

FACTUAL HISTORY

This is the fifth appeal in the present case. The Board issued a merit decision on December 11, 1995, affirming the Office's January 25, April 8 and August 8, 1994 decisions, as modified to reflect that appellant had no disability after March 10, 1993 due to her February 9, 1992 left wrist and thumb injury.² The Board found that the well-rationalized opinion of Dr. Anthony S. Unger, a Board-certified orthopedic surgeon, who served as an impartial medical specialist, established that appellant had no disability after March 10, 1993, due to her February 9, 1992 employment injury.³ The Board subsequently issued nonmerit decisions on February 26, 2003, July 13, 2004 and October 9, 2007 finding that the Office did not abuse its discretion by refusing to reopen appellant's case for further merit review under 5 U.S.C. § 8128(a) because her several applications for review were not timely filed and failed to present clear evidence of error.⁴ The facts and the circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

Appellant again requested reconsideration of her claim.

In a January 12, 2009 decision, the Office denied her request on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

In a February 17 2009 letter, appellant requested reconsideration of her claim and addressed the standards for timely requesting reconsideration of a given decision with the Office, including the implementing regulations at 20 C.F.R. § 10.607. She asserted that her previous reconsideration requests had been timely filed and that the Office and Board had misinterpreted the relevant standard for assessing timeliness of a reconsideration request. She contended that her claim should have been reviewed on the merits and stated:

“Whenever, a claimant receives a decision from [the Board], that decision date begins a new one-year time period to request an application of reconsideration before your Office. Thus, meaning in accordance to the [Federal Employees' Compensation Act] rules and regulations, any Office decisions issued prior to appealing within the appeal procedures, those dates of the Office decisions are relevant upon appealing on any level within the appeal process as stated in the Office decision.... The Office wants to continually believe in accordance to 10.607(a), (b), after receiving a decision on any appeal level, the appeal process should continue to begin again with the same date of the previous Office decision that has been issued prior to appealing to its Office for a reconsideration, and/or to

² Docket No. 95-802 (issued December 11, 1995).

³ The Office accepted that appellant sustained employment-related left thumb tendinitis on February 9, 1992 and determined that she was entitled to disability compensation for this injury until June 1, 1992. In its December 11, 1995 decision, the Board also found that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after February 19, 1992 due to her December 2, 1986 right hand and wrist injury. This injury is not the subject of the present appeal.

⁴ Docket No. 01-1776 (issued February 26, 2003); Docket No. 04-499 (issued July 13, 2004); Docket No. 07-1268 (issued October 9, 2007).

Branch of Hearings and Reviews and/or to [the Board]. Thus, making it impossible because of the fact in accordance to 10.607(a), a claimant can only request reconsideration within one year beginning with the date of the final Office decision which has been issued.

“Therefore, I do not have to establish clear evidence of error on [the Office’s] part as stipulated in 10.607(b) when submitting the request in a timely manner. I would have to request this reconsideration after January 12, 2010, *i.e.* January 13, 2010 and so on. I would like to mention in accordance to 10.607(a) it does not stipulated anything regarding Office decisions are considered to be the last merit decision before appealing within the appeal process. However, in recent decisions issued by the Office, the Office assumes all decisions issued by the Office are merit decisions and [the Board] decisions are non-merit decisions. This is totally incorrect.”

In statements dated May 25, July 22 and August 29, 2009, appellant made similar arguments concerning the timeliness of her reconsideration requests. She asserted that the medical evidence showed that she had disability after March 10, 1993 due to her February 9, 1992 left wrist and thumb injury.

In a November 5, 2009 decision, the Office denied appellant’s reconsideration request on the grounds that her application for review was not timely filed and failed to present clear evidence of error. It found that her arguments regarding the timeliness of her reconsideration requests did not establish clear error in the Office’s denial of her claim for disability.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁵ According to Office procedure, the one-year period for requesting reconsideration begins on the date of original Office decision, but that the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁷

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”⁸ Office regulations and procedure provide that the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (June 2002).

⁷ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁵

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Its 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. The most recent merit decision in this case was the Board's December 11, 1995 decision which affirmed the Office's January 25, April 8 and August 8, 1994 decisions, as modified, to find that appellant had no disability after March 10, 1993 due to her February 9, 1992 left thumb injury. As appellant's February 2009 request for reconsideration was submitted more than one year after this merit decision, it was untimely. Consequently, she must demonstrate clear evidence of error on the part of the Office in denying her claim for compensation.

In accordance with its internal guidelines and with the Board precedent, the Office properly performed a limited review to determine whether appellant's application for review

⁹ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). *Id.* at Chapter 2.1602.3c.

¹⁰ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 7.

showed clear evidence of error that would warrant reopening her case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its prior merit decisions. She did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

Appellant discussed the standards for timely requesting reconsideration, including the Office's regulations at 20 C.F.R. § 10.607. She asserted that she filed timely reconsideration requests and that her claim should have been reviewed on the merits rather than under the clear evidence of error standard. On appeal, appellant presented similar arguments. The Board finds that her argument does not establish clear evidence of error. Appellant contended that a reconsideration request to the Office is timely if it is filed within a year of a nonmerit decision of the Board, even if no Office merit decision was issued in the prior year. As noted, the one-year period for requesting reconsideration begins on the date of original Office decision, and also accompanies any subsequent merit decision on the issues, including a merit decision by the Board.¹⁶ The last merit decision of the Board was issued on December 11, 1995.¹⁷ Appellant did not file her reconsideration request in the present case until February 2009. Therefore, her request was untimely and her claim was properly considered under the clear evidence of error standard.

Appellant asserted that the medical evidence showed that she had disability after March 10, 1993 due to her February 9, 1992 left wrist and thumb injury. However, her mere assertion regarding a matter that is resolved by the submission of medical evidence does not show clear evidence of error in the Office's prior decisions. Appellant also discussed her communications with Office claims examiners and the timeframes of the issuance of Office decisions, but she did not adequately explain how this showed clear evidence of error.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's prior decisions and the Office properly determined that she did not show clear evidence of error in those decisions.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

¹⁶ See *supra* note 6.

¹⁷ The last merit decision of the Office was issued on August 8, 1994.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2010
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