

FACTUAL HISTORY

This case has previously been before the Board. In a November 17, 2005 decision, the Board found that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).² On March 20, 2006 the Board denied appellant's petition for reconsideration of its November 17, 2005 decision. The law and the facts of the previous Board decision and order are incorporated herein by reference.

On March 2, 2007 appellant, through her representative, requested reconsideration and submitted additional evidence, which consisted of a copy of the pleading submitted with appellant's prior appeal to the Board, a partial hearing transcript dated July 21, 2003, an Equal Employment Opportunity Commission (EEOC) decision dated January 6, 2003, medical reports from Dr. A. Benjamin Eubanks, an attending psychiatrist, dated May 14, 2003, June 29, 2006 and February 23, 2007, an e-mail dated June 13, 2006 discussing demonstrations at the employing establishment and statements from coworkers dated April 2002.

By decision dated May 3, 2007, the Office denied appellant's reconsideration request, finding that it was untimely and that she did not demonstrate clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.³ 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.⁴ 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.⁵ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of Office regulations,⁶ if the claimant's application for review shows "clear evidence of error" on the part of the Office. 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.⁷

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

² Docket No. 05-754 (issued November 17, 2005).

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁶ 20 C.F.R. § 10.607.

⁷ *Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

clear evidence of error. 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 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 decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.⁸

ANALYSIS

The Board finds that, as more than one year had elapsed from the date of issuance of the last merit decision in this case, the October 21, 2003 decision of an Office hearing representative, appellant's request for reconsideration on March 2, 2007 was untimely filed.⁹ Consequently, appellant must demonstrate clear evidence of error by the Office in denying her claim for compensation.¹⁰

The Board finds that appellant failed to establish clear evidence of error with her reconsideration request. In considering clear evidence of error, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹ The pleading, EEOC decision, Dr. Eubanks' report dated May 14, 2003 and the statements from coworkers, had previously been reviewed by the Office and the Board. This duplicative evidence is insufficient to establish clear evidence of error.¹² The partial hearing transcript and employing establishment e-mail are irrelevant to this case as the merit issue is whether appellant has established that her claimed condition was caused by employment factors. In his reports dated June 29, 2006 and February 23, 2007, Dr. Eubanks merely advised that appellant's emotional condition was caused by harassment at work. He did not, however, address the one accepted employment factor that, during the period March 24 through 26, 1999, appellant had to prepare binders in a short amount of time. Dr. Eubanks' newly submitted reports are of insufficient 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.¹³ Consequently, appellant has not met her burden to establish clear evidence of error on the part of the Office such that the Office erred in denying merit review. The Board therefore finds that, in accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the evidence and argument submitted by appellant with her March 2, 2007 reconsideration request to ascertain whether it demonstrated clear evidence of error and correctly

⁸ *Nancy Marcano*, 50 ECAB 110 (1998).

⁹ The Board notes that, in a letter to the Office dated July 12, 2006, appellant generally argued that the denial of her claim was in error. This letter would also constitute an untimely request for reconsideration.

¹⁰ 20 C.F.R. § 10.607(b).

¹¹ *Alberta Dukes*, *supra* note 7.

¹² *Id.*

¹³ *Nancy Marcano*, *supra* note 8.

determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.¹⁴

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the evidence. The Office correctly determined that it did not and thus properly denied appellant's untimely request for reconsideration of the merits of her claim.¹⁵

CONCLUSION

The Board finds that, as appellant's March 2, 2007 reconsideration request was not timely filed and she failed to establish clear evidence of error, the Office properly denied a merit review of her claim in its May 3, 2007 decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 3, 2007 be affirmed.

Issued: January 14, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁴ *Id.* The Board notes that appellant submitted additional evidence subsequent to the Office's May 3, 2007 decision and with her appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

¹⁵ *Alberta Dukes, supra* note 7.