



## **ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

On appeal, appellant, through her attorney, argues that the Office erroneously terminated her compensation and schedule award benefits due to her failure to accept a job that was not suitable. She filed a claim before the Equal Employment Opportunity Commission (EEOC) and a decision was issued that determined her employer offered appellant an unreasonable position solely to deny her benefits because of her disabled status. Appellant was stopped from seeking review before the Office as there were jurisdictional issues that needed to be pursued in another forum (*i.e.*, before the EEOC).

## **FACTUAL HISTORY**

On February 25, 2004 appellant, then a 47-year-old special agent, filed a claim for an occupational disease claim alleging that, as a result of typing documents for her cases for 20 years, she sustained medial epicondylitis and carpal tunnel in her right arm. The Office accepted her claim for right medial and lateral epicondylitis, right ulnar neuropathy and right carpal tunnel syndrome. On October 20, 2004 appellant underwent a right ulnar nerve decompression and transposition, right carpal tunnel release. On August 30, 2005 she underwent a left open carpal tunnel release, a left cubital tunnel release with ulnar nerve transposition and a left radial tunnel decompression. The Office paid wage-loss compensation and medical benefits.

In a May 9, 2006 medical report, Dr. Heidi T. Bloom, a treating Board-certified orthopedic surgeon, diagnosed bilateral lateral epicondylitis; status post ulnar nerve transpositions; status post carpal tunnel releases; and status post decompression of bilateral radial nerves. She found appellant medically stationary and listed permanent duty modifications of occasional lifting up to 15 pounds, frequent lifting of 5 pounds, no repetitive keyboarding and no crawling or climbing. Dr. Bloom indicated that this would presumably make appellant no longer eligible to work full time as a Federal Bureau Investigation agent. On November 2, 2006 appellant elected to retire effective November 22, 2006.

On November 7, 2006 the employing establishment offered appellant a position as an operations security assistant. This position was located in the Portland office and was available on November 20, 2006. The employing establishment noted that it would bear all relocation expenses. The position was modified to require no recurring lifting greater than 15 pounds, no carrying of moderate to heavy items greater than 15 pounds and no typing of any kind. The employing establishment noted that typing duties would be alleviated by the use of voice activated software.

On December 1, 2006 the Office informed appellant that the position of operations security assistant was available with the employing establishment. It reviewed the requirements of the position and determined that it was suitable and within her medical limitations as set by Dr. Bloom in a May 9, 2006 report. The Office gave appellant 30 days within which to accept the position or provide a written explanation of reasons for refusal.

In a letter received by the Office on December 12, 2006, appellant declined the position. Appellant stated that she resided in Medford, Oregon and the position was 275 miles away in Portland. She and her husband did not want to move there family. She noted that she elected to retire and would not report for the offered position.

By letter dated January 4, 2007, the Office notified appellant that it did not find her reasons for rejecting the position to be valid. It provided her 15 more days to accept the position or her wage-loss compensation would be terminated. On January 16, 2007 appellant filed a claim for a schedule award.

By decision dated January 22, 2007, the Office terminated appellant's monetary compensation benefits effective January 22, 2007 finding she refused to accept suitable work.

By letter dated July 22, 2009, appellant resubmitted her claim for benefits. She submitted documents concerning her claim before the EEOC, including a copy of the hearing transcript and a copy of a June 11, 2009 decision issued in her favor. Appellant contended that she had challenged the reasonableness of the job offer and that the EEOC agreed with her position. She requested that the Office authorize her to elect benefits under the Act. In the alternative, appellant asked that the Office to reconsider her claim and find that the matter was stayed pending EEOC action. She forwarded a copy of the June 11, 2009 decision which found that she had established by a preponderance of the evidence that the Office intentionally discriminated against her due to her disability when it intentionally acted to prevent her from obtaining a schedule award. Appellant was entitled to reasonable attorney's fees and to an award of nonpecuniary damages based on emotional harm.<sup>3</sup>

By letter dated September 12, 2009, appellant requested reconsideration of the Office's prior decision in light of the recent EEOC decision. She made various arguments concerning the suitability of the offered position including the fact that the position did not accommodate her restrictions against typing.

By decision dated October 29, 2009, the Office denied appellant's claim for reconsideration as it was untimely filed and failed to establish clear evidence of error.

### **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.<sup>4</sup> The

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<sup>3</sup> In discussing her claim, the EEOC noted testimony that the position required typing even though appellant was physically incapable of performing that function, that officials in Portland did not believe that the job offer was serious, that her husband was a special agent for the employing establishment in Medford and that no transfer was offered to him and that the position would required her to move there family including three school-aged children 275 miles.

<sup>4</sup> 20 C.F.R. § 10.607(a).

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.<sup>5</sup>

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.<sup>6</sup> Office regulations and procedure provide that the Office 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.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>9</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>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</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>12</sup> 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 *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 decision.<sup>13</sup>

### ANALYSIS

The Board finds that as more than one year had elapsed from the date of issuance of the last merit decision in this case, *i.e.*, the January 22, 2007 decision terminating appellant's

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<sup>5</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>6</sup> See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>7</sup> *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (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). Evidence such as a detailed, well-rationalized medical report which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3(c).

<sup>8</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>9</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>10</sup> See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>11</sup> See *Leona D. Travis*, *supra* note 9.

<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 5.

monetary benefits, her request for reconsideration on September 12, 2009 was not timely filed. Appellant contended that she was stopped from seeking review before the Office because there were jurisdictional issues that had to be resolved in another forum, *i.e.*, the EEOC. The Board notes the Office has the responsibility for administering the Act, not the EEOC.<sup>14</sup> The Office has exclusive jurisdiction in the cases before it to decide all questions arising under the Act, subject to the review and final decision by the Board.<sup>15</sup> Consequently, appellant must demonstrate clear evidence of error by the Office in terminating her compensation for refusing an offer of suitable work.<sup>16</sup>

Appellant submitted additional factual evidence in support of her request for reconsideration regarding her discrimination complaint filed with the EEOC, including a June 11, 2009 EEOC decision. It found that the employing establishment had discriminated against her; but the EEOC decision does not raise a substantial question as to the correctness of the Office's decision under the Act. The administration judge found that the employing establishment had discriminated against appellant. In making this finding, he clearly noted that he had no jurisdiction to review the Office's determination that appellant improperly refused an offer of suitable work. The administration judge noted that termination of benefits under the Act was the exclusive province of the Department of Labor.<sup>17</sup> He noted that, for similar reasons, he had no jurisdiction to enter a schedule award. The administration judge noted that the standards for determining suitable work under the Act differed from the standard for adjudicating appellant's rights under other federal statutes outside workers' compensation. Accordingly, the Board finds that this decision does not establish clear error on the part of the Office.

To establish clear evidence of error, appellant must submit evidence or argument that is positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>18</sup> The term clear evidence of error is intended to represent a difficult standard.<sup>19</sup> Appellant's request would have to establish on its face that the Office's termination of benefits was erroneous, thereby shifting the weight of the evidence in her favor. For the reasons noted, the evidence submitted by her does not establish clear error by the Office in terminating benefits under section 8106(c)(2). The Board finds that appellant has not established clear evidence of error in the Office's January 22, 2007 decision.

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<sup>14</sup> 20 C.F.R. § 10.1.

<sup>15</sup> *Id.* at § 8128(b) (The actions of the Secretary of Labor or his designee in allowing or denying a payment under the Act is not subject to review by another official of the United States or by a court by mandamus otherwise); *See Anneliese Ross*, 42 ECAB 371 (1991).

<sup>16</sup> 20 C.F.R. § 10.607(b).

<sup>17</sup> The administrative judge commented that the Office's regulations rejected appellant's preference for the area in which she resided or retirement as acceptable reasons for rejecting an offered job.

<sup>18</sup> *B.W.*, Docket No. 10-323 (issued September 2, 2010).

<sup>19</sup> *D.L.*, Docket No. 08-1057 (issued June 23, 2009).

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 29, 2009 is affirmed.

Issued: April 26, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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