

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

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**T.B., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL  
HOSPITAL, Great Lakes, IL, Employer**

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**Docket No. 07-436  
Issued: April 24, 2007**

*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 December 6, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 6, 2006 nonmerit decision denying her request for further review of the merits of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The most recent merit decision of record was the Office's August 25, 2005 decision denying her claim for a June 2, 2005 injury. Because more than one year has elapsed between the last merit decision and the filing of this appeal on December 6, 2006, the Board lacks jurisdiction to review the merits of this claim.<sup>1</sup>

**ISSUE**

The issue is whether 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.

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

## **FACTUAL HISTORY**

On June 8, 2005 appellant, then a 48-year-old information receptionist, filed a traumatic injury claim alleging that she sustained injury to her back, right hip, right leg and toes on June 2, 2005 when the plastic foot rest of a stool she was sitting on broke while she was resting her feet.

On July 25, 2005 Dr. Reuben R. Weisz, an attending Board-certified neurologist, indicated that appellant reported that she fell at work on June 2, 2005. He diagnosed lumbosacral radiculopathy due to the reported employment injury and indicated that she was totally disabled from June 27 to July 28, 2005. Appellant also submitted unsigned reports, dated June 27, July 7 and 28, 2005, on the letterhead of Dr. Weisz.<sup>2</sup> On August 15, 2005 Dr. Manfred Mann, an attending Board-certified family practitioner, indicated that appellant reported that she fell at work when a foot stool broke in half. He stated that she should be on total disability until August 31, 2005.

In an August 25, 2005 decision, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained an injury on June 2, 2005 in the performance of duty.

In a letter dated August 23, 2006 and postmarked August 26, 2006, appellant requested reconsideration of her claim. She argued that she suffered an injury when a plastic foot stool she was sitting on broke in half, her feet fell to the floor and her head jerked forward and fell into a counter.

In a September 6, 2006 decision, 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.

## **LEGAL PRECEDENT**

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 section 8128(a) of the Federal Employees' Compensation 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, the Office must nevertheless undertake a limited review to determine whether the application

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<sup>2</sup> On August 16, 2005 Dr. Weisz diagnosed lumbosacral radiculopathy and lumbosacral spondylosis and recommended work restrictions.

<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). If submitted by mail, a reconsideration request will be deemed timely if postmarked by the U.S. Postal Service within one year from the Office's decision for which review is sought. 20 C.F.R. § 10.607(a).

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> 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 decision.<sup>12</sup>

### ANALYSIS

Appellant filed a traumatic injury claim alleging that she sustained injury to her back, right hip, right leg and right toes on June 2, 2005 when the plastic foot rest of a stool she was sitting on broke while she was resting her feet. In an August 25, 2005 decision, the Office denied appellant’s claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained an injury on June 2, 2005 in the performance of duty. In a September 6, 2006 decision, 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.

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

<sup>6</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>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 *Leona N. Travis*, *supra* note 8.

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

<sup>12</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

In its September 6, 2006 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on August 26, 2006 as her August 23, 2006 reconsideration letter was postmarked on that date.<sup>13</sup> This filing was more than one year after the Office's August 25, 2005 decision, and therefore appellant 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 August 25, 2005 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In connection with appellant's untimely reconsideration request, she argued that she sustained an injury when a plastic foot stool she was sitting on broke in half, her feet fell to the floor, and her head jerked forward and fell into a counter. Her statement that she believed she sustained an employment injury on June 2, 2005 is not sufficient to establish that the Office committed clear error in its prior decision. Appellant's argument would not be relevant in that the main issue of the present case is medical in nature and should be resolved by the submission of medical evidence. She has not shown that the Office committed clear error when it determined that she had not submitted sufficient medical evidence to establish her claim.

For these reasons, the argument submitted by appellant does not raise a substantial question concerning the correctness of the Office's August 25, 2005 decision and the Office properly determined that she 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.

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<sup>13</sup> See *supra* note 3 indicating that the existence of a postmark in the record means that the reconsideration request would be deemed as filed on the date of the postmark.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' September 6, 2006 decision is affirmed.

Issued: April 24, 2007  
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