

FACTUAL HISTORY

This case has been before the Board on numerous prior appeals. Appellant, then a 33-year old clerk, filed an occupational disease claim (Form CA-2) on April 20, 1989 alleging that she developed stress due to harassment and discrimination at work. OWCP accepted the claim for generalized anxiety disorder.

OWCP terminated appellant's compensation in an April 17, 1992 decision on the basis that she refused an offer of suitable work. By decision dated March 25, 1993, it reviewed the merits and denied modification. In each appeal, the Board found that appellant had untimely requested reconsideration before OWCP and had not demonstrated clear evidence of error in the decision terminating benefits for refusal of suitable work.³ The facts and circumstances of the case as discussed in the prior appeals are hereby incorporated by reference.

Appellant again requested reconsideration on November 12, 2014. By decision dated January 20, 2015, OWCP again found the application for reconsideration was untimely and failed to demonstrate clear evidence of error. On September 15, 2015 appellant filed an appeal with the Board of the January 20, 2015 OWCP decision. By order dated October 20, 2015, the Board dismissed the appeal as untimely filed.⁴

On June 15, 2015 appellant submitted a June 12, 2015 application for reconsideration. She reiterated arguments that the job offer was incomplete, violated OWCP regulations, and was never offered in writing after a physician's approval. Appellant resubmitted a copy of a September 15, 1992 letter from the employing establishment, a September 14, 1992 note purporting to accept the position, and a March 3, 1993 letter from OWCP requesting additional information from the employing establishment. By letters dated September 8 and October 28, 2015, appellant again asserted the job offer was invalid.

By decision dated December 14, 2015, OWCP found the application for reconsideration was untimely filed. It denied merit review, finding appellant had not demonstrated clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁵ The

³ Docket No. 92-2518 (issued October 1, 1998); Docket No. 02-1814 (issued January 23, 2003); Docket No. 03-2128 (issued October 30, 2003); Docket No. 04-1429 (issued November 23, 2004); Docket No. 07-1697 (issued December 27, 2007); Docket No. 08-1420 (issued January 6, 2009); Docket No. 09-1497 (issued February 16, 2010); Docket No. 10-1335 (issued February 8, 2011); Docket No. 11-1261 (issued December 6, 2011); Docket No. 11-1261 (issued December 6, 2011); Docket No. 12-1065 (issued October 12, 2012); Docket No. 14-0070 (issued March 24, 2014).

⁴ Docket No. 15-1897 (issued October 20, 2015).

⁵ 5 U.S.C. § 8128(a).

employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”⁶

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.⁷ This section vests the OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁸ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 USC § 8128(a) of FECA.⁹ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.¹⁰ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹¹

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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 OWCP’s decision.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁵

ANALYSIS

The last decision on the merits of the claim was the March 25, 1993 OWCP decision, denying modification of an April 17, 1992 determination that appellant had refused an offer of

⁶ 20 C.F.R. § 10.605 (2012).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ Under section 8128 of FECA, “[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.”

⁹ 5 U.S.C. §§ 8101 *et seq.*

¹⁰ 20 C.F.R. § 10.607 (2012).

¹¹ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹³ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁴ *Id.*

¹⁵ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

suitable work. The application for reconsideration received on June 15, 2015 is untimely and, therefore, appellant must demonstrate clear evidence of error.

The Board noted in the March 24, 2014 decision that appellant has argued repeatedly that the 1992 job offer was inadequate, not properly sent to OWCP, failed to include dates of availability, and violated OWCP regulations at 20 C.F.R. § 10.507. All of these arguments have been raised by appellant and addressed in a series of prior appeals. The Board has held that the evidence of record does not establish clear evidence of error with respect to the job offer. With the current application for reconsideration, appellant resubmitted evidence of record and again argued the job offer was invalid. The subject matter previously reviewed by the Board, absent further merit review by OWCP, is *res judicata* and thus the arguments will not be further reviewed on this appeal.¹⁶

Appellant's application for reconsideration was untimely filed. A claimant may receive a merit review only if clear evidence of error is established. On appeal appellant argues that there were errors and the April 17, 1992 decision should be vacated. She has not demonstrated clear evidence of error, and the Board finds OWCP properly denied appellant's application for reconsideration in this case.

CONCLUSION

The Board finds that OWCP properly found appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

¹⁶ See *J.F.*, Docket No. 14-1589 (issued November 24, 2014); see also *J.V.*, Docket No. 14-0788 (issued October 19, 2015).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs December 14, 2015 is affirmed.

Issued: September 19, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board