



## **FACTUAL HISTORY**

This is the second appeal before the Board in this case. By decision and order issued December 15, 2006,<sup>1</sup> the Board affirmed a May 22, 2006 decision of the Office denying appellant's claim for a respiratory condition. The Board found that she did not submit sufficient medical evidence to establish causal relationship. The law and the facts of the case as set forth in the Board's decision are incorporated by reference.

In a December 15, 2008 letter received by the Office on December 19, 2008, appellant requested reconsideration of the Board's December 15, 2006 decision and order. She asserted that she requested reconsideration by a December 15, 2007 letter but sent it to an incorrect address. Appellant asserted that the medical record established that workplace exposures to "diesel exhaust fumes, silica dust and cleaning chemicals" caused "acute bronchitis, carbon monoxide poisoning, possible silicosis and a chronic upper respiratory condition." She contended that the Office could have developed her claim as one for traumatic injury and not an occupational disease. Appellant requested that the Office further develop the medical evidence. She enclosed medical records considered by the Office prior to the May 22, 2006 decision.

By decision dated April 3, 2009, the Office denied reconsideration on the grounds that appellant's request was not timely filed and failed to present clear evidence of error. It found that the December 19, 2008 request was not filed within one year of the Board's December 15, 2006 decision and order, the final decision in the case. Also, the evidence submitted was insufficient to establish a substantial question concerning the correctness of the Board's decision and order. The Office noted that there was no December 15, 2007 request for reconsideration in the present claim file or in appellant's nine other claim files.

## **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.<sup>5</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>6</sup>

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<sup>1</sup> Docket No. 06-1980 (issued December 15, 2006).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>4</sup> *Thankamma Mathews*, *supra* note 3; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>5</sup> 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>6</sup> 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 3; *Jesus D. Sanchez*, *supra* note 4.

In those cases where requests for reconsideration are not timely filed, 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 in accordance with section 10.607(b) of its regulations.<sup>7</sup> Office regulations state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>10</sup> The evidence 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.<sup>11</sup> 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>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> 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.<sup>14</sup> The Board must make 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>15</sup>

### ANALYSIS

In its April 3, 2009 decision, the Office properly determined that appellant failed to file a timely application for review. The most recent merit decision is the Board's December 15, 2006 decision and order. Appellant requested reconsideration on December 19, 2008, more than one year after December 15, 2006. Accordingly, her request for reconsideration was not timely filed.

The Board finds that appellant's December 19, 2008 letter does not raise a substantial question as to whether the Board's December 15, 2006 decision was in error or *prima facie* shift the weight of the evidence in her favor. In that letter, and on appeal, appellant contends that she filed a timely request for reconsideration on December 15, 2007. However, there is no request

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<sup>7</sup> *Thankamma Mathews*, *supra* note 3.

<sup>8</sup> 20 C.F.R. § 10.607(b).

<sup>9</sup> *Thankamma Mathews*, *supra* note 3.

<sup>10</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> *James R. Mirra*, 56 ECAB 738 (2005).

<sup>12</sup> *Jesus D. Sanchez*, *supra* note 4.

<sup>13</sup> *Leona N. Travis*, *supra* note 10.

<sup>14</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>15</sup> *Gregory Griffin*, *supra* note 5.

for reconsideration of record filed within one year of the Board's December 15, 2006 decision. The Office also reviewed appellant's nine other claim files and found no timely request for reconsideration of the Board's December 15, 2006 decision.

The Office also found that the evidence accompanying the December 19, 2008 request was insufficient to raise a substantial question as to the correctness of the Board's December 15, 2006 decision. Appellant submitted copies of previously considered medical evidence to reiterate an argument previously rejected by the Office. Consequently, the Office properly denied her reconsideration request as it did not establish clear evidence of error.

On appeal, appellant asserted that the Office should have developed her claim as one for traumatic injury and not occupational disease. This argument is not relevant to the issue on appeal of whether her December 19, 2008 request for reconsideration established clear evidence of error.<sup>16</sup>

### **CONCLUSION**

The Board finds that appellant's December 19, 2008 request for reconsideration was untimely filed and failed to show clear evidence of error.

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<sup>16</sup> Appellant submitted new evidence accompanying her request for appeal. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time the final decision was issued in the case. 20 C.F.R. § 501.2(c). Such evidence may be submitted to the Office accompanying a valid request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 3, 2009 is affirmed.

Issued: June 17, 2010  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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