

condition caused by exposure to dust on August 24, 1991. In a report dated July 29, 1992, Dr. Scott A. Kremers, a Board-certified internist, diagnosed sarcoidosis and advised that the inhalation of dust at work caused a temporary aggravation of appellant's symptoms. He stated, however, that appellant was asymptomatic from a respiratory standpoint and had returned to baseline status as of December 1991.

By decision dated September 15, 1992, the Office accepted that appellant sustained a temporary aggravation of sarcoidosis symptoms but denied a claim for benefits based on lack of causal relationship after December 1991. By letter dated February 21, 2003, appellant requested reconsideration of the Office's September 15, 1992 denying compensation. By decision dated June 30, 2003, the Office determined that appellant's February 21, 2003 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. In a November 12, 2003 decision,¹ the Board affirmed the Office's denial of appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. The facts of this case are set forth in the Board's November 12, 2003 decision and are herein incorporated by reference.

By letter dated September 22, 2004, appellant requested reconsideration. In support of his claim, appellant submitted: (a) a September 17, 1991 letter from the employing establishment controverting his claim for continuation of pay; (b) an October 4, 1999 laboratory report showing the results of blood, kidney, PSA, testosterone tests; (c) an October 4, 1991 report indicating surgical pathology and mediastinoscopy test results; and (d) a November 15, 1991 form report from a pulmonologist. Appellant did not submit any new evidence with his request.

By decision dated November 23, 2004, reissued January 3, 2005, the Office denied appellant's request for reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle an employee to a review of an Office decision as a matter of right.³ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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

¹ Docket No. 02-1844 (issued May 13, 2003).

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

accordance with the facts found on review may -- (1) end, or increase the compensation awarded; or (2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its 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 time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁶

In those cases where a request for reconsideration is not timely filed, the Board had held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁷ The Office procedures state that the Office will reopen an appellant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the appellant’s application for review shows “clear evidence of error” on the part of the Office.⁸

To establish clear evidence of error, an appellant 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 manifested 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

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 point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. See 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.607(b).

⁶ See cases cited *supra* note 2.

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

¹¹ See *Jesus D. Sanchez*, *supra* note 3.

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

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

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's decision.¹⁴ The Board makes an independent determination of whether an appellant 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.¹⁵

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on September 15, 1992. Appellant requested reconsideration on September 22, 2004; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's September 22, 2004 request for reconsideration failed to establish clear evidence of error. The evidence appellant submitted is not pertinent to the issue on appeal. The September 17, 1991 letter from the employing establishment controverting his claim for continuation of pay is not relevant because it does not present any evidence or argument pertinent to the medical issue on appeal. The October 4, 1999 and October 4, 1991 reports containing results of various diagnostic tests and the November 15, 1991 form report do not establish clear evidence of error in the Office's determination that appellant did not sustain a medical condition causally related to his federal employment. None of these reports address whether appellant's claimed sarcoidosis condition was causally related to factors of his employment subsequent to December 1991. Therefore, they are not relevant to the underlying issue in the case. Consequently, appellant failed to show clear evidence of error on the part of the Office or that it abused its discretion in denying further merit review. The Board finds that the Office properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration request dated September 22, 2004. As appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further merit review.

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 3.

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

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2005 and November 23, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 2, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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