

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

ELEANORA B. STONEY, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 03-2120
Issued: February 11, 2004**

Appearances:

*Thomas S. Harkins, Esq., for appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On August 28, 2003 appellant filed a timely appeal from a June 19, 2003 decision of the Office of Workers' Compensation Programs, which denied appellant's reconsideration request as untimely filed. Because more than one year has elapsed between the merit decisions dated November 20, 1996 and September 24, 1998 and the filing of this appeal on August 28, 2003 the Board lacks jurisdiction to review the merits of appellant's claims pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly declined to reopen appellant's claims for review of the merits on the grounds that her request for reconsideration was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

On March 19, 1975 appellant, then a 26-year-old clerk, filed a notice of traumatic injury alleging that she injured her back on March 4, 1975 when she slipped on a rubber band in the

performance of duty. The Office accepted appellant's claim for lower back syndrome. Appellant returned to light-duty work and filed notices of recurrence of disability through 1983, which the Office accepted as causally related to her March 4, 1975 employment injury.

On November 18, 1997 appellant filed a notice of recurrence of disability alleging that she sustained a recurrence of disability on October 27, 1997 causally related to her March 4, 1975 employment injury. By decision dated September 24, 1998, the Office denied appellant's claim for recurrence finding that she failed to establish a change in the nature and extent of her accepted low back condition or a change in the nature and extent of her light-duty job requirements.

Appellant filed a new claim on January 29, 1994 alleging that she caught her left foot in a plastic loop causing her to fall on the floor and resulting in a left knee injury. The Office accepted appellant's claim for left knee contusion on April 7, 1994 and later expanded this claim to include hydrarthrosis and internal derangement. On March 23, 1995 appellant returned to part-time limited duty, working six hours a day. She filed several notices of recurrence of disability. Appellant alleged on August 8, 1996 that she sustained a recurrence of total disability on July 23, 1996 causally related to her January 29, 1994 employment injury. The Office denied this claim on November 20, 1996 finding that appellant failed to establish a recurrence of total disability due to a change in the nature and extent of either her work-related left knee condition or her light-duty job requirements.

Appellant, through her attorney, requested reconsideration of both of her claims on March 13, 2002. Appellant's attorney requested that the Office expand appellant's claims to accept "all conditions outlined in the medical evidence of file" as well as the periods of disability denied in the November 20, 1996 and September 24, 1998 Office decisions. He also asserted that the Office should have accepted additional periods of disability from April 7 to 21 1998; and March 12 to May 1, 2000, due to the March 4, 1975 back injury, for which appellant filed additional notices of recurrence of disability.¹

By decision dated June 19, 2003, the Office noted that appellant's claims had been combined and declined to reopen appellant's claims for consideration of the merits on the grounds that her request for reconsideration was not timely and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of

¹ The Board notes that the additional notices of recurrence of disability are not included in the case file before the Board. Furthermore, as the Office has not issued a final decision on these claims, the Board may not address this issue for the first time on appeal. 20 C.F.R. § 501.2(c).

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

compensation.³ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.⁵ In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office.⁶ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷

ANALYSIS

Appellant requested reconsideration on March 13, 2002. Since appellant filed her reconsideration request more than one year from the Office’s November 20, 1996 and September 24, 1998 merit decisions, the Board finds that the Office properly determined that said request was untimely.

In this case, appellant’s March 13, 2002 letter requesting reconsideration was more than one year after the Office’s November 20, 1996 and September 24, 1998 merit decisions and was, therefore, untimely. As appellant’s request was filed more than one year after the Office’s two most recent merit decisions, appellant must demonstrate “clear evidence of error” on the part of the Office in issuing its November 20, 1996 and September 24, 1998 decisions.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁸ The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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

³ Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607 (1999).

⁵ 20 C.F.R. § 10.607(a) (1999).

⁶ 20 C.F.R. § 10.607(b) (1999).

⁷ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

the claimant and raise a substantial question as to the correctness of the Office decision.¹² In the instant case, appellant failed to demonstrate clear evidence of error.

The Office accepted appellant's March 19, 1975 employment injury for lower back syndrome. Appellant filed a notice of recurrence of disability on November 18, 1997 alleging that on October 27, 1997 she sustained a recurrence of total disability as a result of her March 19, 1975 employment injury. The Office denied this claim on September 24, 1998 finding that appellant failed to submit sufficient evidence to establish a change in the nature and extent of her light-duty job requirements or a change in the nature and extent of her injury-related condition.¹³ Following the September 24, 1998 decision, appellant submitted additional medical evidence in support of her claim.

In a report dated April 18, 2002, Dr. Ronald Richman, a Board-certified orthopedic surgeon, reviewed his treatment of appellant. He stated that appellant experienced new back problems on October 27, 1997. Dr. Richman noted appellant's history of injury in 1975 and diagnosed actual lumbosacral sprain "which was probably an aggravation of a preexisting low back condition, which had developed in 1975...." Dr. Richman described appellant's treatment in April 1998 for low back pain, but again failed to describe a change in the nature and extent of her injury-related condition resulting in total disability. He concludes, "[F]or the low back area one must assume that the cause for this problem is associated with the accident, which occurred on March 4, 1975 with spontaneous exacerbations...." Although Dr. Richman's report supports appellant's claim for a recurrence of total disability due to her accepted employment, he did not explain how and why appellant had sustained a change in the nature and extent of her accepted back injury of lower back syndrome resulting in acute lumbosacral sprain. Therefore, this report 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 denying her claim for recurrence of disability.

Dr. Richman also submitted his treatment notes dated July 29, 1996 through April 27, 2000 which he summarized in his April 18, 2002 narrative report. These notes do not provide additional evidence addressing a change in the nature and extent of appellant's condition on November 18, 1997 nor prior to the Office's September 24, 1998 decision. The evidence regarding appellant's alleged continuing low back condition is not relevant to the issue of whether appellant has established clear evidence of error on the part of the Office in denying her claim for recurrence of disability due to a change in the nature and extent of her accepted low back condition on or around November 18, 1997.

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹³ When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements. *Terry R. Hedman*, 38 ECAB 222 (1986).

Dr. Reba Williams, an internist, completed a note on April 27, 2000 and stated that she treated appellant for low back syndrome beginning March 12, 2000. Dr. Williams did not provide a history of injury and did not opine whether appellant's condition was due to her employment injuries. This report does not establish that the Office erred in denying appellant's claim for recurrence of total disability in 1998.

In regard to appellant's January 29, 1994 employment injury accepted by the Office for the condition of left knee contusion, hydrarthrosis and internal derangement, appellant alleged that she sustained a recurrence of total disability on July 23, 1996. The Office denied this claim on November 20, 1996 finding that appellant had failed to establish that she was totally disabled.

In the March 13, 2002 request for reconsideration, appellant submitted a report from Dr. Knolly E. Millett, a physician, dated November 16, 1995, diagnosing traumatic derangement of the left knee. Dr. Millett stated that appellant was disabled from July 12 to August 12, 1995 and that this condition was causally related to her January 29, 1994 employment injury. On December 3, 2002 Dr. Millett opined that appellant had permanent partial disability due to her left knee. While Dr. Millett offered an opinion on the causal relationship between appellant's disability for work in 1995, this report is not relevant in establishing clear evidence of error in denying a recurrence of disability beginning July 23, 1996, as it preexists the period of disability denied by the Office.

Appellant also submitted series of reports from Dr. Williams regarding her left knee. Dr. Williams submitted reports dating from June 17, 2000 to June 4, 2003. She diagnosed left knee strain. Dr. Williams stated on December 21, 2002 that appellant's leg gave way resulting in injury and that appellant could continue to perform limited duty. In notes dated January 6 and November 23, 2002, Dr. Williams diagnosed traumatic osteoarthritis of the left knee. She stated that appellant could continue limited duty on September 28, 2002. On July 18, 2002 Dr. Williams indicated that appellant could return to limited duty on August 3, 2002 and that she was providing treatment due to appellant's left knee and right shoulder injury. Dr. Williams indicated that appellant was totally disabled from September 17 to 24, 2001 due to her left knee.

Dr. Williams' notes and reports do not address the specific periods of total disability alleged by appellant, beginning July 26, 1996. Furthermore, Dr. Williams does not provide physical findings, a history of injury and medical reasoning explaining her belief that appellant's current knee conditions were causally related to her accepted employment injury. Without a detailed medical report explaining how and why appellant's accepted condition had resulted in total disability due to a change in the nature and extent of her accepted employment-related injury, Dr. Williams cannot establish clear evidence of error on the part of the Office and her reports do not require the Office to reopen appellant's claim for consideration of the merits.

Dr. Richman submitted treatment notes dated from May 3, 1999 to May 10, 2001. These notes do not address appellant's condition on July 23, 1996 nor prior to the Office's November 20, 1996 decision. This evidence regarding appellant's alleged continuing left knee condition is not relevant to the issue of whether appellant has established clear evidence of error on the part of the Office in denying her claim for recurrence of disability due to a change in the nature and extent of her accepted left knee condition on or around July 23, 1996.

Dr. Richman's April 18, 2002 narrative report also addresses the treatment he provided for appellant's left knee. He noted appellant's history of injury and reviewed his prior treatment. Dr. Richman noted that he examined appellant on July 22, 1996 and noted that appellant was working four hours a day at that time. He repeated the July 22, 1996 diagnosis of chondromalacia of the patella secondary to her surgery and prior pathology. Dr. Richman stated that by August 26, 1996 appellant could work six hours a day. He did not indicate that appellant was totally disabled due to the diagnosed chondromalacia and did not offer medical reasoning explaining how appellant's accepted employment injury and surgery could result in this condition. In conclusion, Dr. Richman stated, "[I]f the history given by her is correct, then one must assume there is a direct relationship between the problem of the left knee to be associated with the accident, which occurred on January 29, 1994...." As Dr. Richman's report does not establish a change in the nature and extent of appellant's accepted employment injury, his report does not shift the burden of proof in favor of appellant and does not establish clear evidence of error on the part of the Office in its November 20, 1996 decision.

CONCLUSION

The Board finds that appellant has failed to establish clear evidence of error on the part of the Office and that the Office properly declined to reopen her claim for consideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 19, 2003 is affirmed.

Issued: February 11, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member