

evidence did not establish disability for work during the period January 11 to May 6, 2002 causally related to the October 18, 2001 temporary aggravation of spondylolisthesis. In addition, the Board found that appellant had not established a recurrence of disability commencing May 9, 2002. By decision dated October 16, 2007, the Board affirmed an Office decision dated March 8, 2007, denying appellant's application for reconsideration without merit review of the claim.² The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

By letter dated March 27, 2008, appellant requested reconsideration of her claim. She argued that "she was entitled under the [Federal Employees' Compensation] Act to a determination of job suitability." The Office advised appellant that an appeal was pending before the Board. By decision dated June 20, 2008, the Board dismissed the appeal.³ In a letter dated June 27, 2008, appellant requested reconsideration. She stated that she was aware her case was not denied for refusal of suitable work, but again asserted that "at the time of the denial of her claim, she had the right -- as a matter of law -- to be engaged in a suitability determination process pursuant to 5 U.S.C. § 8106(c) of the Act and was wrongly denied this right."

In a decision dated September 24, 2008, the Office found that the application for review was untimely. It denied merit review on the grounds that appellant did not show clear evidence by the Office.

LEGAL PRECEDENT

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁴ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁵

Section 8128(a) of the Act⁶ does not entitle a claimant to a review of an Office decision as a matter of right.⁷ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁸ The Office, through regulations,

² Docket No. 07-1386 (issued October 16, 2007).

³ Docket No. 07-797 (issued June 20, 2008).

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.605 (1999).

⁶ *See supra* note 4.

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁹ As one such limitation, it has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.¹⁰ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹¹

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.¹² In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁴ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ 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.¹⁸ 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.¹⁹

⁹ 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 specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *See Leon D. Faidley, Jr., supra* note 7.

¹² *Leonard E. Redway*, 28 ECAB 242 (1977).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹⁴ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁵ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁷ *See Leona N. Travis, supra* note 15.

¹⁸ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁹ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS

The last decision reviewing the merits of the claim was the Board's decision dated June 9, 2006. The applications for reconsideration were dated March 27 and June 27, 2008. Since appellant did not file an application for reconsideration within one year of the merit decision, it is untimely.

To require the Office to reopen the case for merit review, appellant must establish clear evidence of error, as discussed above. In this case, appellant continues to argue that she was denied a "right" to a suitability determination under 5 U.S.C. § 8106(c). Appellant contends that the Office erred by not making a determination that the limited-duty job was suitable. As the Board explained in its June 9, 2006 decision, the position was a temporary limited-duty position that was not appropriate for a determination under 5 U.S.C. § 8106(c). This section provides that a partially disabled employee who "refuses to seek suitable work" or "refuses or neglects to work after suitable work is offered to, procured by or secured for him" is not entitled to compensation. The Office may invoke 5 U.S.C. § 8106(c) and terminate compensation. If they do so, it must be done in accord with well-established procedures.²⁰ A claimant does not have a "right" to a suitability determination under 5 U.S.C. § 8106(c) based on a temporary position as contended on appeal.

On appeal, appellant also argues that the limited-duty job was not consistent with her work restrictions.²¹ She had raised this argument previously and the Board noted in the June 9, 2006 decision that she had not explained how the position violated her work restrictions. Appellant has not presented any additional evidence to establish that the position was outside a specific work restriction.

In this case, the claim for compensation on intermittent dates from January 11 to May 6, 2002 and for a recurrence of disability on or after May 9, 2002, was denied on the grounds the medical evidence was insufficient. The underlying issue is medical in nature and appellant did not submit evidence or argument pertaining to the medical evidence of record. The Board finds that she did not show clear evidence of error in the denial of the claims. Accordingly, the Office properly denied the application for review without merit review of the claim.

CONCLUSION

The Board finds that the Office properly found appellant's applications for reconsideration were untimely and failed to show clear evidence of error.

²⁰ See *Linda Hilton*, 52 ECAB 476 (2001).

²¹ Appellant cites *Cindy L. Moss*, Docket No. 04-1386 (issued December 13, 2004) for the proposition that a light-duty job consistent with the claimant's work restrictions must be available to the claimant before the burden of proof shifts to the claimant.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 24, 2008 is affirmed.

Issued: September 9, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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