

LAURA C. PITTS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Ellisville, MS, Employer**

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Case Submitted on the Record

On April 11, 2000 appellant, then a 41-year-old city carrier, filed a traumatic injury claim alleging that on April 8, 2000 she sprained her left foot while in the performance of duty. The Office accepted the claim for a left ankle sprain. Appellant returned to work, and on

December 31, 2002, filed a recurrence of disability claim alleging that she remained symptomatic with pain, stiffness and weakness in her left ankle. Appellant noted that date of recurrence was December 7, 2002 and that she stopped work on December 8, 2002.

On January 15, 2003 the Office advised appellant of the evidence she needed to establish her recurrence of disability claim. On March 26, 2003 the Office denied appellant's claim.

On April 17, 2003 appellant requested an oral hearing that was held on March 22, 2004. In a decision dated June 15, 2004, an Office hearing representative affirmed the March 26, 2003 decision. The hearing representative also found that appellant had not established that her lumbar or cervical conditions resulted from the April 2000 employment injury.

On August 27, 2004 appellant requested reconsideration of the June 15, 2004 Office decision and submitted a July 19, 2004 report from Dr. David C. Lee, a Board-certified neurologist. On September 20, 2004 the Office denied appellant's reconsideration request without reviewing the merits of the claim. The Office noted the history of the claim and indicated that the most recent merit decision was dated June 15, 2004.

On July 28, 2005 appellant requested reconsideration and submitted reports from Dr. Lee dated October 24, 2004 and May 15, 2005, and x-ray reports dated July 20, 2005.¹ In a nonmerit decision dated October 17, 2005, the Office denied appellant's July 28, 2005 request for reconsideration on the basis that her request was untimely filed and did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ 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.⁶ The Board has found that the

¹ The Office made reference to an August 3, 2004 decision in its cover letter. This was harmless error as the Office did not issue an August 3, 2004 decision in this case.

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ Under section 8128 of the Act, "[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."

⁵ 20 C.F.R. § 10.606.

⁶ 20 C.F.R. § 10.607.

imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.⁸ In accordance with this holding, the Office has stated in its procedure manual that it 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴ 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.¹⁵ 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 improperly denied merit review in the face of such evidence.¹⁶

⁷ See *Leon D. Faidley, Jr.*, *supra* note 3.

⁸ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996). See also 20 C.F.R. § 10.607(b).

¹⁰ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *Leona N. Travis*, 43 ECAB 227 (1991).

¹² *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration commences the date following the original Office decision. A right to reconsideration within one year also accompanies any subsequent merit decision.¹⁷ Appellant's July 28, 2005 letter requesting reconsideration was submitted more than one year after the Office's merit decision of June 15, 2004, and it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim for compensation.¹⁸

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error that would warrant reopening her case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Board notes that the underlying issue is medical in nature. Dr. Lee's October 24, 2004 report noted appellant's history of left leg pain and diagnostic reports supporting disc dissection at L5-S1 as well as thoracic and cervical conditions. The May 15, 2005 report repeated earlier reports and related appellant's depression to her overall problems. The x-ray reports revealed spinal conditions but did not relate appellant's condition to her employment. The Board finds these reports do not raise a substantial question as to the correctness of the Office's decision and are not sufficient to shift the weight of the evidence in favor of the claim. Her claim was accepted for a left ankle sprain for which her claimed December 7, 2002 recurrence of disability was denied. The evidence and argument submitted by appellant are insufficient to show clear evidence of error by the Office.

On appeal, appellant argued that the Office stated in the September 14, 2004 decision that the last merit decision was August 3, 2004; therefore, her July 28, 2005 request for reconsideration would have been timely filed. Although the Office noted in the cover letter to its September 20, 2004 decision that the last merit decision was dated August 3, 2004, it properly noted within the decision that reconsideration was sought from the Office's June 15, 2004 decision. Its reference to an August 3, 2004 decision was in error and does not render the July 28, 2005 reconsideration request as timely. Appellant, through counsel, previously requested reconsideration of the Office's June 15, 2004 decision on August 27, 2004 and appellant acknowledged that she was unaware of any August 3, 2004 decision.

The Board finds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁷ *Veletta C. Coleman*, 48 ECAB 367 (1997).

¹⁸ 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 17, 2005 is affirmed.

Issued: May 2, 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