

whiplash. By letter dated July 11, 1997, the Office accepted her claim for sprain of the neck. On December 11, 2002 appellant filed a claim for a recurrence of her April 18, 1996 employment injury. By decision dated February 21, 2002, the Office denied her claim for compensation as the medical evidence was not sufficient to establish a recurrence of her original work injury.

On August 1, 2003 appellant filed another claim for recurrence. By decision dated September 25, 2003, the Office denied her claim finding that the factual and medical evidence did not establish that the claimed recurrence resulted from the accepted work injury. Appellant filed a request for reconsideration on September 15, 2004. The Office denied modification by decision dated December 17, 2004. By request dated December 13, 2005, but received by the Office on December 30, 2005, appellant again requested reconsideration. She submitted a nutrition risk evaluation dated March 9, 2004 by a clinical nutrition specialist. In a letter dated December 13, 2005, appellant noted that she received disability insurance from the Veterans Administration and Social Security based on interstitial cystitis and whiplash. She contended that none of her doctors ever indicated that she completed treatment for her injuries sustained as a result of the automobile accident. Appellant also contended that all the relevant medical evidence was not in the file.

By decision dated April 12, 2006, the Office denied appellant's request for reconsideration for the reason that it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.¹ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.² The Office, through regulations, has imposed limitations on the exercise of its discretionary authority to determine whether it will review an award for or against payment of compensation.³ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁴ In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review

¹ 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

² Under Section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607.

⁴ 20 C.F.R. § 10.607(a).

to determine whether the application presents clear evidence of error on the part of the Office in its most recent merit decision.⁵

ANALYSIS

The most recent merit decision was issued on December 17, 2004. Appellant signed the appeal papers with the date “December 13, 2005.” However, the Office indicated that the appeal was not received until December 30, 2005 and accordingly, was not filed within one year of the last merit decision.

The Board notes that the Office regulation and Chapter 2.1602.3(b)(1) of the Office procedure manual provide that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope.⁶ In the instant case, the Office stated that the copy of the priority mail label indicated that the envelope was scanned at the local scanning station on December 30, 2005. The Board has reviewed this label and cannot find any indication on it of when it was scanned. Furthermore, there is no visible post mark. The Office procedure manual states that, when there is no evidence to establish the mailing date, the date of the letter itself should be used.⁷ For this reason, the Board finds that, as appellant’s request was dated December 13, 2005, there is no other evidence that would establish the mailing date.⁸ Therefore, appellant’s request for reconsideration was timely filed. As she timely filed her request for reconsideration within one year of the December 17, 2004 merit decision, the Office improperly denied appellant’s reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted under the clear evidence of error standard, the Board will remand the case to the Office for review of this evidence under the proper standard of review for a timely reconsideration request.

⁵ 20 C.F.R. §.10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁶ *See* 20 C.F.R. § 10.607(a). The Office’s procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

⁷ *Id.* *See also Donna M. Campbell*, 55 ECAB 241 (2004).

⁸ Subsequent to the April 12, 2006 decision, appellant submitted additional evidence. The Board’s jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

CONCLUSION

The Board finds that appellant's December 13, 2005 request for reconsideration was timely filed.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 12, 2006 is set aside and the case is remanded for further development consistent with this decision

Issued: May 10, 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