



claim, and the August 14, 2007 nonmerit decision denying her request for merit review.<sup>1</sup> The facts and the law contained in that decision are incorporated herein by reference.

On May 7, 2008 appellant submitted an appeal request form requesting reconsideration. The top right hand corner of the form contained the date August 29, 2006. In support of her request, appellant submitted a statement dated July 14, 2006, noting that she was depressed due to her inability to function. She also submitted a witness statement from Coworker Christine Foltyn corroborating appellant's claim of injury on May 23, 2006.

In a decision dated July 21, 2008, the Office denied appellant's request for reconsideration. It found that, as appellant's May 7, 2008 request for reconsideration was not submitted within one year of the Office's initial decision denying her traumatic injury claim decision, dated August 29, 2006, it was untimely. The Office further found that the evidence received did not present clear evidence of error in its August 29, 2006 decision.

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act<sup>2</sup> provides that the Office may review an award for or against compensation upon application by an employee and/or his or her representative who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.<sup>3</sup>

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meet at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.<sup>4</sup> Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

20 C.F.R. § 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. 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 clear evidence of error.<sup>6</sup> 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

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<sup>1</sup> Docket No. 07-2291 (issued February 26, 2008).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> 20 C.F.R. § 10.605.

<sup>4</sup> *Donna L. Shahin*, 55 ECAB 192 (2003).

<sup>5</sup> 20 C.F.R. § 10.608.

<sup>6</sup> *See Alberta Dukes*, 56 ECAB247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

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 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. 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>7</sup>

In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>8</sup> This includes any hearing or review of the written record decision, any denial of modification following a reconsideration request, any merit decision by the Employees' Compensation Appeals Board and any merit decision following action by the Board.<sup>9</sup>

### ANALYSIS

The Board finds that the Office improperly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607 and did not present clear evidence of error. It abused its discretion in denying appellant's reconsideration request, as it applied an improper standard in reviewing the request.

By decision dated July 21, 2008, the Office found that appellant's May 7, 2008 request for reconsideration of the August 29, 2006 decision was not timely as the request was not filed within a year of that decision. It also found that appellant's request for reconsideration failed to demonstrate clear evidence of error. As noted above, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>10</sup> This includes any denial of modification following a reconsideration request, as well as any merit decision by the Board.<sup>11</sup> The Office initially denied appellant's traumatic injury claim by decision dated August 29, 2006. In subsequent merit decisions dated November 20, 2006 and July 11, 2007, it denied modification of its initial

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<sup>7</sup> See *Alberta Dukes*, *supra* note 8.

<sup>8</sup> *Larry L. Litton*, 44 ECAB 243 (1992). See Federal (FECA) Procedure Manual, Part 2 – Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (October 2005)

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (October 2005).

<sup>10</sup> *Supra* note 8. See *Id.*, Part 2 – Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (October 2005).

<sup>11</sup> *Supra* note 9.

decision. On February 26, 2008 the Board affirmed the Office's July 11, 2007 merit decision denying appellant's traumatic injury claim. Under Office procedures, appellant had one year from the issuance of the February 26, 2008 decision of the Board to file a timely request for reconsideration. Therefore, the Board finds that her May 7, 2008 request for reconsideration was timely.

The Board finds that the Office improperly applied the clear evidence of error standard in denying appellant's request for reconsideration. Therefore, its July 21, 2008 decision must be set aside and remanded for an appropriate decision to protect appellant's rights of appeal.

**CONCLUSION**

The Board finds that the Office improperly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed and did not present clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 21, 2008 is set aside and the case remanded for further proceedings consistent with this decision.

Issued: May 21, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board