

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DONNA CHANEY and DEPARTMENT OF THE ARMY,  
FITZSIMONS ARMY MEDICAL CENTER, Aurora, CO

*Docket No. 01-314; Submitted on the Record;  
Issued September 17, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the October 21, 1999 decision denying appellant's request for reconsideration. Since more than one year has elapsed between the date of the Office's most recent merit decision on October 8, 1998, denying appellant's recurrence of disability claim, and the filing of appellant's appeal on October 23, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

The Board finds that the Office acted within its discretion in denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.<sup>2</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>3</sup>

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<sup>1</sup> 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

<sup>2</sup> 20 C.F.R. § 10.607(a).

<sup>3</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

The Office properly found, by its October 21, 1999 decision, that the one-year time limit for filing a request for reconsideration of the Office's October 8, 1998 decision expired on October 8, 1999, and that the request for reconsideration dated October 14, 1999 was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.<sup>4</sup> Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>6</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>7</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>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</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>10</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>11</sup> 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.<sup>12</sup>

In this case, appellant did not submit any evidence or legal arguments in support of her October 14, 1999 request for reconsideration. Appellant only stated: "Please put into effect my reconsideration of my denial -- leaving insurance -- please reconsider follow-up with latest medical." No medical evidence, however, was included with her request. Appellant submitted a

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<sup>4</sup> *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>6</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> *Jesus D. Sanchez*, *supra* note 3.

<sup>9</sup> *Leona N. Travis*, *supra* note 7.

<sup>10</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

<sup>12</sup> *Gregory Griffin*, *supra* note 4.

handwritten letter dated October 8, 1999 which the Office received on the same day. Appellant stated that her letter was to confirm that she is still proceeding with her claim and that she needs more time to obtain recent medical evaluations. The Board finds that appellant's statements do not constitute the necessary clear evidence of error.

Appellant did not submit any new evidence which raised a substantial question as to the correctness of the Office's October 8, 1998 decision denying appellant's recurrence of disability claim.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied it.

The October 21, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
September 17, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member