

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

S.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cincinnati, OH, Employer**

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**Docket No. 06-1802
Issued: March 16, 2007**

Appearances:

*Geoffrey P. Damon, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 2, 2006 appellant, through counsel, filed a timely appeal from a June 5, 2006 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for reconsideration and finding that it failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated November 27, 2002 and the filing of this appeal, 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).

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. On August 11, 2004 the Board issued an order remanding case to the Office for reconstruction and proper assemblage of the case record as it did not contain the Office's November 27, 2002 decision, which found that appellant did not sustain recurrences of disability on April 3, July 17 and August 9, 2000 causally related to her December 24, 1997 employment-related cervical strain, vasovagal syncope episode and head

contusion.¹ By decision dated August 2, 2005, the Board affirmed the Office's September 9, 2004 decision, which denied further merit review of her claim pursuant to 5 U.S.C. § 8128(a).² The facts and the circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The facts and the history relevant to the present issue are hereafter set forth.

On December 30, 1997 appellant, then a 45-year-old general clerk, filed a traumatic injury claim, Office number 09-0436355, alleging that on December 24, 1997 she was working at the window when a coworker requested her paycheck and became upset when appellant told her that it was not available. She stated that her head and back hurt and she experienced anxiety and stress as a result of fainting after a meeting she had with a supervisor regarding this incident.³ Appellant stopped work on December 26, 1997 and returned to work on February 16, 1998. By letter dated February 23, 1998, the Office accepted her claim for a cervical strain due to an unexplained fall (fainting) to the floor on December 24, 1997. In a March 25, 1998 decision, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition while in the performance of duty. The Office found that she failed to establish that her emotional condition was caused by compensable factors of her employment.

In a letter dated May 25, 1998, appellant requested reconsideration. By decision dated June 10, 1998, the Office denied modification on the grounds that she failed to establish that her emotional condition was causally related to compensable factors of her employment. By letter dated January 20, 1999, appellant requested reconsideration.

On January 22, 1999 appellant filed a claim (Form CA-2a), alleging that she sustained a recurrence of disability on January 14, 1999. She stopped work on January 14, 1999 and returned to work on January 18, 1999. In a March 10, 1999 decision, the Office denied appellant's claim because she failed to establish that she was totally disabled from January 14 to 18, 1999 due to the December 24, 1997 employment injury.

In a March 19, 1999 letter, appellant requested reconsideration of the Office's March 25 and June 10, 1998 and March 10, 1999 decisions. By decision dated April 23, 1999, the Office accepted that appellant sustained an emotional condition while in the performance of duty. The Office accepted an acute situational reaction, vasovagal syncope and a head contusion. The Office vacated the March 25 and June 10, 1998 decisions.

¹ Docket No. 04-983 (issued August 11, 2004).

² Docket No. 05-398 (issued August 2, 2005).

³ Prior to filing the instant claim, appellant filed a traumatic injury claim on July 10, 1997 assigned file number 09-0430458. She alleged that she experienced mental stress as a result of her supervisor, Pat Carson, shouting at her and violently slammed the timecard racks. By decision dated September 2, 1997, the Office found that appellant failed to establish that her emotional condition was caused by compensable factors of her employment. The Office later issued decisions dated January 12 and July 6, 1998, February 16, 1999 and March 1 and July 10, 2000 denying modification. The Office also issued decisions on May 18, September 17 and December 22, 1999, which denied appellant's request for reconsideration of her claim. On May 27, 1999 the Office combined appellant's assigned file numbers 09-0436355 and 09-0430458 into one master case file assigned number 09-0430458.

By decision dated May 18, 1999, the Office denied modification of its March 10, 1999 decision, finding that appellant did not establish that she was totally disabled from January 14 to 18, 1999 due to the December 24, 1997 employment injury.

On September 25, 2000 appellant filed CA-2a forms alleging that she sustained recurrences of disability on April 3, July 17 and August 9, 2000. She stopped work on August 9, 2000. By decision dated January 16, 2001, the Office denied appellant's claims, finding the medical evidence of record insufficient to establish that her total disability on the claimed dates was causally related to the December 24, 1997 employment injuries. The Office noted that appellant should have filed an occupational disease claim because she alleged new work factors as the cause of her disability.

Appellant requested reconsideration by letters dated March 23 and April 25, 2001. The Office denied modification in a May 2, 2001 decision, finding that she did not submit rationalized medical evidence establishing that she was totally disabled on April 3, July 17 and August 9, 2000 due to the accepted December 24, 1997 employment injuries. Appellant's subsequent May 25, June 5 and October 18, 2001 requests for reconsideration were denied by the Office on September 6, 2001 and January 15, 2002. The medical evidence she submitted was insufficient to establish that she sustained a recurrence of disability on the claimed dates causally related to the accepted employment injuries. An undated reconsideration request was received by the Office on September 5, 2002 and was denied by the Office in a decision dated November 27, 2002, on the grounds that the medical evidence submitted did not address whether appellant sustained a recurrence of disability on the claimed dates causally related to the accepted employment injuries.

Appellant requested reconsideration by letter dated May 13, 2003. She asked to be reimbursed for time lost from work during the period August 9, 2000 through July 30, 2001. In a July 9, 2003 decision, the Office denied her reconsideration request as the evidence submitted was irrelevant and insufficient to warrant further merit review of the claim.

By letter dated November 20, 2003, appellant, through her attorney, requested reconsideration of the Office's November 27, 2002 decision. Counsel argued that appellant had submitted sufficient medical evidence to establish that she sustained a recurrence of disability causally related to the December 24, 1997 employment injuries.

By decision dated January 26, 2004, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was irrelevant and insufficient to warrant a merit review.

Following the issuance of the Board's August 11, 2004 order remanding appellant's case, by letter dated September 9, 2004, the Office advised appellant that the January 26, 2004 decision would be reissued with the date of September 9, 2004 and accompanied by appeal rights. In the September 9, 2004 decision, the Office denied appellant's request for reconsideration because the evidence submitted was irrelevant and insufficient to warrant further merit review.

After the issuance of the Board's decision on August 2, 2005, appellant, through counsel, requested reconsideration before the Office in letters dated September 7 and 8, 2005. She submitted duplicate copies of the Office's November 27, 2002, July 9, 2003 and September 9, 2004 decisions, correspondence from the Office regarding its February 19, 2003 referral of appellant to a second opinion medical examination and March 20, 2003 request for information from Dr. David Helm, an attending Board-certified psychiatrist, whose medical treatment notes indicated that appellant's emotional and agoraphobia conditions were treated during the period July 10, 2003 through July 12, 2005.

In a September 6, 2005 medical report of Dr. Donald P. Carruthers, a Board-certified psychiatrist, which described the trigger point procedure he performed on appellant's cervical spine on that date. On October 27, 2005 he requested that the Office authorize a trigger point injection for appellant's neck and right upper back, which was performed on August 31, 2005. On December 16, 2005 Dr. Carruthers requested authorization for chiropractic treatment, spinal manipulation on appellant's neck, scheduled for that date.

By letter dated March 15, 2006, appellant, through counsel, again requested reconsideration before the Office.

In a decision dated June 5, 2006, the Office found that appellant's letter requesting reconsideration was dated March 15, 2006, more than one year after the Office's November 27, 2002 decision and was untimely. The Office found that appellant did not submit evidence to establish clear evidence of error in the prior decision finding that she did not sustain a recurrence of disability on April 3, July 17 and August 9, 2000 causally related to her December 24, 1997 employment-related injuries.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's 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.⁶

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

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be 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 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.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 merit review in the face of such evidence.¹⁴

ANALYSIS

The Board finds that 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.¹⁵

The last merit decision in this case was issued by the Office on November 27, 2002. It found that appellant failed to establish that she sustained a recurrence of disability on April 3, July 17 and August 9, 2000 causally related to her December 24, 1997 employment-related cervical strain, vasovagal syncope episode and head contusion. As her March 15, 2006 letter requesting reconsideration was made more than one year after the Office's November 27, 2002 merit decision, the Board finds that it was not timely filed.

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).

¹⁵ *Larry L. Litton*, 44 ECAB 243 (1992).

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 finding that she failed to establish that she sustained a recurrence of disability on April 3, July 17 and August 9, 2000 causally related to her December 24, 1997 employment-related cervical strain, vasovagal syncope episode and head contusion. The Board notes that this issue is medical in nature.

In support of her March 15, 2006 request for reconsideration, appellant submitted duplicate copies of the Office's November 27, 2002, July 9, 2003 and September 9, 2004 decisions, correspondence from the Office regarding its February 19, 2003 referral of appellant to a second opinion medical examination and March 20, 2003 request for information from Dr. Helm. This evidence is insufficient to shift the weight of the evidence in favor of appellant's claim. It is not medical in nature and, accordingly, does not address the threshold issue of whether appellant submitted evidence establishing that she sustained a recurrence of disability on April 3, July 17 and August 9, 2000 causally related to her December 24, 1997 employment-related injuries.¹⁶

Dr. Helm's medical treatment notes stated that he evaluated appellant's emotional and agoraphobia conditions during the period July 10, 2003 through July 12, 2005. Dr. Carruthers' September 6, 2005 report described the trigger point procedure he performed on appellant's cervical spine on that date. His October 27 and December 16, 2005 requests sought authorization for chiropractic treatment of appellant's neck and upper right back. The Board finds that the evidence submitted is not relevant to the underlying issue or to shift the weight of the evidence in favor of appellant's claim. Neither Dr. Helm's treatment notes nor Dr. Carruthers' report address whether appellant sustained recurrences of disability on April 3, July 17 and August 9, 2000 casually related to her December 24, 1997 employment-related injuries. Dr. Carruthers' requests for authorization were not medical in nature rather they were merely requests for Office action regarding the approval of medical treatment. The Board finds that Dr. Helm's treatment notes and Dr. Carruthers' report and requests for authorization do not establish clear evidence of error.

For these reasons, appellant has not established clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

¹⁶ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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