

**United States Department of Labor
Employees' Compensation Appeals Board**

BRENDA L. WOODS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Memphis, TN, Employer**

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**Docket No. 04-1529
Issued: November 23, 2004**

Appearances:
Brenda L. Woods, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On May 24, 2004 appellant filed a timely appeal of May 17 and April 30, 2004 decisions of the Office of Workers' Compensation Programs, finding that appellant's requests for reconsideration were untimely and failed to show clear evidence of error. Since the appeal was filed more than one year after the last merit decision dated March 25, 1993, the Board does not have jurisdiction to review the merits of the claim pursuant to 20 C.F.R. § 501.3(d)(2).

ISSUE

The issue is whether the Office properly determined that appellant's requests for reconsideration were untimely and failed to show clear evidence of error.

FACTUAL HISTORY

The current appeal is the fourth appeal in the case. The Office terminated appellant's compensation on the grounds that she refused an offer of suitable work in an April 17, 1992 decision and denied modification in a March 25, 1993 decision. In a decision dated October 1, 1998, the Board affirmed a January 12, 1996 Office decision, finding that appellant's

reconsideration request was untimely and failed to show clear evidence of error.¹ 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 requests for reconsideration as untimely and failing to establish clear evidence of error.² In the last 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.³

In a letter dated March 18, 2004, appellant again requested reconsideration of her claim. She stated that the job offer was presented to her before her physician had approved the offer, which appellant alleged was a violation of vocational rehabilitation regulations. She submitted a copy of an undated job offer and a March 16, 1993 letter from the employing establishment to the Office regarding the job offer. Appellant also argued that her requests for reconsideration were never untimely and submitted copies of prior decisions in the case.

By decision dated April 30, 2004, the Office determined that appellant's request for reconsideration was untimely. The Office further determined that appellant did not show clear evidence of error and therefore the case was not reopened for merit review.

Appellant again request reconsideration by letter dated May 7, 2004. She reiterated her argument that her reconsideration requests were timely and that she had shown error by the Office. By decision dated May 17, 2004, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁷ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for

¹ Docket No. 96-2518 (issued October 1, 1998).

² Docket No. 02-1814 (issued January 23, 2003).

³ Docket No. 03-2128 (issued October 30, 2003).

⁴ 5 U.S.C. § 8128(a).

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

⁶ 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."

⁷ 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 specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

review is filed within one year of the date of that decision.⁸ 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).⁹

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.¹⁰ 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.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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.¹⁷ 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 improperly denied merit review in the face of such evidence.¹⁸

⁸ 20 C.F.R. § 10.607(a).

⁹ See *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁰ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹² See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁵ See *Leona N. Travis*, *supra* note 13.

¹⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁸ *Gregory Griffin*, 41 ECAB 458 (1990).

ANALYSIS

In the present case, appellant stated that her requests for reconsideration were timely. Appellant indicated that she filed an appeal of the March 25, 1993 merit decision with the Board on August 3, 1993, but she acknowledged that she withdrew this appeal. A request for reconsideration must be made within one year of a merit decision of the Office. The Office decisions commencing with a June 4, 1993 decision were not decisions on the merits of the claim, nor has the Board reviewed a merit decision. The last decision on the merits was the March 25, 1993 decision and therefore any reconsideration request submitted more than one year after March 25, 1993 is untimely under section 10.607(a) of the Office's regulations. Accordingly, the March 18 and May 7, 2004 requests for reconsideration are untimely.

On reconsideration appellant's primary argument appears to be that she was presented the job offer before her physician approved the position, which represented a violation of vocational rehabilitation procedures. Appellant did not refer to a specific Office procedural requirement with respect to suitable work termination or provide any probative evidence of error in this case. The Office terminated appellant's compensation on the grounds that she refused an offer of suitable work and to reopen the case for merit review she must show clear evidence of a procedural or substantive error in the suitable work determination. The March 18 and May 7, 2004 requests for reconsideration do not establish clear evidence of error and therefore the Office properly denied the requests in this case.

CONCLUSION

The requests for reconsideration dated March 18 and May 7, 2004 are untimely because they were filed more than one year after the last merit decision on March 25, 1993. Appellant did not submit probative evidence establishing clear evidence of error in the April 17, 1992 suitable work termination and therefore the Office properly denied the requests for reconsideration without merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 17 and April 30, 2004 are affirmed.

Issued: November 23, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member