

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

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**W.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Baltimore, MD, Employer**

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**Docket No. 10-210  
Issued: October 7, 2010**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 26, 2009 appellant filed a timely appeal from an October 5, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. The most recent merit review in this case was the Board's November 30, 2004 decision affirming the Office's denial of appellant's claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

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<sup>1</sup> For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3 (2008).

## **FACTUAL HISTORY**

This case has previously been before the Board. On January 13, 1992 appellant alleged that he was disabled as a result of a low back condition which he attributed to his accepted October 29, 1990 employment injury. On May 9, 1997 the Board affirmed the Office's June 1 and August 26, 1994 and January 23, 1995 decisions denying his claim, on the grounds that the medical evidence was insufficient to establish a causal relationship between his low back condition and the accepted injury.<sup>2</sup> In a November 30, 2004 decision, the Board affirmed the Office's April 14, 2004 decision, finding that the medical evidence failed to establish causal relation.<sup>3</sup> In a January 14, 2009 decision, the Board affirmed the Office's April 10, 2008 nonmerit decision denying appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.<sup>4</sup> The facts of the case as set forth in the prior decisions are incorporated herein by reference.<sup>5</sup>

On June 8, 2009 appellant requested reconsideration. He contended error by the Office as it failed to meet its burden on causal relationship, provided no rationalized medical opinion evidence and falsified his case record. Appellant contended that the evidence of record supported his disability.

Appellant submitted the June 12, 2007 report of Dr. Steven J. Triantafyllou, a Board-certified orthopedic surgeon, who found general tenderness in the spine area and noted some loss of lumbar lordosis. Range of motion was 50 percent of normal. Dr. Triantafyllou diagnosed pain to the neck, mid and lower back, cervical and lumbar disc disease and cervical and lumbar radiculopathy.

On February 22, 2008 Dr. Bruce Sicilla, a treating physician, noted appellant complaint of chronic neck, shoulder and low back pain since his October 1990 work injury. He stated that within a reasonable degree of medical certainty, appellant's ongoing symptoms were related to an aggravation of cervical degenerative disc disease, without radiculopathy, "status post fall out of the chair on October 29, 1990." In letters dated May 5, 2009, Dr. Sicilla confirmed that he had treated appellant since October 5, 2007 for cervical pain. He stated that appellant had been in good health with regard to his spine up until the October 10, 1989 work injury.

Appellant provided reports dated April 25, 1991 to June 14, 1996 from Dr. Eli M. Lippman, a Board-certified orthopedic surgeon, and a March 27, 2000 report from Dr. Gebreye W. Rufael, a Board-certified internist, previously of record. He also submitted a

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<sup>2</sup> Docket No. 95-1368 (issued May 9, 1997). The Board also affirmed the denial of appellant's request for a hearing and review of the merits.

<sup>3</sup> Docket No. 04-1364 (issued November 30, 2004).

<sup>4</sup> Docket No. 08-1570 (issued January 14, 2009).

<sup>5</sup> Appellant's November 10, 1989 traumatic injury claim (File No. xxxxxx956) was accepted for cervical, thoracic and lumbosacral strains. His April 29, 1990 traumatic injury claim (File No. xxxxxx457) was accepted for head contusion and cervical strain. The Office subsequently combined the claim files.

copy of a February 21, 1992 compensation payment in the amount of \$7,369.09 for the period December 16, 1990 to April 30, 1991.

In an October 5, 2009 decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.<sup>6</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). To be entitled to a merit review of the Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.<sup>7</sup> 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 Act.<sup>8</sup>

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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>9</sup> The Office regulations and procedure provide that it 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.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>11</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>12</sup> 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>13</sup> It is not enough merely to show that the evidence could be construed

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> *Supra* note 6, *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>9</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>10</sup> *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). 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.

<sup>11</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>12</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>13</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

so as to produce a contrary conclusion.<sup>14</sup> 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.<sup>15</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.<sup>16</sup>

### ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The one-year time limitation period for requesting reconsideration begins on the date of the original Office decision and upon any subsequent merit decision.<sup>17</sup> As appellant's June 8, 2009 request for reconsideration was submitted more than one year after the Board's November 30, 2004 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by the Office in the denial of his claim.<sup>18</sup>

Appellant contended that his claim was improperly denied as he submitted sufficient medical evidence to support his low back condition. This contention does not establish error on the part of the Office, but merely repeats arguments previously raised and considered by the Office and the Board. He argued that the Office committed error by failing to meet its burden to support its position on causal relationship. The Board finds that appellant's contention is not persuasive as it is not consistent with the general legal standards applicable to establishing a claim. The Office accepted that he sustained cervical, thoracic and lumbosacral strains on November 10, 1989. The Board determined in the November 20, 2004 decision that the strains had resolved by the time appellant returned to duty on March 9, 1990. The Office also accepted the October 29, 1990 injury for a cervical strain and head contusion. The Board's May 9, 1997 decision found that the medical evidence established that these conditions had resolved without disability. After finding that appellant's accepted conditions had resolved it became his burden to establish any subsequent periods of disability related to these injuries.<sup>19</sup> His claim for a low back condition related to the October 29, 1990 employment injury was not accepted based on the insufficiency of rationalized medical opinion evidence. Appellant, rather than the Office, had the burden of proof to establish causal relation. Similarly, he has not come forward with substantial evidence to support allegations that the Office falsified his case record or made false statements. Appellant's arguments on reconsideration are insufficient to raise a substantial question

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<sup>14</sup> See *M.L.*, 60 ECAB \_\_\_\_ (Docket No. 09-956, issued April 15, 2010). See *Leona N. Travis*, *supra* note 12.

<sup>15</sup> See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>16</sup> *Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>17</sup> 20 C.F.R. § 10.607(a); see *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>18</sup> *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>19</sup> See *Gary M. DeLeo*, 56 ECAB 656 (2005). The fact that the etiology of a condition is unknown or obscure does not relieve a claimant of the burden of establishing causal relation or shift the burden to the Office to disprove an employment relationship.

concerning the correctness of the Office's denial of his claim or to shift the weight of the evidence in his favor.

Moreover, the medical reports submitted by appellant are insufficient to establish clear error by the Office in denying his claim. Dr. Triantafyllou's June 12, 2007 report and Dr. Sicilla's May 9, 2009 letters do not address the underlying issue of causal relationship which renders them irrelevant. Dr. Sicilla's February 22, 2008 report noted only that appellant's ongoing symptoms were related to an aggravation of cervical degenerative disc disease "status post fall out of the chair on October 29, 1990." This report does not raise a substantial question as to the correctness of the Office's decision. 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 prior to when the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>20</sup> The duplicative reports of Dr. Lippman and Dr. Rufael were of record and previously considered. This evidence does not establish clear error by the Office. The financial records are not relevant to the issue decided by the Office, namely whether appellant established a low back condition causally related to the October 29, 1990 work injury. Appellant has not submitted evidence of clear error.

### **CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely and failed to demonstrate clear evidence of error.

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<sup>20</sup> *Joseph R. Santos*, 57 ECAB 554 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 7, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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