



On September 15, 2003 appellant filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability on August 19, 2003 which was causally related to her March 10, 2003 employment injury.

In a report dated August 22, 2004, appellant's treating physician, Dr. Allen L. Babcock, a Board-certified orthopedic surgeon, stated that she had fallen four feet from a ladder four days prior to the examination. She related that upon impact she heard something pop in her right shoulder; she stated that she had been unable to move her right arm without significant pain since that time. Appellant also had been unable to perform her job with the employing establishment since her fall.

By decision dated October 29, 2003, the Office denied appellant's claim for a recurrence of her accepted right shoulder condition. The Office found that she was not entitled to compensation because she reinjured her right shoulder in an intervening, nonwork-related event.

By letter dated April 13, 2004, appellant's attorney requested reconsideration.

By decision dated April 30, 2004, the Office denied modification of the October 29, 2003 decision.

By letter dated October 21, 2004, appellant requested reconsideration.

By decision dated January 3, 2005, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions, nor included new and relevant evidence sufficient to require the Office to review its prior decision.

By letter dated December 14, 2005, appellant requested reconsideration and submitted a November 21, 2005 letter from her supervisor, Ken Krzycki. He stated that, on August 19, 2003, the date of the alleged recurrence, appellant reported for duty with a notice of restrictions from her physician. These restrictions were not based on the previously accepted condition, but stemmed from her fall from a ladder which occurred at home.

By decision dated January 25, 2006, the Office denied appellant's request for reconsideration without a merit review, finding that she 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 Act<sup>1</sup> does not entitle an employee to a review of an Office decision as a matter of right.<sup>2</sup> This section, vesting the Office

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5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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 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).<sup>3</sup> 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.<sup>4</sup> 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).<sup>5</sup>

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.<sup>6</sup> Office procedures states 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 a claimant’s application for review shows “clear evidence of error” on the part of the Office.<sup>7</sup>

To establish clear evidence of error, a claimant’s must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>9</sup> 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>10</sup> It is not enough merely to show that the evidence could be

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<sup>3</sup> 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; or (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).

<sup>4</sup> 20 C.F.R. § 10.607(b).

<sup>5</sup> *See* cases cited *supra* note 2.

<sup>6</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>8</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> *See Jesus D. Sanchez*, *supra* note 2.

construed so as to produce a contrary conclusion.<sup>11</sup> 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.<sup>12</sup> 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's decision.<sup>13</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>14</sup>

### ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on April 30, 2004. Appellant requested reconsideration on December 14, 2005. Thus, her reconsideration request is untimely as it was outside the one-year time limit following the most recent merit decision.

The Board finds that appellant's December 14, 2005 request for reconsideration failed to show clear evidence of error. The November 21, 2005 letter from her supervisor does not support her claim. Mr. Krzycki's statement that appellant reported for duty with her physician's notice of restrictions based on injuries stemming from her August 15, 2003 fall from a ladder at home is consistent with the Office's finding in that decision. The Office reviewed the evidence she submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of her. Appellant did not submit any medical evidence in support of her claim. Consequently, the evidence submitted by her on reconsideration is insufficient to establish clear evidence of error on the part of the Office, such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.

### CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration request dated December 14, 2005. Inasmuch as her reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on January 25, 2006.

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<sup>11</sup> See *Leona N. Travis*, *supra* note 9.

<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Faidley*, *supra* note 2.

<sup>14</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 25, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 17, 2006  
Washington, DC

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

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