



## **FACTUAL HISTORY**

This is the fourth appeal in the instant case. In a February 26, 2003 decision, the Board affirmed a May 24, 2002 nonmerit decision, which found that appellant's May 8, 2002 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.<sup>2</sup> The Board noted that the most recent decision on appellant's claim for fibromyalgia was the Office's October 27, 1994 merit decision denying the claim on the grounds that the evidence of record failed to support that appellant sustained an injury in the performance of duty.

In a letter dated September 20, 2004, appellant requested reconsideration.<sup>3</sup>

On appeal for the second time, the Board issued an Order Remanding Case in Docket No. 04-1678 on January 19, 2005, finding that appellant's October 20, 2003 letter and the May 2, 2003 medical report accompanying it clearly referred to her claim for fibromyalgia, file number 131045972, but instead was adjudicated by the Office in its May 18, 2004 decision as a request for reconsideration of her claim for right shoulder tendinitis, under file number 130995970. The Board set aside the May 18, 2004 decision and remanded the case to the Office for a decision on her request for reconsideration in file number 131045972.

In the third appeal, the Board found the Office's November 26, 2004 decision was null and void.<sup>4</sup> In that decision, the Board found the underlying issue in the November 26, 2004 nonmerit decision was whether appellant has fibromyalgia that is causally related to her employment. This was the same underlying issue in appellant's appeal to the Board that was docketed as No. 04-1678 on June 22, 2004. As the Board did not issue a decision on this appeal until January 19, 2005, the Office did not have jurisdiction to issue a decision concerning this same issue on November 26, 2004.

Upon return of the case record, by decision dated November 14, 2005, the Office issued a nonmerit decision denying appellant's request for reconsideration. In support of its decision, the Office found that appellant's September 20, 2004 request for reconsideration of the October 27, 1994 Office decision in file number 131045972 was not timely filed and did not demonstrate clear evidence of error.

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<sup>2</sup> Docket No. 02-2238 (issue February 26, 2003).

<sup>3</sup> In her letter appellant noted she was sending one letter requesting reconsideration for five claims. The claims noted were file number 131045972, which is her fibromyalgia claim; file number 1308006520, which is her lumbar cervical strain claim; file number 131014284, which is her cervical strain claim; file number 13205053, which is her radiculopathy claim; and file number 131149660, which is her repetitive trauma claim. In her request she referenced an attached August 20, 2004 report by Dr. Edward Kiederling for each claim.

<sup>4</sup> Docket No. 05-805 (issue June 21, 2005).

## 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>5</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>6</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>7</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>8</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>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>11</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>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</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>14</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

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<sup>5</sup> 5 U.S.C. §§ 8101-8193. The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB \_\_\_\_ (Docket No. 04-208, issued March 18, 2004).

<sup>6</sup> 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

<sup>7</sup> *Leon J. Modrowski*, 55 ECAB \_\_\_\_ (Docket No. 03-1702, issued January 2, 2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>8</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 merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

<sup>9</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> *See Darletha Coleman*, 55 ECAB \_\_\_\_ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> *See Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> *See Leon J. Modrowski*, 55 ECAB \_\_\_\_ (Docket No. 03-1702, issued January 2, 2004); *Jesus D. Sanchez supra* note 7.

<sup>13</sup> *See Leona N. Travis, supra* note 11.

<sup>14</sup> *See Nelson T. Thompson, supra* note 9.

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.<sup>15</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>16</sup>

### ANALYSIS

By letter dated September 20, 2004, appellant requested reconsideration of an October 27, 1994 merit decision denying her claim for fibromyalgia. As this request was more than one year following the issuance of the October 27, 1994 decision, the Board finds that it is untimely.

The question for determination then becomes whether appellant's untimely request for reconsideration demonstrates clear evidence of error on the part of the Office in its October 27, 1994 merit decision. Appellant's September 20, 2004 request for reconsideration fails to demonstrate clear evidence of error on the part of the Office in its October 27, 1994 decision. The Office denied appellant's claim that her fibromyalgia was caused or aggravated by factors of her employment. In support of her request, appellant references a medical report, which was not attached to her request and is not in the record. Nothing in appellant's September 20, 2004 request for reconsideration establishes that the Office's October 27, 1994 decision was erroneous in finding that her fibromyalgia condition was not employment related.

Because appellant's September 20, 2004 request for reconsideration does not establish, on its face, that the Office hearing representative's October 27, 1994 decision was erroneous, the Board will affirm the Office's November 14, 2005 decision not to reopen her case for a review on the merits on the grounds that said request was untimely filed and did not establish clear evidence of error.

### CONCLUSION

The Board finds that the Office properly determined that appellant's September 20, 2004 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

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<sup>15</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>16</sup> See *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 14, 2005 is affirmed.

Issued: July 7, 2006  
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