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 6, 2003 be and hereby is affirmed.

Issued: November 17, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member