

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

J.N., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Salt Lake City, UT,
Employer**

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**Docket No. 07-2241
Issued: September 5, 2008**

Appearances:
David J. Holdsworth, Esq., for the appellant
No appearance, for the Director

Oral Argument July 24, 2008

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 4, 2007 appellant, through her attorney, filed a timely appeal from an August 3, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration as it was untimely and did not establish clear evidence of error.¹ As there is no merit decision on the relevant issue within one year of the filing date of this appeal, the Board lacks jurisdiction to review the merits of this case.² Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the August 3, 2007 nonmerit decision.

¹ By decision dated February 12, 2007, the Office granted appellant a schedule award for a 14 percent permanent impairment of the left lower extremity. Appellant has not appealed this decision and thus it is not before the Board at this time; *see* 20 C.F.R. § 501.2(c).

² 20 C.F.R. §§ 501.2(c); 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On October 27, 2002 appellant, then a 45-year-old transportation security screener, filed a claim for a traumatic injury to her left leg and foot on October 23, 2002 when she tripped while inspecting a passenger. The Office accepted the claim for a left ankle sprain and patellofemoral chondromalacia of the left knee.³

The Office paid appellant compensation for total disability from December 18, 2002 to January 7, 2003. Appellant returned to limited-duty work on January 8, 2003. On January 17, 2003 the employing establishment placed appellant on administrative leave and on June 23, 2003 terminated her employment during her probationary period for misconduct.⁴

On November 24, 2003 appellant filed a claim for compensation.

By decision dated February 11, 2004, the Office denied this claim for wage-loss compensation from June 14 through December 13, 2003. Appellant requested a hearing, which was held on January 6, 2005. By letter dated February 17, 2005, appellant's attorney requested an extension of time to submit a report from Dr. Dennis Gordon, an attending Board-certified orthopedic surgeon. In a decision dated May 6, 2005, the hearing representative affirmed the February 11, 2004 decision. She found that the record did not establish that appellant's condition worsened after January 2003 such that she could not perform her limited-duty employment.

In letters dated January 25, May 12, July 10 and August 18, 2006, appellant's attorney notified the Office that appellant continued to seek medical evidence establishing total disability during 2003 and 2004 due to her accepted work injury.⁵ On July 16, 2007 appellant, through her attorney, requested reconsideration of the Office's May 6, 2005 decision. He attributed the delay in requesting reconsideration to difficulty obtaining a medical report from her attending physician. Appellant obtained a new attending physician after Dr. Gordon declined to treat her because of "hassles he had incurred in dealing with the federal worker's compensation system."

In a report dated May 29, 2007, Dr. Gordon R. Kimball, a Board-certified orthopedic surgeon, related that he performed arthroscopic surgery on appellant's left knee in September 2006. He noted that her prior attending physician, Dr. Gordon, was unable to assist

³ By decision dated February 18, 2003, the Office denied appellant's claim on the grounds that she did not establish an injury as alleged. On November 10, 2003 an Office hearing representative reversed the February 18, 2003 decision.

⁴ On January 13, 2004 the Office accepted that appellant sustained left hip trochanteric bursitis and a chest contusion, resolved, as consequential injuries.

⁵ Appellant's attorney also noted that appellant sustained an injury to her left knee in private employment. The Office is adjudicating issues regarding her claim for wage loss beginning November 2006.

her in obtaining workers' compensation benefits for periods of total disability in 2003 and 2004. Dr. Kimball reviewed in detail the medical records from Dr. Gordon. He stated:

“In conclusion, the medical records of the treating physician establish that [appellant] was temporarily and totally disabled from January 31, 2003 to May 2004. Dr. Gordon's impression was that her employer was not accommodating her and that the type of work she was being required to do was beyond her limitations and restrictions at the time. Thus, Dr. Gordon concluded that to allow her to continue to work in the type of work her employer was providing would have jeopardized her recovery and permanent health.”

In a progress report dated June 11, 2007, Dr. Kimball noted that appellant continued to have knee problems postsurgery and diagnosed possible reflex sympathetic dystrophy.⁶

By decision dated August 3, 2007, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.⁷ The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁸ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁹ The Office procedures state 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, if the claimant's application for review shows “clear evidence of error” on the part of the Office.¹⁰ 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.¹¹

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

⁶ On June 14, 2007 the Office expanded acceptance of the claim to include a left ankle sprain, left chondromalacia patellae, left enthesopathy of the hip and a tear of the medial meniscus of the left knee.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

⁹ *Veletta C. Coleman*, 48 ECAB 367 (1997).

¹⁰ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: “[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous.” 20 C.F.R. § 10.607(b).

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² 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.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 improperly denied merit review in the face of such evidence.¹⁴

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁵ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶ As appellant's July 16, 2007 request for reconsideration was submitted more than one year after May 6, 2005, the date of the last merit decision on the issue, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim for compensation.¹⁷

On appeal, appellant's attorney argues that appellant was unable to request reconsideration within the one-year time period due to difficulties obtaining a medical report from her attending physician, Dr. Gordon. Section 10.607(a), however, is unequivocal in setting forth the time limitation period of one year for requesting reconsideration of the decision for which review is sought and does not indicate that late filing may be excused by extenuating circumstances.¹⁸

In a report dated May 29, 2007, Dr. Kimball discussed Dr. Gordon's treatment of appellant following her employment injury. He concluded that appellant was disabled from

¹² *Leon J. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹³ *Id.*

¹⁴ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁷ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁸ 20 C.F.R. § 10.607(c); *Donald Booker-Jones*, 47 ECAB 685 (1996). The Office's regulations do provide that the time to file a request for reconsideration shall not include any periods subsequent to the decision for which the claimant can establish through probative medical evidence that she was unable to communicate in any way and her testimony is necessary to obtain modification. Appellant has not submitted such evidence. *John Crawford*, *supra* note 14.

employment for the period January 31, 2003 to May 2004 because of her accepted employment injury. Dr. Kimball based his finding on his review and analysis of the medical evidence from Dr. Gordon. While he found that appellant was disabled due to her work injury from January 31, 2003 to May 2004 and provided reasons for his finding, his opinion is not sufficient to establish clear evidence of error. The term “clear evidence of error” is intended to represent a difficult standard. The submission of 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.¹⁹ The evidence must *prima facie* shift the weight of the evidence in favor of appellant.²⁰ Dr. Kimball’s report does not manifest on its face that the Office committed an error in denying her request for compensation for disability in 2003 and 2004.

On June 11, 2007 Dr. Kimball noted that appellant continued to have knee problems postsurgery and diagnosed possible reflex sympathetic dystrophy. As he did not address the relevant issue of whether she was disabled due to her employment injury in 2003 and 2004, his report is insufficient to establish clear evidence of error.²¹

As the evidence submitted by appellant is insufficient to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office’s last merit decision, she has not established clear evidence of error.²²

CONCLUSION

The Board finds that the Office properly denied appellant’s request for reconsideration as it was not timely filed and did not demonstrate clear evidence of error.

¹⁹ *Joseph R. Santos*, 57 ECAB 554 (2006).

²⁰ *See Darletha Coleman*, *supra* note 12.

²¹ *Howard Y. Miyashiro*, 51 ECAB 253 (1999) (a claimant must submit evidence relevant to the issue which was decided by the Office to establish clear evidence of error).

²² *See Veletta C. Coleman*, *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 3, 2007 is affirmed.

Issued: September 5, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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