

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

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**B.A., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Spokane, WA, Employer**

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**Docket No. 07-920  
Issued: August 6, 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 20, 2007 appellant filed a timely appeal from the December 11, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying her untimely request for reconsideration and finding that it failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated January 22, 2002 and the filing of this appeal on February 20, 2007 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 October 5, 2001 appellant, then a 49-year-old pharmacy technician, filed an occupational disease claim alleging that on March 2, 2001 she first realized her cervical spine condition was due to her hyperextending her neck to look at the computer. She stated that she first became aware of her cervical condition on November 20, 2000.

By letter dated October 21, 2001, the Office informed appellant that the evidence was insufficient to support her claim. It advised her as to the medical and factual evidence required to support her claim. The Office provided appellant 30 days to submit additional evidence in support of her claim.

In response, appellant submitted an October 19, 2001 report, progress notes for September 2001 and an October 8, 2001 report and disability slip providing physical restrictions by Richard H. Bale, a treating physician, reports dated September 5 and 25, October 8 and November 20, 2001, by Dr. John J. Demakas, a treating Board-certified neurologist, an August 15, 2001 magnetic resonance imaging (MRI) scan and a November 11, 2001 statement. In her statement, appellant alleged that she was required to work at a nonergonomical worksite appropriate for her height and use of bifocals. Appellant also alleged that her duties required repetitive work and use of multiple work stations with outdated chairs. The repetitive duties including bending her neck down while preparing medication, stoop and twisting.

On September 5, 2001 Dr. Demakas diagnosed cervical stenosis based upon a physical examination and review of an August 15, 2001 MRI scan. In an October 8, 2001 report, he noted that appellant continued to have arm symptoms and neck pain. Dr. Demakas discussed the results of appellant's MRI scan with her and "showed her the films demonstrating a rather large central disc extrusion with a moderately severe stenosis at C5-6 and to a lesser extent at C6-7." He opined that appellant's "job as a pharmacist probably contributed to this since apparently she does a lot of lifting, bending, twisting and spends a fair amount of time with her head extended" due to the computer placement. Specifically, Dr. Demakas concluded that appellant's work duties were a contributing factor of her condition. In a September 25, 2001 report, he reviewed the diagnosis and surgical recommendation with her. On November 20, 2001 Dr. Demakas diagnosed a herniated cervical disc and recommended C6-7 anterior cervical discectomy with fusion.

In his October 19, 2001 report, Dr. Bale noted that appellant had no cervical problems prior to November 2000. He reported that a November 20, 2000 physical examination revealed tenderness to palpation. Appellant reported tingling feelings going down her arm and paracervical neck pain. On July 13, 2001 Dr. Bale stated that they "discussed the relationship between her increasing cervical neck condition and the ergonomics" at her workstation. A September 5, 2001 MRI scan showed C5-6 mild moderate disc space narrow and some anterior spurring, a C6-7 diffuse herniation resulting in cervical stenosis and C5-6 moderate central disc extrusion with moderate stenosis.

On December 3, 2001 the employing establishment controverted appellant's claim and submitted information regarding her duties and the computer placement. The employing establishment noted that a chair was not needed to view the computer as they were set on high

workstations. It noted that appellant was taken out of rotation and assigned to the window workstation as this “was the best area of the pharmacy for her to work in as far as her injury was concerned.” The employing establishment noted that appellant’s duties included some lifting, bending and stooping and required mainly standing or walking.

On December 17, 2001 and January 7, 2002 appellant submitted a December 13, 2001 progress note by Dr. Bale and a November 20, 2001 report by Dr. Paul E. Russell, a treating Board-certified family medicine practitioner, who diagnosed cervical disc disease and noted that appellant stated that the condition was employment related.

By decision dated January 22, 2002, the Office denied appellant’s claim that her cervical condition was sustained in the performance of duty. It found that the medical evidence submitted by appellant failed to contain a rationalized opinion explaining how her condition was causally related to the work factors she identified.

In a letter dated November 28, 2006, appellant’s counsel requested reconsideration. In support of her request appellant submitted reports dated October 19, 2001 and September 30, 2002 by Dr. Bale and an October 8, 2001 report and December 4, 2002 surgical report by Dr. Demakas. Her counsel argued that the Office “shirked its duty to develop” appellant’s claim as it failed to follow the Office’s procedure manual regarding the development of the claim. Specifically, appellant contended that the Office should have requested a supplemental report from Dr. Bale according to section 2.810.5(b) of the procedure manual. She further contended that the medical evidence submitted by appellant “established a *prima facie* case that required further development” particularly as there was no contradictory evidence regarding causal relationship.

In a September 30, 2002 report, Dr. Bale opined that appellant sustained an injury due to her hyperextending her neck while performing her work duties. He also noted that her “holding the [tele]phone between her head and shoulder while typing” aggravated her condition and caused extreme pain. In concluding, Dr. Bale attributed appellant’s condition to her work environment and job duties.

On December 4, 2002 Dr. Demakas performed anterior cervical disc removal surgery. He diagnosed cervical degenerative disc disease with stenosis and spondylosis.

By decision dated December 11, 2006, the Office denied appellant’s request on the grounds that it was not timely filed and did not present clear evidence of error.

### **LEGAL PRECEDENT**

The Federal Employees’ Compensation Act<sup>1</sup> 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

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<sup>1</sup> 5 U.S.C. §§ 8101 *et seq.*

district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.<sup>2</sup>

The application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup>

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.<sup>4</sup> Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

Title 20 of the Code of Federal Regulations, section 10.607(b) provide 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.<sup>6</sup> 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.<sup>7</sup>

### ANALYSIS

In its December 11, 2006 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on

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<sup>2</sup> 20 C.F.R. § 10.605.

<sup>3</sup> 20 C.F.R. § 10.606.

<sup>4</sup> *Donna L. Shahin*, 55 ECAB 192 (2003).

<sup>5</sup> 20 C.F.R. § 10.608.

<sup>6</sup> *See Alberta Dukes*, 56 ECAB \_\_\_\_ (Docket No. 04-2028, issued January 11, 2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

<sup>7</sup> *See Alberta Dukes*, *supra* note 6.

February 22, 2002. Appellant's November 28, 2006 letter requesting reconsideration was submitted more than one year after the February 22, 2002 merit decision and was, therefore, untimely.

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). 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.

The Board finds that appellant did not establish clear evidence of error. Appellant's counsel contended before the Office that it erred in not requesting Dr. Bale to submit a supplemental report according to section 2.810.5(b) of the procedure manual. She contended that the medical evidence submitted by appellant "established a *prima facie* case that required further development" particularly as there was no contradictory evidence regarding causal relationship. Thus, it was clear error on the part of the Office when it failed to develop the medical evidence.

Appellant's assertions before the Office are without merit. The Board notes that it is appellant's burden to establish the essential elements of her claim by the submission of appropriate evidence.<sup>8</sup> The Office reviewed the evidence submitted by appellant and found that it was insufficient to establish that her condition was causally related to the employment factors identified by appellant. There is no evidence to suggest that the Office committed error when it did not request Dr. Bale to submit a supplemental report. The Board notes that the clear evidence of error standard is intended to be a difficult standard.<sup>9</sup> As noted above, appellant must submit evidence that proves, on its face, that the Office's decision was clearly erroneous. Her argument in her reconsideration request that the Office should have developed the evidence by requesting Dr. Bale to submit a supplemental report does not raise a substantial question as to the correctness of the Office's decision.

Furthermore, the medical reports submitted on reconsideration, September 30, 2002 report by Dr. Bale and an October 8, 2001 report and December 4, 2002 surgical report by Dr. Demakas, also do not establish clear evidence of error by the Office. As noted above, the evidence submitted must be relevant to the issue which was decided by the Office. Here, 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. Accordingly, the evidence submitted in support of the reconsideration request must address causal relationship and be so persuasive that it shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of the Office's decision. 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

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<sup>8</sup> See, e.g., *Larry D. Dunkin*, 56 ECAB \_\_\_\_ (Docket No. 04-1949, issued December 22, 2004).

<sup>9</sup> See, e.g., *James R. Mirra*, 56 ECAB \_\_\_\_ (Docket No. 05-998, issued September 6, 2005).

evidence of error.<sup>10</sup> The October 8, 2001 report by Dr. Demakas and the October 19, 2001 report by Dr. Bale were considered by the Office in its January 22 2002 decision and, thus, are duplicative. Dr. Demakas, in his December 4, 2002 surgical report, does not render an opinion on causal relationship. Dr. Bale, in his September 30, 2002 report, attributes appellant's condition to her employment duties and work environment, but provides no supporting rationale explaining how her condition was aggravated by her employment duties. Accordingly, neither Dr. Demakas' nor Dr. Bale's report is sufficient to establish clear evidence of error in the Office's January 22, 2002 merit decision. Appellant has submitted no other evidence sufficient to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office's decision.

**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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 11, 2006 is affirmed.

Issued: August 6, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>10</sup> *Id.*