

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

P.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Gaithersburg, MD, Employer**

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**Docket No. 09-1590
Issued: February 26, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 5, 2009 appellant filed a timely appeal from an Office of Workers' Compensation Programs decision dated May 1, 2009, which denied her reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated December 11, 1995 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This is the sixth appeal before the Board. The Office accepted that appellant sustained tendinitis and de Quervain's complex of the right hand and wrist and she returned to limited-duty work on December 29, 1990. In decisions dated April 8 and June 9, 1994, it found that appellant

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 and 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. Appellant 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 new medical evidence, *i.e.*, an April 27, 2005 report from Dr. Azer, in support of her claim.

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 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.

By decision dated January 28, 2008, the Office denied appellant's request for reconsideration without a merit review, finding that appellant 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. In an October 15, 2008 decision,⁵ the Board affirmed the Office's

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).

⁵ Docket No. 08-1230 (issued October 15, 2008).

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. The facts and the circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

By letters dated November 12, 2008, March 4 and 24, 2009, 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 November 12, 2008 reconsideration request was timely because it was filed within one year of the Board's October 15, 2008 decision. Appellant argued that her claim should be reviewed on the merits. She alleged, as she did in prior requests for reconsideration, that the reports of Dr. Azer showed that she had disability after February 19, 1992 due to her accepted right hand and wrist injury. In addition, appellant contended that the Office acted improperly by failing to provide adequate findings of fact and reasoning in its decision, that it did not adequately explain why it did not evaluate her reconsideration request, that it failed to apply the appropriate legal standards in adjudicating her claim and that it failed to provide her with the proper appeal rights.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁶ does not entitle an employee to a review of an Office decision as a matter of right.⁷ 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).⁸ 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.⁹ The Board has found that the

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ 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) advancing a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

⁹ 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).¹⁰

The regulations also state that when the Office denies an application for reconsideration without reopening the case for review on the merits, that decision cannot be the subject of another application for reconsideration. The only recourse is to file an appeal with the Board.¹¹

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.¹² 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.¹³

To establish clear evidence of error, an appellant 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 manifested 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 To show clear evidence of error, the evidence must raise a substantial question as to the correctness of the Office's decision.¹⁹ 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.²⁰

¹⁰ See cases cited *supra* note 7.

¹¹ 20 C.F.R. § 10.608.

¹² *Rex L. Weaver*, 44 ECAB 535 (1993).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

¹⁶ See *Jesus D. Sanchez*, *supra* note 7.

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

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

¹⁹ *Faidley*, *supra* note 7.

²⁰ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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. Appellant requested reconsideration on November 12, 2008; thus, the reconsideration request is untimely as it was outside the one-year time limit. Appellant argues that her request for reconsideration was filed within one year of the Board's "merit" decision dated October 15, 2008. The Board's decision did not, though, review the merits of the case. It was a nonmerit review. The one-year time limitation refers back to the last merit decision, which in this cases was the December 11, 1995 decision of the Board.

The Board finds that appellant's November 12, 2008, March 4 and 24, 2009 letters requesting reconsideration failed to show clear evidence of error. Appellant did not submit any new medical evidence with her request. In addition, appellant's request letters were cumulative and repetitive of 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. Appellant continues to dispute the timeliness of her requests for reconsideration, but her arguments continue to be without merit.

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 evidence of error on the part of the Office in her reconsideration request letters dated November 12, 2008, March 4 and 24, 2009. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on May 1, 2009.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2010
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