

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

EARTHA L. WESTON, Appellant

and

**DEPARTMENT OF COMMERCE, U.S.
CENSUS BUREAU, Durham, NC, Employer**

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**Docket No. 06-165
Issued: June 8, 2006**

Appearances:
Eartha L. Weston, pro se
Miriam D. Ozur, Esq., for the Director

Oral Argument May 10, 2006

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 30, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 24, 2005 nonmerit decision, denying her request for further merit review of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's October 7, 2003 decision, denying her claim for an employment-related recurrence of disability. Because more than one year has elapsed between the last merit decision and the filing of this appeal on October 30, 2005, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On June 21, 2000 appellant, then a 41-year-old census enumerator, filed a traumatic injury claim alleging that she sustained neck and back injuries when her vehicle was struck from behind by another vehicle on June 5, 2000. The Office accepted that appellant sustained cervical and thoracic strains on June 5, 2000. She stopped work on June 5, 2000 and, in late 2000, she began to participate in an Office-sponsored vocational rehabilitation program.²

By decision dated May 10, 2002, the Office adjusted appellant's compensation to zero effective May 10, 2002 based on its determination that the position of clerk fairly and reasonably represented her wage-earning capacity.³

On July 11, 2003 appellant filed a claim form alleging that she sustained a recurrence of disability on March 31, 2003 due to her June 5, 2000 employment injury. She asserted that she continuously experienced dizziness and pain and spasms in her neck and back since June 5, 2000.

In a clinical note dated May 1, 2003, a physician with an illegible signature indicated that appellant reported experiencing a "recurrence of neck pain" after lifting heavy boxes at home.⁴ In a May 2, 2003 report, Dr. Aleem A. Iqbal, an attending Board-certified neurologist, stated that appellant reported experiencing dizziness, headaches and neck and back pain after a vehicular accident on June 5, 2000. He recommended diagnostic testing and stated, "It is my contention that she has suffered with post-traumatic syndrome, although it is much too long for post-traumatic syndrome to persist at this time." In a report dated August 25, 2003, Dr. Iqbal noted that diagnostic testing showed that appellant had mild irritation of the L5 nerve root.

By decision dated October 7, 2003, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of disability on or after March 31, 2003 due to her June 5, 2000 employment injury.

By letter dated June 20, 2005, appellant requested reconsideration of the Office's October 7, 2003 decision and stated, "Base[d] on Dr. Stephen Strzelecki's report, that provides you with more medical evidence, I am appealing this decision."⁵

Appellant submitted the first three pages of an April 29, 2005 report entitled "neuropsychological evaluation." The report did not identify the name of the preparer and was unsigned and incomplete. It indicated that appellant reported having "physical and cognitive

² Appellant regularly received physical therapy treatment for her neck and back complaints.

³ The Office indicated that the wages of a clerk exceeded those of a census enumerator.

⁴ The record also contains clinical notes from mid 2003, including a July 14, 2003 note in which a physician with an illegible signature detailed appellant's complaints of pain and spasms in her neck and back.

⁵ Appellant submitted letters to the Office dated June 9, 13 and 15, 2005 in which she asserted that she sustained a brain injury on June 5, 2000 and argued that the medical evidence of Dr. Strzelecki established her claim. She also submitted a similar June 9, 2005 letter which she originally sent to a congressional representative.

functioning” difficulties after a June 2000 vehicular accident and noted that testing for intelligence, memory and auditory skills revealed average to low average results.

Appellant also submitted a November 7, 2003 report in which Dr. Michael D. Paul, an attending Board-certified orthopedic surgeon, diagnosed cervical and thoracic-lumbar spine strain, right knee pain due to chondromalacia and left ear tinnitus and left-sided face pain of undetermined cause. He noted that the cervical and thoracic spine strain of June 5, 2000 had reached maximum medical improvement and stated, “The intervening injury of March 31, 2003 resulted in the recurrence of the pain due to her cervical spine strain.” Appellant also submitted a July 15, 2003 report in which Dr. Iqbal stated that she complained of paralumbar and paracervical suprascapular pain. He noted that testing results had not been “significantly abnormal in terms of brainstem auditory evoked response study” and indicated that the magnetic resonance imaging (MRI) scan showed very mild irritation of the right L5 nerve root.⁶

Appellant submitted a September 25, 2003 clinical note in which a physician with an illegible signature detailed her complaints of dizziness and neck pain. She also resubmitted a July 14, 2003 note in which the same physician detailed her complaints of neck and back pain.

By decision dated June 24, 2005, the Office denied appellant’s request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.⁷

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.⁸ The 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 Federal Employees’ Compensation Act.⁹

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.”¹⁰ Office regulations and procedure provide that the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set

⁶ The record contains the results of a May 24, 2004 brainstem auditory evoked response study which was obtained by Dr. Paul. Appellant resubmitted copies of the May 2 and August 25, 2003 reports of Dr. Iqbal.

⁷ Appellant submitted additional evidence after the Office’s June 24, 2005 decision, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

⁸ 20 C.F.R. § 10.607(a).

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

¹⁰ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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.¹⁷

ANALYSIS

The Office accepted that appellant sustained cervical and thoracic strains due to a vehicular accident on June 5, 2000. By decision dated October 7, 2003, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of disability on or after March 31, 2003 due to her June 5, 2000 employment injury. By decision dated June 24, 2005, the Office denied appellant's request for further review of the merits of her claim on the grounds that her June 20, 2005 request was untimely filed and failed to demonstrate clear evidence of error.

In its June 24, 2005 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Her reconsideration request was filed on June 20, 2005, more than one year after the Office's October 7, 2003 decision and, therefore, she must demonstrate clear evidence of error on the part of the Office in issuing this decision.

¹¹ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (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 2.1602.3c.

¹² See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹³ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁴ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁵ See *Leona N. Travis*, *supra* note 13.

¹⁶ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 9.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its October 7, 2003 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

Appellant submitted the first three pages of an April 29, 2005 report entitled “neuropsychological evaluation.” However, the report is not relevant to the question of whether she sustained an employment-related recurrence of disability on or after March 31, 2003 because it has little probative value due to the fact that it does not identify the name of the preparer and is unsigned and incomplete.¹⁸ Appellant argued that she sustained a brain injury on June 5, 2000 which led her to sustain a recurrence of disability, but this argument would not be relevant as the main issue of the present case is medical in nature and must be resolved by the submission of medical evidence.¹⁹

Appellant also submitted a November 7, 2003 report in which Dr. Paul, an attending Board-certified orthopedic surgeon, diagnosed cervical and thoracic-lumbar spine strain, right knee pain due to chondromalacia and left ear tinnitus and left-sided face pain of undetermined cause. This report would not be relevant because Dr. Paul provided no clear opinion that appellant’s continuing neck and back problems were related to the June 5, 2000 accident and did not otherwise opine that appellant sustained an employment-related recurrence of disability.²⁰ In fact, Dr. Paul suggested that her continuing complaints were due to a nonwork-related injury when he stated that the “intervening injury of March 31, 2003 resulted in the recurrence of pain due to her cervical spine strain.”²¹

Appellant submitted a July 15, 2003 report in which Dr. Iqbal, an attending Board-certified neurologist, stated that testing results had not been “significantly abnormal in terms of brainstem auditory evoked response study” and indicated that the MRI scan showed very mild irritation of the right L5 nerve root.²² Appellant resubmitted copies of May 2 and August 25, 2003 reports of Dr. Iqbal which indicated that she had limited findings on examination. These

¹⁸ Appellant noted that this was a report of a Dr. Strzelecki, but no complete report of a Dr. Strzelecki was added to the record prior to the issuance of the Office’s June 24, 2005 decision. Moreover, the incomplete report indicated that appellant complained of having “physical and cognitive functioning” difficulties after a June 2000 vehicular accident and noted that testing for intelligence, memory and auditory skills revealed average to low average results. It did not, however, indicate that appellant sustained a brain injury on June 5, 2000 or show that she sustained an employment-related recurrence of disability.

¹⁹ The Board notes that the Office has not accepted that appellant sustained a brain injury on June 5, 2000.

²⁰ See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee’s condition is of limited probative value on the issue of causal relationship).

²¹ Appellant reported increased neck pain after lifting boxes at home on March 31, 2003.

²² The record contains the results of a May 24, 2004 brainstem auditory evoked response study which was obtained by Dr. Paul. The results do not provide any opinion that appellant’s brainstem responses were affected by the June 5, 2000 injury.

reports are not relevant in that they do not contain an opinion that appellant sustained a recurrence of disability on or after March 31, 2003 due to her June 5, 2000 employment injury.²³

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's October 7, 2003 decision and the Office properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 24, 2005 decision is affirmed.

Issued: June 8, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

²³ In his May 2, 2003 report, Dr. Iqbal stated that it was his contention that appellant "suffered with post-traumatic syndrome" after June 5, 2000, but he also equivocally stated that "it is much too long for post-traumatic syndrome to persist at this time." Appellant submitted a September 25, 2003 clinical note in which a physician with an illegible signature detailed her complaints of dizziness and neck pain and also resubmitted a July 14, 2003 note in which the same physician detailed her complaints of neck and back pain. These notes contain no indication that she sustained an employment-related recurrence of disability and, therefore, are not relevant to the main issue of the present case.