

**United States Department of Labor
Employees' Compensation Appeals Board**

B.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Memphis, TN, Employer**

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**Docket No. 09-1457
Issued: February 16, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 26, 2009 appellant filed a timely appeal of a May 12, 2009 decision of the Office of Workers' Compensation Programs finding her request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3(e), the Board does not have jurisdiction over the merits of the claim.¹

ISSUE

The issue is whether the Office properly determined appellant's January 21, 2009 application for reconsideration was untimely and failed to show clear evidence of error.

¹ The last decision of the merits of the claim is dated March 25, 1993. For decisions prior to November 18, 2008, a claimant had one year to file an appeal with the Board under 5 U.S.C. § 501.3. The Board does not have jurisdiction over a merit decision on this appeal.

FACTUAL HISTORY

This is the seventh appeal in the case. The Office terminated appellant's compensation on the grounds that she refused an offer of suitable work in an April 17, 1992 decision and denied modification in a March 25, 1993 decision. In a decision dated October 1, 1998, the Board affirmed a January 12, 1996 Office decision finding that appellant's reconsideration request was untimely and failed to show clear evidence of error.² By decision dated January 23, 2003, the Board affirmed Office decisions dated April 26 and September 7, 2001 and April 11 and July 26, 2002, denying her requests for reconsideration as untimely and failing to establish clear evidence of error.³ In the next appeal, the Board affirmed an August 8, 2003 Office decision that found appellant's June 28, 2003 reconsideration request was untimely and failed to show clear evidence of error.⁴ By decision dated November 23, 2004, the Board affirmed decisions dated April 4 and May 17, 2004, finding that appellant's requests for reconsideration were untimely and failed to show clear evidence of error.⁵ In a decision dated December 27, 2007, the Office affirmed its decisions dated May 10 and 29, 2007, finding that appellant's applications for reconsideration were untimely and failed to show clear evidence of error.⁶ By decision dated January 6, 2009, the Board affirmed an April 4, 2008 Office decision again finding the request for reconsideration untimely and failing to show clear evidence of error.⁷ The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

By letter dated January 21, 2009, appellant requested reconsideration of her claim before the Office. She stated that the employing establishment's response to the Office on March 16, 1993 regarding the job offer did not provide the requested information. Appellant argued that the March 25, 1993 decision should have vacated the April 17, 1992 refusal of suitable work decision.

In a decision dated May 12, 2009, the Office found that the application for reconsideration was untimely. It further denied merit review on the grounds that the application failed to show clear evidence of error by the Office.

LEGAL PRECEDENT

The Federal Employees' Compensation 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.⁸ The employee shall exercise this right through a request to

² Docket No. 96-2518 (issued October 1, 1998).

³ Docket No. 02-1814 (issued January 23, 2003).

⁴ Docket No. 03-2128 (issued October 30, 2003).

⁵ Docket No. 04-1529 (issued November 23, 2004).

⁶ Docket No. 07-1697 (issued December 27, 2007).

⁷ Docket No. 08-1420 (issued January 6, 2009).

⁸ 5 U.S.C. § 8128(a).

the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”⁹

Section 8128(a) of the Act¹⁰ does not entitle a claimant to a review of an Office decision as a matter of right.¹¹ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.¹² The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).¹³ As one such limitation, the Office 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.¹⁴ 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).¹⁵

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.¹⁶ 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.¹⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁹ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish

⁹ 20 C.F.R. § 10.605 (1999).

¹⁰ 5 U.S.C. § 8128(a).

¹¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² 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.”

¹³ 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; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *See Leon D. Faidley, Jr.*, *supra* note 11.

¹⁶ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹⁸ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁹ *See Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.²⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²¹ 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.²² 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.²³

ANALYSIS

In the January 21, 2009 reconsideration request, appellant again asserts that the job offer made by the employing establishment was invalid. She raised this argument numerous times previously, and the Board considered the argument in its January 23 and October 30, 2003, December 27, 2007 and January 6, 2009 decisions. In her January 28, 2008 reconsideration request, which was reviewed by the Board in the January 6, 2009 decision, appellant specifically argued that the employing establishment did not provide an adequate response to the Office's March 3, 1993 request for information on the job offer. The Board again finds she did not submit probative evidence establishing clear evidence of error by the Office. The Office properly denied merit review in this case.

CONCLUSION

The Board finds appellant's application for reconsideration was untimely and failed to show clear evidence of error.

²⁰ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

²¹ See *Leona N. Travis*, *supra* note 19.

²² See *Nelson T. Thompson*, 43 ECAB 919 (1992).

²³ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 12, 2009 is affirmed.

Issued: February 16, 2010
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