

did not sustain a recurrence of total disability on or after February 19, 1992 due to her accepted right hand and wrist conditions. The Board issued a decision on December 11, 1995 affirming the Office's decisions.¹ The Board determined that the reports of appellant's attending Board-certified orthopedic surgeons, Dr. Rida N. Azer and Dr. William E. Gentry, did not show that she sustained such an employment-related recurrence of disability. By decisions dated April 3, 1997, April 10 and September 29, 1998, June 3, 1999, March 14 and June 23, 2000, February 21 and May 4, 2001, the Office denied appellant's request for merit review on the grounds that her applications for review were not timely filed and failed to present clear evidence of error. In decisions dated March 17, 2003² and July 13, 2004,³ the Board affirmed the Office's refusal to reopen appellant's case for merit review because her applications for review were not timely filed and failed to present clear evidence of error.

On May 9, 2005 appellant requested reconsideration of her claim that she sustained a recurrence of disability due to her accepted right hand and wrist injury. She contended that her September 4, 2003 reconsideration request was timely because it was filed within one year of the Board's March 17, 2003 decision; she argued that her claim should have been reviewed on the merits. Appellant alleged that the reports of Dr. Azer showed that she had disability after February 19, 1992 due to her accepted right hand and wrist injury. She submitted an April 27, 2005 report from Dr. Azer, who stated findings on examination, reviewed the medical history and stated:

“[Appellant] informed me that the injury occurred in 1986 but in 1992 she was placed on a full-time modified distribution clerk [job] ... with symptoms and exacerbation[.] [H]er condition was regarded as a ‘recurrence.’” It is noted that [appellant's] conditions are caused by the work injuries as indicated and that delay has compromised the outcome inasmuch as she now has atrophy of the thenar muscles with weakness and exacerbation.... [Appellant] does need the surgery. At present she has been unable to work and remains so until her condition has been treated and she has recuperated.

“It is noted that the recurrence occurred when the patient was working full time in the modified distribution clerk position. [A]ccording to her employer this was a recurrence. [Appellant] informs me that this date was February 19, 1992.”

In decisions dated January 26, 2006 and March 5, 2007, the Office denied appellant's requests for reconsideration without merit review. By decision dated December 12, 2007,⁴ the Board set aside the March 5, 2007 Office decision, finding that the Office did not provide sufficient findings of fact and reasoning to explain its determination that appellant was not entitled to a review of the merits of her claim. The Board stated that the Office did not adequately explain why it did not evaluate appellant's reconsideration request, which addressed

¹ Docket No. 95-802 (issued December 11, 1995).

² Docket No. 01-2038 (issued March 17, 2003).

³ Docket No. 04-545 (issued July 13, 2004).

⁴ Docket No. 07-1364 (issued December 12, 2007).

the merits of her claim that she sustained a recurrence of disability, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.607. The Board found that the Office did not discuss whether appellant's December 2006 reconsideration request was timely or apply the appropriate standard for evaluating her reconsideration request after making such a determination. It remanded the case to the Office for a proper evaluation of appellant's December 2006 reconsideration request in accordance with 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.607. The facts and the circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

By decision dated January 28, 2008, the Office denied appellant's request for reconsideration without a merit review, finding she had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It 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 Act⁵ does not entitle an employee to a review of an Office decision as a matter of right.⁶ This section, vesting the Office 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).⁷ 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.⁸ The Board has found that the

⁵ 5 U.S.C. § 8128(a).

⁶ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁷ 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) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

⁸ 20 C.F.R. § 10.607(b).

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).⁹

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.¹⁰ Office procedures state 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 appellant's application for review shows "clear evidence of error" on the part of the Office.¹¹

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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.¹⁷ The Board makes an independent determination of whether an appellant 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.¹⁸

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. The last merit decision in this case was dated December 11, 1995.

⁹ See cases cited *supra* note 2.

¹⁰ *Rex L. Weaver*, 44 ECAB 535 (1993).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹² See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ See *Jesus D. Sanchez*, *supra* note 6.

¹⁵ See *Leona N. Travis*, *supra* note 13.

¹⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁸ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

Appellant requested reconsideration on December 4, 2006; thus, the reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's December 4, 2006 request for reconsideration failed to show clear evidence of error. The only new medical report submitted in support of the untimely request for reconsideration was the April 27, 2005 report from Dr. Azer, whose April 27, 2005 report is of limited probative value as it did not provide a reasoned medical opinion on the relevant issue, *i.e.*, whether appellant sustained a recurrence of total disability on or after February 19, 1992 due to her accepted right hand and wrist conditions.

Dr. Azer stated findings on examination, reviewed appellant's medical history and noted her complaints of pain. She related that appellant believed she experienced symptoms and exacerbation of her pain. Dr. Azer indicated generally that appellant's conditions as of February 1992 were caused by her accepted work injuries and recommended surgery. However, her report did not contain an explanation of how appellant's condition and or disability as of February 19, 1992 was caused or aggravated by her accepted right hand and wrist conditions and did not contain any probative, rationalized medical opinion sufficient to *prima facie* shift the weight of the evidence in favor of appellant. A review of the medical evidence of record does not establish that the Office erred in finding that appellant did not sustain a recurrence of her work-related disability as of February 19, 1992. Further, the report and appellant's request letter were cumulative and repetitive of reports and arguments previously rejected by the Board and the Office. No other evidence was received by the Office. Appellant has failed to demonstrate clear evidence of error on the part of the Office.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant 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 4, 2006. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on January 28, 2008.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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