



appellant's claim for compensation. The Board affirmed the March 15, 2000 decision on January 22, 2002. On June 12, 2002 the Office denied modification of the March 15, 2000 decision and on August 8, 2003, denied merit review. On March 3, 2004 the Board affirmed the Office's August 8, 2003 decision. The facts and the circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.<sup>1</sup>

By letter dated May 7, 2004, appellant requested reconsideration of her claim and submitted evidence in support of her request. In a September 8, 1998 notice, the Office of Personnel Management (OPM) approved her application for a disability retirement. Medical reports from Dr. Edward C. Littlejohn, appellant's treating Board-certified orthopedic surgeon, were submitted, dated from November 10, 2000 to May 8, 2003. A January 26, 1993 magnetic resonance imaging scan (MRI) report, a February 23, 1993 report from Dr. William H. Irving, a second opinion physician and a Board-certified orthopedic surgeon, and documents from the employing establishment dated from November 18, 1996 to February 7, 1997 were also presented.

By decision dated October 22, 2004, the Office denied appellant's request for further merit review of her claim. It found that the request was untimely made and that the evidence put forward did not establish clear evidence of error.

### **LEGAL PRECEDENT**

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>2</sup> The Office 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.<sup>3</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>4</sup> The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>5</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>6</sup>

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<sup>1</sup> Docket No: 00-1570 (issued January 22, 2002); Docket No. 04-163 (issued March 3, 2004).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

<sup>4</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997).

<sup>5</sup> *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

<sup>6</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinions 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.<sup>8</sup> 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 abused its discretion in denying merit review in the face of such evidence.<sup>9</sup>

### ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>10</sup> In this case, appellant's May 7, 2004 letter requesting reconsideration was submitted more than one year after the Office's most recent merit decision on the underlying issue, dated June 12, 2002. Therefore, it was untimely. Consequently, she must demonstrate "clear evidence of error" by the Office in denying her claim for compensation.<sup>11</sup>

The issue for purposes of establishing clear evidence of error in this case is whether appellant submitted evidence establishing that there was an error in the Office's determination that she failed to establish that she was totally disabled from her modified job due to her work-related injury from March 1, 1999. The Board notes that this issue is medical in nature. Appellant submitted medical reports from Dr. Littlejohn that reiterated his opinion that her bilateral shoulder osteoarthritis and left thumb condition caused pain and limited her ability to perform routine tasks. He also noted her need for right shoulder prosthesis. This evidence does not sufficiently explain how any disability beginning March 1, 1999 was work related and does not shift the weight of the evidence in favor of the claim. Dr. Littlejohn's opinions are repetitive of his prior reports that were previously considered by the Office and do not otherwise contain

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<sup>7</sup> *Leon J. Modrowski*, 55 ECAB \_\_\_\_ (Docket No. 03-1702, issued January 2, 2004); *Dorletha Coleman*, 55 ECAB \_\_\_\_ (Docket No. 03-868, issued November 10, 2003).

<sup>8</sup> *Id.*

<sup>9</sup> *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

<sup>10</sup> *Veletta C. Coleman*, *supra* note 4.

<sup>11</sup> 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB \_\_\_\_ (Docket No. 03-2223, issued January 9, 2004).

any medical reasoning or rationale that raises a substantial question as to the correctness of the Office's decision. Dr. Irving's 1993 report predates the claimed period of disability and thus is insufficient to show clear evidence of error.

Appellant argued that she did not retire from the government and that her physician advised her to stop work. She then applied for and was accepted for disability retirement.<sup>12</sup> She argued that the job her doctor approved was not the job she was assigned. Appellant stated that she performed her assigned duties even though they were not within her restrictions and that her injury was a permanent disability, not a recurrence. She also noted that her arthritis, which the Office had not approved, was established by a report that noted "shoulders and allied disorders" and that the second opinion physician found that her arthritis was related to her rotator cuff tear.

The Board notes that none of appellant's arguments are relevant to the underlying issue in this case, which is whether the medical evidence established that her employment-related conditions had worsened and thus prevented her from working at her modified position beginning March 1, 1999. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>13</sup> The Board finds that appellant has not established clear evidence of error on the part of the Office.<sup>14</sup>

### CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128.

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<sup>12</sup> Decisions of other agencies regarding disability are not binding on the Office. The standards for establishing work-related disability under the Act, which governs the Office and the Board, are not the same as the standards set for disability retirement or social security benefits. See *Raj B. Thackurdeen*, 54 ECAB 396 (2003).

<sup>13</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>14</sup> On appeal, appellant also indicated that she disagreed with the Board's March 3, 2004 decision. However, the Board no longer has jurisdiction over that appeal as the Board's decision became final upon the expiration of 30 days from the date of the filing of the March 3, 2004 decision. 20 C.F.R. § 501.6(d).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 22, 2004 is affirmed.

Issued: April 14, 2006  
Washington, DC

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

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