

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

F.G., Appellant)

and)

DEPARTMENT OF COMMERCE,)
U.S. PATENT & TRADEMARK OFFICE,)
Arlington, VA, Employer)

**Docket No. 08-573
Issued: October 7, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 12, 2007 appellant filed a timely appeal of a June 13, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration as it was untimely and did not establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision of the Office dated April 24, 2003 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

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 for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has twice previously been on appeal before the Board.¹ In a July 19, 2005 decision, the Board affirmed the September 10, 2004 decision of the Office which denied appellant's request for reconsideration. The Board found that the Office properly refused to reopen appellant's claim for further review of the merits of her claim. In a May 21, 2004 decision, the Board affirmed the Office's June 30 and April 24, 2003 decisions. The Board found that appellant failed to establish a recurrence of disability causally related to a December 9, 1993 employment injury and the Office properly refused to reopen her case for further reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). The facts and the history contained in the prior appeals are incorporated by reference.

Appellant requested reconsideration on March 27, 2006. She alleged that, despite paying her attorney to represent her, the attorney never explained her claim or did anything to represent her. Appellant alleged that her attorney was subsequently suspended, that her attorney let her case expire and she wished to pursue reconsideration.

On March 30, 2006 appellant's congressional representative inquired into the status of appellant's claim. By letter dated March 31, 2006, the Office advised appellant's congressional representative that appellant needed to clarify whether she wished to pursue a review option before the Board or the Office.

On April 18, 2006 appellant requested reconsideration. She alleged that the Board erred by failing to address the issue of her on-the-job injury, which was partially accommodated for the last five years of her employment, which could have caused further possibility of future economic harm. Appellant also alleged that she had submitted enough evidence to prove her on-the-job injury and justify an award of compensation. She alleged that the prior decision should be reversed and a ruling issued in her favor. By letter dated October 3, 2006, appellant's representative requested a copy of appellant's claim file and requested the status of her claim.

On April 20, 2007 appellant requested the status of her claim. She requested that the Office reverse its prior decision and provide her with compensation and restore her medical coverage. On April 23, 25 and 26, 2007 appellant alleged that her injury was causally related to her employment. She also requested a 100 percent disability rating from the Office as she was awarded 100 percent disability from Social Security. On April 27, 2007 appellant repeated her request for compensation. In a letter dated April 29, 2007, to her congressional representative, she alleged that she had proven causal relationship in her claim.

By letter dated June 4, 2007, appellant requested reconsideration. She referred to Title 18 U.S.C. § 1922 and alleged that it was related to officer's or employees of the United States and their responsibilities which included filing and retaining reports. Appellant alleged that the Office erred in its decision by failing to develop the medical evidence. She alleged that the Office should have sent her for a second opinion examination to determine the extent of her impairments.

¹ Docket No. 05-454 (issued July 19, 2005); Docket No. 04-516 (issued May 21, 2004).

The Office received copies of letters dated April 28 and May 3, 2007 from appellant to her congressional representative requesting assistance with her claim. It also received a copy of appellant's request for the name of her claims representative, and several status requests from appellant in which she alleged that she had proven her claim and requested compensation, plus several statements dated April 23, 24 and 27, 2007 indicating that she had proven causal relationship.

In a decision dated June 13, 2007, the Office denied appellant's reconsideration request because it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”³

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).⁴ This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁶

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8128(a).

⁴ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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 that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. 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.⁷ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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's decision. 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.⁸

ANALYSIS

The Office correctly determined that appellant's reconsideration request was untimely as it was not filed within one year of the last merit decision. The most recent merit decision was the Board's May 21, 2004 decision which affirmed an Office decision finding that appellant failed to establish a recurrence of disability causally related to a December 9, 1993 employment injury. Appellant untimely requested reconsideration on several occasions, commencing on March 27, 2006, more than one year after the most recent merit decision.

When an application for review is untimely, the Office will undertake a limited review to determine whether the application presents clear evidence that the final merit decision was in error.⁹ The issue in this case is whether appellant had demonstrated clear evidence of error on the part of the Office in determining that she failed to establish a recurrence of disability causally related to her December 9, 2003 employment injury. The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

Appellant made several arguments regarding the quality of service she received from her attorney in relation to assisting her with her case. She also alleged that she continued to suffer from her employment injury and demanded compensation. However, appellant's argument's impugning the adequacy of her attorney's representation and asserting injury-related residuals, is

⁷ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

⁸ *Id.*

⁹ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607 (b) provides: The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of it in its most recent decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b).

irrelevant to whether the Office made an error in its April 24, 2003 decision, which was decided on the medical evidence of record.

With her June 4, 2007 request for reconsideration, appellant referred to Title 18 U.S.C. § 1922 and alleged that it was related to her claim because employees and supervisors had a duty to file and retain reports. She also alleged that the Office failed to develop the medical evidence and to send her to a second opinion examination to determine the extent of her impairments. Appellant has not, however, explained how this raises a substantial question as to the correctness of the Office's decision that denied her claim for a recurrence of disability. To the extent that appellant asserts that she was denied due process as the Office failed to assist her with properly developing her claim, the Board notes that this argument would be related to a constitutional question. The Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures.¹⁰ As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim such as that made by appellant.¹¹ The federal courts retain jurisdiction over decisions under the Act where there is a charge of a violation of a clear statutory mandate or there is a constitutional due process claim.¹² The Board notes that appellant's claim for a recurrence of disability was denied because she did not provide sufficient medical evidence to establish that her disability for the claimed period was causally related to her accepted employment injury. These arguments do not show clear evidence of error in the Office's decision denying her recurrence claim.

Appellant also provided copies of letters she had written to her congressman, and copies of requests for the names of her claims representatives, and copies of several status requests and repeated her claims that she had proven her case. She also alleged that she had submitted enough evidence to prove her on-the-job injury and justify an award of compensation. Appellant alleged that the prior decision should be reversed and a ruling issued in her favor to include compensation and medical coverage. The Board notes that the underlying issue is medical in nature, and these allegations do not show that the Office clearly erred in denying her claim for a recurrence of disability.

Office procedures provide that 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.¹³

The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in its April 24,

¹⁰ See *Johnson v. Robinson*, 415 U.S. 361 (1974) and cases cited therein.

¹¹ See *Robert F. Stone*, 57 ECAB 292 (2005); *Diana L. Smith*, 56 ECAB 524 (2005); *Vittorio Pittelli*, 49 ECAB 181 (1997).

¹² See *Andrew Fullman*, 57 ECAB 574 (2006).

¹³ *Annie L. Billingsley*, 50 ECAB 210 (1998).

2003 decision that denied appellant's claim for a recurrence of disability. Therefore, the Board finds that appellant has not presented clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 7, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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