

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

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**J.D., Appellant**

**and**

**U.S. CENSUS BUREAU, REGIONAL OFFICE,  
Fort Worth, TX, Employer**

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**Docket No. 08-241  
Issued: May 6, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On November 1, 2007 appellant filed a timely appeal from an October 11, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her reconsideration request. 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 a June 14, 2006 Office decision terminating her compensation effective July 9, 2006. Because more than one year elapsed between this merit decision and the filing of her appeal, the Board lacks jurisdiction to review the merits of this claim.<sup>1</sup>

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The record also contains an April 11, 2007 Office decision denying appellant's request for knee surgery. Appellant has not appealed this decision to the Board and the matter is not currently before the Board.

## ISSUE

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

## FACTUAL HISTORY

The Office accepted that on May 31, 2000 appellant, then a 46-year-old census enumerator, sustained a sprain/strain of her left ankle, derangement of her left medial meniscus and sprains/strains of both knees when she fell while stepping off a curb at work.<sup>2</sup> The Office paid appellant appropriate compensation for periods of compensation. In a December 5, 2001 decision, the Office granted appellant a schedule award for a seven percent permanent impairment of her right leg. On July 28, 2004 the Office granted her a schedule award for a seven percent permanent impairment of her left leg.<sup>3</sup>

In an April 6, 2006 report, Dr. Myron L. Glickfield, an attending osteopath, determined that appellant could perform the census enumerator job she held when injured on May 31, 2000. He indicated that appellant did not have any work restrictions due to residuals of the May 31, 2000 injury. In a June 14, 2006 decision, the Office terminated appellant's entitlement to disability compensation effective July 9, 2006. The Office based its termination on the opinion of Dr. Glickfield.

Appellant submitted October 26, 2006 reports in which Dr. Les Benson, an attending Board-certified family practitioner, noted that she reported falling on her knees at work.<sup>4</sup> Dr. Benson indicated that appellant had left knee effusion, left degenerative joint disease, left knee crepitus and organic affective disorder due to this injury. He stated, "In my opinion, she is unable to work at this time because of her physical condition, *i.e.*, anxiety/depression and also impaired cognitive function so she cannot work at this time."

Appellant also submitted reports of an attending chiropractor and the findings of diagnostic testing of her knees dated beginning in November 2006. In periodic notes, Dr. Benson provided similar assessments of the condition of appellant's left knee. Beginning in January 2007, Dr. Linden Dillen, an attending orthopedic surgeon, provided assessments of appellant's left knee condition. On April 12, 2007 Dr. Benson indicated that appellant's multiple left knee findings upon magnetic resonance imaging (MRI) testing were related to her May 31, 2000 fall at work.

On September 17, 2007 appellant requested reconsideration of the Office's June 14, 2006 termination decision. In an October 11, 2007 decision, the Office denied appellant's request for

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<sup>2</sup> Appellant was terminated from the employing establishment on November 25, 2000 due to lack of work.

<sup>3</sup> The Office authorized left knee surgeries which were performed on February 21, 2004 and June 21, 2005. On June 30, 2006 she received compensation for an additional three percent permanent impairment of her left leg.

<sup>4</sup> The date of injury is listed as May 31, 2000 at the top of the report.

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.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.<sup>5</sup> 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.<sup>6</sup>

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."<sup>7</sup> Office regulations and procedure provide 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(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>10</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>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

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<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>7</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>8</sup> 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.

<sup>9</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>10</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>11</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>12</sup> *See Leona N. Travis*, *supra* note 10.

<sup>13</sup> *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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>14</sup>

### ANALYSIS

The Office accepted that on May 31, 2000 appellant sustained a sprain/strain of her left ankle, derangement of her left medial meniscus and sprains/strains of both knees when she fell while stepping off a curb at work. In an April 6, 2006 report, Dr. Glickfield, an attending osteopath, determined that appellant could perform the census enumerator job she held when injured on May 31, 2000. In a June 14, 2006 decision, the Office terminated appellant's entitlement to disability compensation effective July 9, 2006.

In its October 11, 2007 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on September 17, 2007, more than one year after the Office's June 14, 2006 decision, and therefore she must demonstrate clear evidence of error on the part of the Office in issuing this decision.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its June 14, 2006 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 October 26, 2006 reports in which Dr. Benson, an attending Board-certified family practitioner, indicated that she reported falling on her knees at work on May 31, 2000. He stated that appellant had left knee effusion, left degenerative joint disease, left knee crepitus and organic affective disorder due to this injury and noted that she was totally disability due to her physical and emotional conditions. These reports do not show clear evidence of error in the Office's June 14, 2006 termination decision because Dr. Benson's October 26, 2006 reports are not relevant to this matter. Dr. Benson did not provide any opinion on the effect of appellant's May 31, 2000 employment injury on her ability to work in mid 2006. He only provided an opinion on appellant's ability to work in late October 2006, a time almost eight months after the April 6, 2006 examination of Dr. Glickfield (which provided the basis for the Office's termination) and almost four months after the July 9, 2006 effective date of the termination.<sup>15</sup>

Beginning in January 2007, Dr. Dillen, an attending orthopedic surgeon, provided an assessment of appellant's left knee condition. These reports do not show clear evidence of error in the Office's June 14, 2006 termination decision because they are not relevant to the

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<sup>14</sup> *Leon D. Faidley, Jr., supra* note 6.

<sup>15</sup> The later reports of Dr. Benson also do not show clear evidence of error because they do not contain any opinion on appellant's ability to perform her date-of-injury job in mid 2006.

termination of appellant's compensation. Dr. Dillen did not provide any opinion on the effect of appellant's May 31, 2000 employment injury on her ability to work in mid 2006.<sup>16</sup>

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's June 14, 2006 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' October 11, 2007 decision is affirmed.

Issued: May 6, 2008  
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

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<sup>16</sup> Appellant also submitted reports of an attending chiropractor, but these nonmedical reports do not show clear evidence of error because they are not relevant to the main issue of the present case which is medical in nature. The reports do not constitute probative medical evidence because appellant's chiropractor did not diagnose spinal subluxations as demonstrated to exist by x-rays. 5 U.S.C. § 8101(2). See *Jack B. Wood*, 40 ECAB 95, 109 (1988). Appellant submitted the findings of diagnostic testing of her knees dated beginning in November 2006, but these reports are not relevant to her ability to work in mid 2006.