



duty. The Office accepted her claim for right knee contusion. On January 20, 1998 appellant's right knee gave out and she fell, sustaining a right ankle fracture. The Office accepted appellant's right ankle fracture as a consequential injury.

In a decision dated May 31, 2002, the Office terminated appellant's wage-loss compensation and medical benefits relating to her right ankle fracture. The Office relied on the February 12, 2002 opinion of Dr. Joel R. Graziano, a Board-certified orthopedic surgeon and referral physician, who found that appellant was capable of resuming her regular duties as a program assistant.

Appellant requested an oral hearing, which was held on February 5, 2003. By decision dated May 19, 2003, the Office hearing representative affirmed the May 31, 2002 decision terminating wage loss and medical benefits.

On May 21, 2004 the Office received an undated request for reconsideration from appellant. She also submitted a March 1, 2004 report from Dr. Gerhard Kraske, a Board-certified internist.<sup>1</sup>

In a decision dated July 7, 2004, the Office found that appellant's request was untimely filed and failed to demonstrate clear evidence of error on the part of the Office in terminating wage loss and medical benefits. Accordingly, the Office declined to review the merits of appellant's claim.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>2</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>3</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>4</sup> One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>5</sup> In those instances when a request for reconsideration is not timely filed, the Office

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<sup>1</sup> Dr. Kraske stated that appellant was a diabetic and she was also taking medication for anxiety. He further stated that there was a correlation between appellant's sugar levels, stress and her anti-anxiety medication.

<sup>2</sup> 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> 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." 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607 (1999).

<sup>5</sup> *Id.* at § 10.607(a) (1999).

will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office in its “most recent merit decision.”<sup>6</sup>

### ANALYSIS

The one-year time limitation began to toll the day the Office issued its May 19, 2003 decision, as this was the last merit decision in the case.<sup>7</sup> The Office received appellant’s undated request for reconsideration on May 21, 2004. Because the request was received one year and two days after the Office hearing representative issued the May 19, 2003 merit decision, the Office found the request to be untimely.

Section 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.<sup>8</sup> The regulation further provides that, if the request is “submitted by mail, the application will be deemed timely if postmarked ... within the time period allowed.”<sup>9</sup>

On appeal, appellant argued that her request was postmarked on time and she had a delivery receipt from the postal service indicating that the Office received the request prior to May 21, 2004. As previously stated, appellant’s request was undated and the Office indicated that it received the request on May 21, 2004. While appellant claimed to have mailed her request in a timely fashion, the record does not include a copy of the envelope in which appellant submitted her request for reconsideration.<sup>10</sup> The record also does not include any other evidence of mailing or receipt that would otherwise establish a timely filing. Additionally, the request did not bear a date. As the record is devoid of any additional information that would render appellant’s request timely, the Office properly relied on the May 21, 2004 date of receipt.

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<sup>6</sup> *Id.* at § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>7</sup> See *Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

<sup>8</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>9</sup> *Id.*

<sup>10</sup> The Office’s procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark, or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

Because appellant filed her request more than one year after the Office's May 19, 2003 merit decision, she must demonstrate "clear evidence of error" on the part of the Office in terminating her wage loss and medical benefits for her right ankle fracture. To establish clear evidence of error, appellant must submit evidence relevant to the issue that was decided by the Office.<sup>11</sup> Dr. Kraske's March 1, 2004 report is not relevant to the issue of entitlement to ongoing medical benefits or wage loss. He did not mention either of appellant's accepted conditions. Dr. Kraske did not discuss the right knee contusion or appellant's right ankle fracture. His comment about there being a correlation between appellant's sugar levels, stress and her anti-anxiety medication is not at all relevant to the present issue.

Appellant's request for reconsideration and the accompanying evidence failed to demonstrate clear evidence of error on the part of the Office in terminating wage loss and certain medical benefits. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

**CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 7, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>11</sup> See *Dean D. Beets*, *supra* note 6.