

turning and stretching in the performance of duty. The Office accepted the claim for a lumbar sprain; appellant returned to work on September 24, 2001.

On January 18, 2002 appellant filed a notice of recurrence of disability (Form CA-2a) indicating that she stopped working as of January 11, 2002. By decision dated April 16, 2002, the Office denied the claim for a recurrence of disability, finding that the medical evidence was insufficient to establish causal relationship between the claimed disability and the employment injury.

Appellant requested a hearing, which was held on February 25, 2003. In a decision dated May 15, 2003, the Office hearing representative affirmed the April 16, 2002 decision. The decision as sent to appellant's address of record.

In a letter dated June 18, 2003, a congressional representative stated that appellant "would like a status update" following her recent hearing. An Office memorandum dated June 24, 2003 indicated that the Office advised the congressional representative's office that a decision was issued on May 15, 2003 and appellant should exercise her appeal rights if she disagreed with the decision. By letter dated September 23, 2003, the congressional representative stated that appellant would like a status update on her claim, as she was scheduled for surgery and was requesting information on whether the surgery would be covered by workers' compensation. An Office memorandum dated October 2, 2003 indicated that the congressional representative's office was advised that the case had been denied on May 15, 2003 and nothing had changed since then.

In a letter dated May 11, 2004, the congressional representative stated that appellant had filed for reconsideration, but never received a response from the Office. A memorandum dated June 28, 2004 noted that no reconsideration request had been received.

By undated letter received by the Office on July 1, 2004, appellant requested reconsideration of her claim. Appellant stated that she had sent in a reconsideration request in July 2003. She submitted a decision from the Social Security Administration, Office of Hearings and Appeals, finding that she was entitled to disability insurance benefits as of January 10, 2002.

By decision dated August 2, 2004, the Office found 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 Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ The Office, through regulations, has imposed limitations on the exercise of its

¹ 5 U.S.C. § 8128(a).

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 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."

discretionary authority under 5 U.S.C. § 8128(a).⁴ 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.⁵ 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).⁶

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.⁷ 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ The Board makes an

⁴ 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, or (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).

⁵ 20 C.F.R. § 10.607(a).

⁶ *See Leon D. Faidley, Jr., supra* note 2.

⁷ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

⁹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² *See Leona N. Travis, supra* note 10.

¹³ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *See Leon D. Faidley, Jr., supra* note 2.

independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office improperly merit review in the face of such evidence.¹⁵

ANALYSIS

With respect to the timeliness of the reconsideration request, the record indicates that the Office did not receive a request until July 1, 2004. Appellant stated that she had sent a reconsideration request in July 2003, but there is no evidence in the record that the Office received a reconsideration request from appellant prior to July 1, 2004. A congressional representative sent inquiries as to the status of the case on June 18 and September 23, 2003, and the Office properly advised that a May 15, 2003 decision had been issued and she could exercise her appeal rights. Appellant did not submit a copy of a July 2003 request for reconsideration or evidence to establish a mailing date.¹⁶ In the absence of any probative evidence of a proper mailing of a reconsideration request prior to July 1, 2004, the date of the reconsideration request in this case is July 1, 2004. Since this is more than one year after the May 15, 2003 decision, it is untimely.

The evidence submitted consists of a decision from an administrative law judge pursuant to a claim for benefits from the Social Security Administration. A determination made for disability retirement purposes is not determinative of disability for compensation purposes. The two relevant statutes (Social Security Act and the Federal Employees' Compensation Act) have different standards of medical proof and disability under one statute does not prove disability under the other.¹⁷ The underlying issue presented in this case is a medical issue regarding a recurrence of disability commencing January 11, 2002 causally related to the accepted April 2, 2001 lumbar sprain. A decision under the Social Security Act does not consider issues of causal relationship with an employment injury or the relevant case law, regulations and procedures regarding claims for a recurrence of disability under the Act. The Board finds that the evidence submitted does not establish clear evidence of error by the Office in denying the claim for a recurrence of disability as of January 11, 2002 and, therefore, the Office properly denied the request for reconsideration.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely as it was filed more than one year after the May 15, 2003 decision. The Board further finds that the evidence submitted does not establish clear evidence of error and the Office properly denied the request for reconsideration.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁶ 20 C.F.R. § 10.607 provides that evidence such as certified mail receipts, certificate of service and affidavits may be used to establish the mailing date.

¹⁷ *See James E. Norris*, 52 ECAB 93, 103 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 2, 2004 is affirmed.

Issued: April 4, 2005
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member