

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

FACTUAL HISTORY

This is the second appeal in this case. In the prior appeal,² the Board issued a decision on July 24, 2007 affirming the Office's May 3, 2006 decision on the grounds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).³ The Board found that the evidence submitted by appellant, including a February 2, 2006 report of Dr. James A. Hill, an attending Board-certified orthopedic surgeon, did not require reopening her claim for further consideration of the Office's April 20, 2004 wage-earning capacity determination. The Board found that Dr. Hill's report was not relevant to the main issue of the present case because Dr. Hill did not provide any opinion on appellant's ability to work in the constructed position of receptionist for 20 hours per week, either around the time of the April 2004 adjustment of her compensation or at any point thereafter.⁴ The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

In an October 25, 2007 letter received by the Office on October 29, 2007, appellant requested reconsideration of her claim. She argued that the Office had not met its burden of proof to adjust her compensation because it did not show that she could perform the constructed position of receptionist. Appellant submitted numerous documents in support of her reconsideration request that had not been previously considered by the Office.

In a July 31, 2006 report, Dr. Hill diagnosed unsuccessful left rotator cuff repair, post-traumatic arthritis of the left knee, possible rotator cuff tear of the right shoulder, and lumbar disc disease. In August 21 and 23, 2006 reports, Dr. Alan G. Shepard, an attending Board-certified neurologist, described appellant's complaints and stated that he saw no evidence for any acute neurological changes that would be causing her lower extremity pain. In a September 15, 2006 report, he stated that appellant continued to suffer from lumbar myelopathy, sprains and strains of the ankle and foot, derangement of the left knee, and severe bilateral neck and shoulder pain.

In a March 8, 2007 work restrictions form, Dr. Hill checked a box indicating that appellant could not work eight hours with restrictions. In March 8, June 14 and August 30, 2007 narrative reports, he described appellant's problems related to post-traumatic knee arthritis, rotator cuff tearing and lumbar disc disease. Appellant also submitted medical reports and other documents pertaining to medications and medical devices, reports of diagnostic testing and

² Docket No. 07-175 (issued July 24, 2007).

³ The Office accepted that appellant injured herself on May 1, 1980 when her left foot became stuck under a security gate and on May 2, 1980 when she stepped off a curb into a low area. It accepted that she sustained a left medial meniscus tear, left knee internal derangement, chronic left ankle strain, and right knee post-traumatic arthritis, left big toe spur, and L4-5 disc herniation secondary to her left leg condition. In an April 20, 2004 decision, the Office adjusted appellant's compensation effective April 21, 2004 based on her ability to work in the constructed position of receptionist for 20 hours per week. The position was sedentary in nature and required lifting up to 10 pounds. The Office later denied modification of its April 20, 2004 wage-earning capacity determination in a decision dated July 19, 2005.

⁴ The Board also agreed with the Office that two other newly submitted medical reports were not relevant and that two other medical reports had previously been submitted and considered.

emergency room reports. She submitted numerous reports which had already been submitted and considered by the Office, including a June 31, 2001 report of Dr. Kenneth Vaughn, an attending Board-certified preventive medicine physician, which included a description of his March 30, 2001 examination.

In a November 28, 2007 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.⁵ 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.⁶

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 establishes "clear evidence of error."⁷ 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ 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.

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴

ANALYSIS

In its November 28, 2007 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on October 29, 2007, more than one year after the Office's last merit decision dated July 19, 2005, and therefore she must demonstrate clear evidence of error on the part of the Office in issuing this decision or the prior Office merit decisions concerning her wage-earning capacity.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its wage-earning capacity decisions. She did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In support of her reconsideration request, appellant submitted a March 8, 2007 work restrictions form in which Dr. Hill, an attending Board-certified orthopedic surgeon, checked a box indicating that she could not work eight hours with restrictions. However, this report would not tend to show clear evidence of error because it is of limited probative value regarding appellant's wage-earning capacity beginning April 21, 2004 and continuing thereafter. Dr. Hill did not provide any medical rationale explaining his opinion that appellant could not perform any work.¹⁵ In other reports dated between July 31, 2006 and August 30, 2007, he described appellant's problems related to post-traumatic knee arthritis, rotator cuff tearing and lumbar disc disease. In reports dated between August 21 and September 15, 2006, Dr. Shepard, an attending Board-certified neurologist, described appellant's complaints and stated that he saw no evidence for any acute neurological changes that would be causing her lower extremity pain. These reports of Dr. Hill and Dr. Shepard would not tend to show clear evidence of error because they do not contain any discussion of appellant's ability to work. Therefore, the reports are not relevant to whether appellant could work in the constructed position of receptionist beginning April 21, 2004 and continuing thereafter. They do not show clear evidence in the Office's wage-earning capacity determination and its decision not to modify that determination.

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value). Moreover, Dr. Hill did not clearly indicate whether this ostensible disability was related to accepted employment injuries or impairment caused by preexisting injuries.

Appellant also submitted medical reports pertaining to medications and medical devices, reports of diagnostic testing and emergency room reports. Although these documents constituted medical evidence, none of the documents contained an opinion on her ability to perform the receptionist position from April 2004 onwards. Appellant submitted numerous medical reports which had already been submitted and considered by the Office, including a June 31, 2001 report of Dr. Vaughn, an attending Board-certified preventive medicine physician, which included a description of his March 30, 2001 examination. None of these reports contained an opinion on appellant's ability to work.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's July 19, 2005 decision or the prior Office merit decisions concerning her wage-earning capacity and the Office properly determined that she did not show clear evidence of error.

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.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 28, 2007 decision is affirmed.

Issued: April 15, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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