

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**B.Y., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE,  
KIRTLAND AIR FORCE BASE, NM, Employer**

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**Docket No. 07-852  
Issued: July 12, 2007**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 7, 2007 appellant filed a timely appeal from a February 1, 2007 decision of the Office of Workers' Compensation Programs denying her request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than one year has elapsed from the last merit decision dated March 6, 2001 to the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

**FACTUAL HISTORY**

On May 12, 1999 appellant, then a 40-year-old former secretary, filed a traumatic injury claim alleging that she sustained an injury on August 1, 1989 as a result of the front door slamming continuously for months and the vibrations striking her body.

In a July 26, 1999 decision, the Office denied appellant's claim on the grounds that it was not timely filed under the Federal Employees' Compensation Act. It noted that an original claim for compensation must be filed within 3 years of the date of injury, unless the immediate superior had actual knowledge of the injury within 30 days.

In a September 18, 1999 letter, appellant requested a hearing. A hearing was held on December 7, 1999. By decision dated February 29, 2000, the hearing representative affirmed the July 26, 1999 decision.

In a March 6, 2001 appeal, the Board affirmed the Office's July 26, 1999 and February 29, 2000 decisions.<sup>1</sup>

In a June 27, 2006 letter, appellant requested reconsideration. She noted that she was receiving social security disability benefits as her sole source of income and that she was unable to return to work. On July 20, 2006 the Office issued a letter acknowledging appellant's request, accompanied by appeal rights. Appellant thereafter again appealed to the Board.

On November 29, 2006 the Board found that the Office's July 20, 2006 letter was a final decision; however, the Office had not made adequate findings as to whether appellant's June 27, 2006 request for reconsideration was untimely filed and if so whether appellant had failed to establish "clear evidence of error." The Board set aside the July 20, 2006 Office decision and remanded the case for further action.

By decision dated February 1, 2007, the Office denied appellant's request for reconsideration as untimely filed and not presenting clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is 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>5</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>6</sup>

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<sup>1</sup> Docket No. 00-1408 (issued March 6, 2001).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>4</sup> *Thankamma Mathews*, *supra* note 3; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>5</sup> 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>6</sup> 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

In those cases where requests for reconsideration are not timely filed, 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 in accordance with section 10.607(b) of its regulation.<sup>7</sup> Office regulation states that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows clear evidence of error on the part of the Office.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifest on its face that it committed an error.<sup>10</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>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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 it.<sup>13</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>14</sup> The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.<sup>15</sup>

### ANALYSIS

The Office found 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>16</sup> In this case, appellant's June 27, 2006 letter requesting reconsideration was submitted more than one year after the most recent merit decision of record, March 6, 2001, and, thus, it was untimely.

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<sup>7</sup> *Thankamma Mathews*, *supra* note 3 at 770.

<sup>8</sup> 20 C.F.R. § 10.607(b).

<sup>9</sup> *Thankamma Mathews*, *supra* note 3 at 770.

<sup>10</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>11</sup> *Jesus D. Sanchez*, *supra* note 4 at 968.

<sup>12</sup> *Leona N. Travis*, *supra* note 10.

<sup>13</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>14</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>15</sup> *Gregory Griffin*, *supra* note 5.

<sup>16</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997).

Consequently, she must demonstrate clear evidence of error by the Office in denying her claim for compensation.<sup>17</sup>

Appellant submitted no evidence and offered no argument in support of her untimely reconsideration request which would establish error in the denial of her claim. Appellant's current income and ability to work have no bearing on the issue of whether her initial claim for benefits was timely filed. Therefore she has not established error by the Office in denying her claim on the grounds that her claim was untimely filed. To establish clear evidence of error, the evidence must be of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the merits of the Office's decision.<sup>18</sup> Appellant did not submit any evidence or arguments and she has failed to establish error. The Office properly denied reconsideration of her claim.

### **CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration on the merits on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

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<sup>17</sup> 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB 241 (2004).

<sup>18</sup> See *Veletta C. Coleman*, *supra* note 16.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 1, 2007 is affirmed.

Issued: July 12, 2007  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board