

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

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**B.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
St. Louis, MO, Employer**

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**Docket No. 10-323  
Issued: September 2, 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 November 9, 2009 appellant filed a timely appeal from the May 12, 2009 decision of the Office of Workers' Compensation Programs denying her request for further review of the merits of her claim as untimely filed and failing to establish clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision.<sup>1</sup> The last merit decision of record was the March 21, 2006 Office decision wherein it denied modification of the December 2, 2004 decision denying appellant's claim for a recurrence of disability. Because more than one year has elapsed between the issuance of the last merit

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<sup>1</sup> Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of the Office's decision. See 20 C.F.R. § 501.3(f)(2). As the Office's decision was issued May 12, 2009, the 180-day computation begins May 13, 2009. One hundred and eighty days from May 13, 2009 was Monday, November 9, 2009. Since using November 18, 2009, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service's postmark is November 9, 2009 which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

decision on March 21, 2006 and the filing of this appeal on November 9, 2009, the Board lacks jurisdiction to review the merits of the case.<sup>2</sup>

### **ISSUE**

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On appeal, appellant contends that she has permanent injury to her left arm and is still receiving medical treatment.

### **FACTUAL HISTORY**

On October 28, 1992 appellant, then a 37-year-old clerk, injured the fingers of her left hand when she dropped a tray on the line. The Office accepted her claim for left ulnar nerve neuropathy with surgical repair, tear of the tendon in the left fourth finger and left-sided thoracic outlet syndrome. Appellant received wage-loss compensation and medical benefits.

By decision dated October 24, 1995, the Office denied all claims for wage-loss compensation beginning November 10, 1994 as the evidence failed to establish that appellant's disability for work after that date was due to the employment injury of October 18, 1992.<sup>3</sup> This decision did not affect her continuing entitlement to medical benefits. This decision was affirmed by a hearing representative on April 12, 1997. On June 8, 1998 the Office issued a schedule award for 53 percent impairment of the left upper extremity.

On August 17, 2004 appellant filed a claim alleging a recurrence of disability, commencing April 14, 2004, causally related to the October 28, 1992 accepted injury. She alleged that repetitive work gradually affected the condition in her arm. By decision dated December 2, 2004, the Office denied appellant's recurrence claim and also found no employment-related condition. On October 4, 2005 appellant requested reconsideration. By decision dated March 21, 2006, the Office reviewed the merits of appellant's case but denied modification of the prior decision.

By letter dated March 5, 2009, appellant requested reconsideration. She noted that she was addressing the prior recurrence denial contending a worsening condition. Appellant submitted a statement summarizing her treatment, referencing reports previously of record and reviewed by the Office, her medical treatment and vocational rehabilitation.

By decision dated May 12, 2009, the Office denied appellant's request for reconsideration finding that it was untimely filed and did not show clear evidence of error.

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<sup>2</sup> For final Office decisions issued prior to November 19, 2008, claimants had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2) (2008). For final Office decisions issued on and after November 19, 2008, claimants have 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e) (2009).

<sup>3</sup> The Office found that appellant's termination from the employing establishment was unrelated to her work-related condition.

## 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.<sup>4</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 Federal Employees' Compensation Act.<sup>5</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, the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>6</sup> 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.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>9</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>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</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>12</sup> 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

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<sup>4</sup> 20 C.F.R. § 10.607(a).

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

<sup>6</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>7</sup> 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

<sup>8</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>9</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>10</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>11</sup> *See Leona D. Travis*, *supra* note 9.

<sup>12</sup> *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.<sup>13</sup>

### ANALYSIS

The Board notes that the most recent merit decision is the March 21, 2006 decision denying appellant's claim for a recurrence of disability causally related to her accepted injury of October 28, 1992. Appellant filed her request for reconsideration by letter dated March 5, 2009. Accordingly, this request was filed over one year after the issuance of the March 21, 2006 decision. It was not timely filed.

The Office properly reviewed appellant's request under the clear evidence of error standard and determined that appellant has not established clear evidence of error. Appellant did not submit any evidence with her request for reconsideration rather she submitted her summation of her case and argued that she had sustained a recurrence. To establish clear evidence of error, appellant must submit evidence or argument that is positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>14</sup> The term clear evidence of error is intended to represent a difficult standard.<sup>15</sup> Appellant's request would have to establish on its face that the Office's denial of her claim was erroneous. It cannot be a matter of opinion; it must be a matter of proof. Appellant did not submit such evidence. She provided a summary of her case and referred to evidence previously of record and reviewed by the Office. Appellant's arguments regarding permanent impairment are not relevant to the issue of a recurrence of disability commencing April 14, 2004.<sup>16</sup> As the Board has held, to establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by the Office and such evidence must manifest on its face that the Office committed an error.<sup>17</sup>

Because appellant's request for reconsideration failed to demonstrate clear evidence of error in the Office's most recent merit decision, the Board finds that the Office properly refused to reopen appellant's case for review on the merits.

### 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.

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<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 5.

<sup>14</sup> *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>15</sup> *D.L.*, 60 ECAB \_\_\_\_ (Docket No. 08-1057, issued June 23, 2009).

<sup>16</sup> As the Office did not issue a final decision with regard to whether appellant sustained an increased permanent impairment, the issue is not before the Board in this appeal. 20 C.F.R. § 501.2(c).

<sup>17</sup> *Supra* notes 8, 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 12, 2009 is affirmed.

Issued: September 2, 2010  
Washington, D.C.

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