

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

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**J.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Shawnee Mission, KS, Employer**

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**Docket No. 10-408  
Issued: August 11, 2010**

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant*  
*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 November 30, 2009 appellant filed a timely appeal from an October 28, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision in this case was the Office's July 19, 2007 decision denying appellant's request to expand her claim. The Board lacks jurisdiction to review the merits of the case.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

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<sup>1</sup> For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

## **FACTUAL HISTORY**

On December 21, 2005 appellant, then a 50-year-old rural mail carrier, sustained an injury in the performance of duty when she fell and struck the right side of her head on a mailbox. The Office accepted her claim for scalp laceration of the right brow.

On January 26, 2006 appellant asked the Office to expand her claim to include the conditions of postconcussion syndrome and blurred vision. In a decision dated March 6, 2006, the Office denied the request on the grounds that the medical evidence was insufficient to establish a causal relationship between the accepted injury and the claimed conditions.

On March 30, 2006 appellant requested reconsideration. She submitted a March 15, 2006 report from Dr. James Applebaum, a treating physician, who diagnosed postconcussion syndrome and opined that her condition was related to the December 21, 2005 work injury. By decision dated June 28, 2006, the Office denied modification of its prior decision.

On May 30, 2007 appellant requested reconsideration. She submitted reports dated August 3, 2006 and February 6, 2007 from Dr. Thomas J. Whittaker, a Board-certified ophthalmologist, who diagnosed postconcussion syndrome with headache, blurred vision and dry eyes. Dr. Whittaker opined that the postconcussion syndrome was directly related to the December 21, 2005 work injury. He further opined that appellant's blurred vision was partially attributable to the accepted injury and that her dry eye condition was exacerbated by medication used to treat postconcussion syndrome.

In a July 19, 2007 decision, the Office denied modification of its previous decision, finding that the medical evidence was insufficiently rationalized to establish a causal relationship between the claimed conditions and the accepted injury.

On July 10, 2008 appellant requested reconsideration of the July 19, 2007 decision. On July 30, 2008 the Office denied merit review.

On June 9, 2009 appellant through counsel again requested reconsideration. She stated that the basis of her request was the contents of an October 31, 2008 letter from Dr. Whittaker.

In support of her request for reconsideration, appellant submitted three documents. In an October 30, 2008 letter to Dr. Whittaker, she requested an explanation as to how her blurred vision was related to the accepted injury. In an October 31, 2008 letter, Dr. Whittaker stated that appellant developed postconcussive syndrome and headache as a result of an August 21, 2005 work accident, when she slipped and struck her head. Treatment for the postconcussive syndrome left her with dry eyes, which was the proximate cause of the blurred vision. In a letter dated July 9, 2009, Dr. Whittaker indicated that he would be happy to testify that appellant's postconcussive syndrome was "an accepted condition."

By decision dated October 28, 2009, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

## LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at anytime on his own motion or on application.<sup>2</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.<sup>3</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 § 8128(a) of the Act.<sup>4</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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>5</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>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>8</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>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</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>11</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>5</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>6</sup> *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004).

<sup>7</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>8</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>9</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>10</sup> *See M.L.*, 60 ECAB \_\_\_\_ (Docket No. 09-956, issued April 15, 2010). *See Leona N. Travis*, *supra* note 8.

<sup>11</sup> *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.<sup>12</sup>

### ANALYSIS

The Board finds that the Office properly refused to reopen appellant's case for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.<sup>13</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>14</sup> As appellant's June 9, 2009 request for reconsideration was submitted more than one year after the date of the last merit decision of record on July 19, 2007 it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim.<sup>15</sup>

Counsel's contention that Dr. Whittaker's October 31, 2008 report is sufficient to warrant merit review, does not allege or establish error on the part of the Office, but merely repeats arguments considered previously. Therefore, his argument is insufficient to raise a substantial question concerning the correctness of the Office's decision.

Medical evidence submitted by appellant is insufficient to establish that the Office committed an error. In his October 31, 2008 letter, Dr. Whittaker stated that appellant developed postconcussive syndrome and headache as a result of an August 21, 2005 work accident, when she slipped and struck her head and that treatment for the postconcussive syndrome left her with dry eyes, which was the proximate cause of the blurred vision. On July 9, 2009 he indicated that he would be happy to testify that appellant's postconcussive syndrome was "an accepted condition." Although Dr. Whittaker's reports generally support his claim, they essentially repeat information contained in his prior reports and fail to raise a substantial question as to the correctness of the Office's decision. The term "clear evidence of error" is intended to represent a difficult standard. The submission of 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.<sup>16</sup>

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<sup>12</sup> *Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>13</sup> 20 C.F.R. § 10.607(a).

<sup>14</sup> *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>15</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>16</sup> *Joseph R. Santos*, 57 ECAB 554 (2006).

Appellant's October 30, 2008 letter to Dr. Whittaker was not relevant to the issue decided by the Office, namely whether the claimed conditions were causally related to the accepted work injury. Therefore, it cannot establish clear evidence of error.<sup>17</sup>

The Board finds that the evidence submitted by appellant in support of her untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that the Office committed an error. Therefore, appellant has failed to meet her burden of proof to show clear evidence of error on the part of the Office.

### **CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's case for reconsideration of the merits on the grounds that her request was untimely and failed to demonstrate clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 28, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 11, 2010  
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

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<sup>17</sup> See *supra* note 7 and accompanying text.