

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

N.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Northwood, NH, Employer**

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**Docket No. 08-2277
Issued: June 3, 2009**

Appearances:

Bradley M. Lown, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 18, 2008 appellant, through counsel, filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated July 11, 2008 denying her untimely request for reconsideration and finding that she failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated December 23, 2005 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), but has jurisdiction over the nonmerit issue.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On May 21, 2005 appellant, then a 51-year-old clerk, filed an occupational disease claim alleging that in 2003 she first became aware that her left rotator cuff strain and bankart reconstruction surgery on April 5, 2005 were employment related.

Appellant submitted medical reports from Dr. Douglas J. Moran, a treating Board-certified orthopedic surgeon. In a June 19, 2003 report, Dr. Moran diagnosed mild left shoulder rotator cuff tendinitis and right shoulder acromioclavicular joint irritation. He related that appellant attributed her increased shoulder pain to her increased overhead lifting. On July 20, 2005 Dr. Moran noted appellant's repetitive use shoulder injury was "completely consistent with the microtrauma that results in shoulder disability" as seen in appellant's case. In a July 29, 2005 report, he opined that appellant's left shoulder was better following surgery.

By decision dated September 14, 2005, the Office denied appellant's claim on the grounds that she had failed to establish that her left shoulder condition was causally related to her employment duties.

On October 10, 2005 appellant requested reconsideration. In a November 22, 2005 report, Dr. Moran noted that appellant's left shoulder was doing well, but that she could not do any heavy lifting.

By decision dated December 23, 2005, the Office denied appellant's request for further merit review.

Subsequent to the decision, the Office received reports dated February 24 to June 9, 2006 from Dr. Moran.

In a letter dated September 15, 2006, appellant's counsel advised the Office that he was in the process of acquiring evidence and would submit it when available. He also requested information on the status of appellant's claim. The medical evidence referenced in the letter included reports dated July 20 and 29 and October 4, 2005 and April 3 and July 13, 2006 by Dr. Moran.¹

On October 23, 2006 Dr. Moran reported that appellant had real pathology in her left shoulder.

On November 17 and December 18, 2006 the Office received additional medical reports from Dr. Moran. In an October 4, 2005 report, Dr. Moran opined that appellant sustained a left upper extremity injury due to her repetitive work duties. In an October 26, 2006 report, he reiterated that appellant had real pathology in her left shoulder. In a February 2, 2007 report, Dr. Moran noted that she was seen for pain in both her shoulders with the right worse than the left. He noted that appellant was required to lift up to 70 pounds as well as having to push, pull and lift and was miserable with regard to both shoulders.

¹ The record indicates no medical evidence accompanied the September 15, 2006 letter.

In a June 22, 2007 report, Dr. Moran referenced his prior reports and opined that appellant's bilateral shoulder condition was employment related. He stated that appellant was restricted from performing any repetitive activity involving her upper extremities.

On June 27, 2007 appellant filed an appeal with the Board, docketed as No. 07-1806.²

On October 19, 2007 the Office received medical evidence from Dr. Moran dated July 20, 2005 through June 22, 2007.

In a December 20, 2007 report, Dr. Moran provided physical findings for both shoulders. He diagnosed rotator cuff tendinitis and impingement bursitis, which he attributed to appellant's repetitive overhead work duties.

By order dated January 3, 2008, the Board dismissed appellant's appeal as it did not have jurisdiction. The Board found that the most recent decision in the record was a nonmerit decision dated December 23, 2005, which was more than a year prior to appellant's filing of her appeal on June 27, 2007.

On March 11 and 14, 2008 the Office received reports regarding appellant's right upper extremity dated June 18 and 25, 2003 from Dr. C.P. Corcoran, a treating Board-certified internist. A March 6, 2008 report by Dr. Moran was also submitted.

On April 25, 2008 appellant, through counsel, requested reconsideration of the September 14, 2005 denial of her claim. On July 1, 2008 appellant again requested reconsideration.

By decision dated July 11, 2008, 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.³

LEGAL PRECEDENT

The Federal Employees' Compensation Act⁴ 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.⁵ 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

² Docket No. 07-1806 (issued January 3, 2008).

³ The Board notes that, following the July 11, 2001 nonmerit decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *J.T.*, 59 ECAB ____ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB ____ (Docket No. 06-1564, issued February 27, 2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ 20 C.F.R. § 10.605.

the date of that decision.⁶ 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 Act.⁷

Title 20 of the Code of Federal Regulations, section 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.⁸ 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 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.⁹

ANALYSIS

In its July 11, 2008 decision, the Office properly determined that appellant failed to file a timely application for reconsideration. It rendered its most recent merit decision on September 14, 2005. Appellant's request for reconsideration was dated July 1, 2008, which was more than one year after September 14, 2005. Accordingly, the Board finds that her request for reconsideration was not timely filed.

The Board notes that the September 15, 2006 letter from appellant's counsel does not constitute a request for reconsideration. Appellant's counsel requested a case status update, stated that he was acquiring additional evidence and portended to submit evidence. Appellant did not ask the Office to review any of its decisions. The Office therefore properly interpreted the letter as an informational request.

Following its denial of appellant's reconsideration request as untimely filed, in accordance with 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 which would warrant reopening the case for further merit review under section 8128(a).

⁶ *Id.* at § 10.607(a).

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

⁸ *See Alberta Dukes*, 56 ECAB 247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

⁹ *See Alberta Dukes*, *supra* note 8.

The Office reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly establish that the Office's prior decision was in error.

Appellant submitted medical reports from Dr. Moran, which are insufficient to establish clear evidence of error. As noted the evidence submitted must be relevant to the issue which was decided by the Office. In this case, appellant's claim was denied on the grounds that the medical evidence did not establish a causal relationship between her diagnosed condition and employment factors. 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 insufficient to show clear evidence of error.¹⁰ Dr. Moran merely reiterated his opinion that appellant's left shoulder condition was due to repetitive work duties. This evidence does not establish clear error on the part of the Office. Dr. Moran's reports are insufficient to establish clear evidence of error in the Office's September 14, 2005 merit decision. Appellant has submitted no other evidence to raise a substantial question as to the correctness of the Office's decision denying her claim.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as the request was filed outside the one-year time limitation and did not establish clear evidence of error.

¹⁰ A.F., 59 ECAB ____ (Docket No. 08-977, issued September 12, 2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 11, 2008 is affirmed.

Issued: June 3, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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