

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of MAMIE R. HOLLOWELL and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Toledo, OH

*Docket No. 03-759; Submitted on the Record;
Issued May 7, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On May 18, 1981 appellant, then a 33-year-old clerk, filed a traumatic injury claim alleging that on May 17, 1981 she hurt her shoulder while lifting bundles from a belt. The Office accepted appellant's claim for a strained left shoulder.

On March 20, 1992 appellant filed a claim alleging that she sustained a recurrence of disability.

By decision dated July 29, 1992, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability causally related to her May 17, 1981 employment-related injury. In an August 28, 1992 letter, appellant, through her attorney, requested an oral hearing before an Office representative.

In a February 10, 1993 decision, finalized February 12, 1993, the hearing representative affirmed the Office's decision. In a June 16, 1993 letter, appellant, through her attorney, requested reconsideration.

The Office denied appellant's request for modification based on a merit review of the claim by decision dated July 14, 1993. Appellant appealed to the Board.

In a March 2, 1995 decision, the Board affirmed the Office's decision.¹ Appellant requested reconsideration through her attorney by letter dated December 2, 2002. Appellant submitted a February 19, 2002 report of Dr. Susan E. Stephens, a Board-certified orthopedic surgeon, noting her complaints of increased low back pain radiating into her left leg with

¹ Docket No. 93-2243 (issued March 2, 1995).

numbness and tingling in both feet, neck pain, and bilateral tingling in both hands and ring and small fingers. Dr. Stephens noted her findings on physical and objective examination, and a review of medical records. She diagnosed a strained hip and left lumbosacral strain. She stated that appellant was currently suffering from not only a lumbar disc herniation, but also signs and symptoms of cervical spondylosis and possibly stenosis. She prescribed appellant's medical treatment and additional objective evaluation. In her August 30, 2002 report, Dr. Stephens diagnosed a strained hip and left lumbosacral strain.

By decision dated January 8, 2003, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

The Board finds that the Office properly found that the request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed her appeal with the Board on January 30, 2003 the only decision properly before the Board is the Office's January 8, 2003 decision denying appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ The Office, through its 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

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶

As the last merit decision in this case was issued by the Board on March 2, 1995, which affirmed the Office's July 14, 1993 decision finding that appellant failed to establish a recurrence of disability causally related to her May 17, 1981 employment injury, appellant's December 2, 2002 request for reconsideration was made outside the one-year time limitation. Thus, the Board finds that appellant's request for reconsideration was untimely filed.

² 20 C.F.R. §§ 501.2(c); 501.3(d)(2); see *John Reese*, 49 ECAB 397, 399 (1998).

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Larry L. Litton*, 44 ECAB 243 (1992).

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.⁷

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 must manifest 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 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.¹²

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also 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.¹³ 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 a merit review in the face of such evidence.¹⁴

The issue for purposes of establishing clear evidence of error in this case is whether appellant submitted evidence establishing that there was an error in the Office's determination that she did not sustain a recurrence of disability causally related to her May 17, 1981 employment injury.

In this case, the evidence submitted by appellant does not establish clear evidence of error. Dr. Stephens' February 19 and August 30, 2002 reports indicated that appellant suffers from a lumbar disc herniation, signs and symptoms of cervical spondylosis and possibly stenosis, a strained hip and left lumbosacral strain. However, as these reports failed to address the relevant issue whether these conditions and resultant disability were causally related to appellant's May 17, 1981 employment injury, this evidence does not raise a substantial question

⁷ 20 C.F.R. § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

as to the correctness of the Board's March 2, 1995 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

For these reasons, the Office properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The January 8, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 7, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member