

FACTUAL HISTORY

This is the fourth appeal in the present case. Previously, in a December 22, 1997 decision, the Board set aside an Office decision and remanded the case for further development.¹ In a July 24, 2002 decision, the Board affirmed the Office decisions dated August 3 and October 12, 2000. The Board found that appellant failed to establish that her condition during the claimed period of disability was causally related to the accepted employment injury of September 4, 1987 and the Office in its October 12, 2000 decision properly denied appellant's request for reconsideration as it did not meet the requirements set forth under 5 U.S.C. § 8128.² The law and the facts of the case are set forth in the Board's prior decisions and incorporated herein by reference.³

In a letter dated September 3, 2004, appellant requested reconsideration. She advised that she was seeking reconsideration of job placement and job benefits. Appellant indicated that she was never offered rehabilitation, job training or job placement and would like to obtain job placement in her area. She also submitted a letter to the Office dated April 22, 2004 which requested that her case, file number 13-893849, be recalled and she referenced an Office letter, not included with the reconsideration request, which she alleged suggested that the Office would consider acceptance of a low back strain and Achilles tendinitis.

By decision dated December 2, 2004, the Office denied appellant's request for reconsideration on the grounds that it was not timely and that appellant did not present clear evidence of error by the Office.

¹ Docket No. 96-173 (issued December 22, 1997).

² Docket No. 01-1425 (issued July 24, 2002). Regarding the third appeal, on July 16, 2003 appellant wrote a letter to the Board in response to the Board's July 24, 2002 decision which was inadvertently docketed as appeal No. 03-1941. The Board subsequently dismissed this appeal as appellant did not identify any adverse Office decision for which she sought Board review. Docket No. 03-1941 (issued December 30, 2003).

³ Appellant's claim was accepted for internal derangement of the left knee and arthroscopic surgery was authorized. She was terminated from federal employment on June 6, 1991 due to excessive absenteeism. The record reflects that appellant filed three compensation claims: file number 13-0836221 for an injury sustained on September 4, 1987 which was accepted for left knee internal derangement and left knee arthroscopy; file number 13-0893849 for an injury sustained on July 11, 1989 which was denied on October 10, 1989; and file number 13-1048030 for an injury sustained on June 1, 1994 which was denied on December 2, 1994. The Office noted that file numbers 13-0836221 and 13-0893849 were doubled for case management purposes.

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.”⁴

The Office, through regulations, 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 the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁵

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁶

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁷ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁰ The Board makes an independent

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁶ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L. Billingsley*, *supra* note 5.

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of the Office.¹¹

ANALYSIS

In the December 2, 2004 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on August 3, 2000 and appellant's request for reconsideration was dated September 3, 2004 which was more than one year after August 3, 2000. Accordingly, appellant's request for reconsideration was not timely filed.

The Board notes that appellant did not submit any evidence with her reconsideration request sufficient to *prima facie* shift the weight of the evidence in her favor and concludes that appellant has not established clear evidence of error. In a letter dated September 3, 2004, appellant advised that she was seeking reconsideration of job placement and job benefits. Appellant indicated that she was never offered rehabilitation, job training or job placement and would like to obtain job placement in her area. She also submitted a copy of a letter to the Office dated April 22, 2004 which requested that her case, file number 13-893849, be recalled and she referenced an Office letter which she asserted suggested that the Office would consider acceptance of a low back strain and Achilles tendinitis. The Board notes that appellant's reconsideration request addressed appellant's desire to undergo job placement; however, it does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision which determined that she failed to establish that her condition during the claimed period of disability was causally related to the accepted injury of September 4, 1987. Additionally, appellant submitted no new medical evidence to support that any disability during the claimed period was causally related to her accepted work injury. Therefore the Office properly found that appellant's statement and letter of April 22, 2004 did not establish clear evidence of error. The Office properly denied appellant's reconsideration request.

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

CONCLUSION

The Board, therefore, finds that the Office properly determined that appellant's request for reconsideration dated September 3, 2004 was untimely filed and did not demonstrate clear evidence of error.

ORDER

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

Issued: August 9, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board