



## **FACTUAL HISTORY**

This is the fourth appeal in the present case. In the first appeal, the Board issued a merit decision on December 11, 1995, affirming the Office's January 25, April 8 and August 8, 1994 decisions, as modified, to reflect that appellant had no disability after March 10, 1993 due to her February 9, 1992 left wrist and thumb injury. It also found that she had not met her burden of proof to establish that she sustained a recurrence of total disability on or after February 19, 1992 causally related to her accepted December 2, 1986 right wrist injury.<sup>2</sup> The Board found that the well-rationalized opinion of Dr. Anthony S. Unger, a Board-certified orthopedic surgeon, who served as an impartial medical specialist, established that appellant had no disability after March 10, 1993, due to her February 9, 1992 employment injury.<sup>3</sup> In the second appeal, the Board issued a nonmerit decision on February 26, 2003, affirming the Office's April 2 and June 1, 2001 decisions on the grounds that it did not abuse its discretion by refusing to reopen appellant's case for further merit review under 5 U.S.C. § 8128(a) because her applications for review were not timely filed and failed to present clear evidence of error.<sup>4</sup> In the third appeal, the Board issued a nonmerit decision dated July 13, 2004, affirming the Office's August 18, 2003 nonmerit decision denying appellant's request for reconsideration as untimely and failing to show clear evidence of error.<sup>5</sup> The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

On May 12, 2005 appellant requested reconsideration before the Office. She contended that her request was timely, in that it was filed within one year of the Board's July 13, 2004 decision. Appellant recited the history of her case and argued that the medical evidence of record did not establish that her left wrist and thumb condition had ceased. She contended that she should not have to provide new medical evidence on each appeal to the Office, in that she had already provided supporting medical evidence from her attending physician, Dr. Rida Azer, a Board-certified orthopedic surgeon.

Appellant submitted a May 4, 2005 report from Dr. Azer who stated that appellant had pain, numbness and weakness in the left wrist and hand. Examination revealed tenderness over the first dorsal compartment; positive Finkelstein's sign; intact abductor pollicis longus and extensor pollicis; thickening of the first dorsal compartment with limitations of motion; tenderness over the volar carpal ligament with a positive Tinel's sign of the median nerve and hypoesthesia over the left median nerve distribution. Dr. Azer recommended surgical intervention. Appellant had informed him that she was working on a "NIXIE" machine, and was

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<sup>2</sup> Docket No. 95-802 (issued December 11, 1995).

<sup>3</sup> The Office had accepted that appellant sustained employment-related left thumb tendinitis on February 9, 1992. The Office determined that appellant was entitled to disability compensation for this injury until June 1, 1992. The file number for this injury is A25-398729. In its December 11, 1995 decision, the Board also affirmed the Office's April 8 and June 9, 1994 decisions on the grounds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after February 19, 1992 due to her December 2, 1986 right hand and wrist injury. This injury (file number A25-297044) is not the subject of the present appeal.

<sup>4</sup> Docket No. 01-1776 (issued February 26, 2003).

<sup>5</sup> Docket No. 04-499 (issued July 13, 2004).

sorting, lifting and sealing damaged mail. Appellant also informed Dr. Azer that “she had a ‘recurrence’ on July 18, 1992.”

In a letter dated July 18, 2005, the Office informed appellant that it did not have jurisdiction to review the merits of her request for reconsideration, because the Board’s July 13, 2004 decision was a nonmerit decision, which became final 30 days after it was filed.

In a letter dated December 7, 2006, appellant contended that the Office’s July 18, 2005 decision, denying her request for reconsideration of its May 12, 2005 decision, did not contain findings of fact, a statement of reasons or appeal rights. She disagreed with the one-year time limitation for filing a request for reconsideration, contending that her request should be considered timely because it was filed within one year of the Board’s July 13, 2004 nonmerit decision. Appellant reiterated her contention that the weight of medical evidence should be afforded to her attending physician, Dr. Azer, and that her claim was improperly denied.

By decision dated March 1, 2007, the Office denied appellant’s request for reconsideration on the grounds that it was untimely and failed to present clear evidence of error.<sup>6</sup>

### **LEGAL PRECEDENT**

The Federal Employees’ Compensation Act<sup>7</sup> provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”<sup>8</sup>

20 C.F.R. § 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit, and must manifest on its face that the Office committed an error. 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>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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

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<sup>6</sup> In its March 1, 2007 decision, the Office referred to December 7, 2006 as the date of appellant’s request for reconsideration. However, the Board notes that appellant requested reconsideration on May 12, 2005.

<sup>7</sup> 5 U.S.C. § 8101 *et seq.*

<sup>8</sup> 20 C.F.R. § 10.605.

<sup>9</sup> See *Alberta Dukes*, 56 ECAB \_\_\_\_ (Docket No. 04-2028, issued January 11, 2005); see also *Leon J. Modrowski*, 55 ECAB 196 (2004).

probative value to *prima facie* shift the weight of the evidence in favor of the claimant. 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>10</sup>

### 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 begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>11</sup> The last merit decision in this case was the Board's December 11, 1995 decision, affirming the Office's January 25, April 8 and August 8, 1994 decisions, as modified, to reflect that appellant had no disability after March 10, 1993 due to her February 9, 1992 left thumb injury, and finding that she had not met her burden of proof to establish that she sustained a recurrence of total disability on or after February 19, 1992, causally related to her accepted December 2, 1986 right wrist injury. As appellant's May 12, 2005 request for reconsideration was submitted more than one year after this last merit decision, it was untimely.<sup>12</sup> Consequently, she must demonstrate clear evidence of error on the part of the Office in denying her claim for compensation.<sup>13</sup>

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. On May 12, 2005 appellant contended that her request for reconsideration was timely, in that it was filed within one year of the Board's July 13, 2004 decision. She recited the history of her case and argued that the medical evidence of record did not establish that her left wrist and thumb condition had ceased. Appellant contended that she should not have to provide new medical evidence on each appeal to the Office, in that she had already provided "actual factual evidence with supporting medical evidence from [her] attending physician, Dr. Rida Azer, without coercion." In her December 7, 2006 letter, she disagreed with the one-year time limitation for filing a request for reconsideration, contending that her request should be considered timely because it was filed within one year of the Board's July 13, 2004 nonmerit decision. Appellant reiterated her contention that the weight of medical evidence should be afforded to her attending physician, Dr. Azer, and that her claim was improperly denied. She submitted a May 4, 2005 report from

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<sup>10</sup> See *Alberta Dukes*, *supra* note 9.

<sup>11</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>12</sup> In its March 1, 2007 decision, the Office referred to December 7, 2006 as the date of appellant's request for reconsideration. However, the Board notes that appellant requested reconsideration on May 12, 2005 and reiterated her request on December 7, 2006. The Office's informational letter dated July 18, 2005 does not constitute a final decision with appeal rights.

<sup>13</sup> 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB 241 (2004).

Dr. Azer, who provided findings on examination and recommended surgical intervention. Dr. Azer related appellant's report that she had experienced a "recurrence" on July 18, 1992."

The Board finds that the evidence submitted is not 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's decision.<sup>14</sup> Appellant's argument that her request was timely because it was filed within one year of the Board's July 13, 2004 decision is without merit. According to Office procedures, the one-year period for requesting reconsideration begins on the date following the original Office decision, but also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.<sup>15</sup> As noted, the last merit decision in this case was the Board's December 11, 1995 decision. Its July 13, 2004 decision was a nonmerit decision. Therefore, appellant May 12, 2005 request for reconsideration clearly falls outside the one-year time limitation. Her disapproval of Office procedures relating to reconsideration requests is insufficient to establish error.

Appellant also contends that her claim was improperly denied based on the medical evidence of record, that the weight of medical evidence should be afforded to her attending physician, and that she should not have to provide new medical evidence on each appeal to the Office. These arguments do not establish error on the part of the Office, but merely repeat arguments considered previously. Dr. Azer's May 4, 2005 report also repeats medical evidence already in the case record and does not establish clear error on the part of the Office in denying her claim.<sup>16</sup> This evidence does not manifest on its face that the Office committed an error in its December 11, 1995 decision. Although the evidence submitted by appellant in support of her untimely request for reconsideration generally supports her claim, it fails to raise a substantial question as to the correctness of the Office's decision. Thus, the evidence and argument submitted by appellant are insufficient to show clear evidence of error on the part of the Office.

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 refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

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<sup>14</sup> *Id.*

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (June 2002).

<sup>16</sup> See *Helen E. Paglinawan*, 51 ECAB 591 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 1, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board