

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

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**J.T., Appellant**

**and**

**U.S. POSTAL SERVICE, MAIN POST OFFICE,  
Milwaukee, WI, Employer**

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**Docket No. 10-558  
Issued: September 3, 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 December 28, 2009 appellant filed a timely appeal of the December 3, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration because it was not timely filed and failed to establish clear evidence of error. The most recent merit decision is that of the Board dated October 23, 2008. Following the Board's decision, appellant had one year to request reconsideration by the Office.<sup>1</sup> As more than one year has lapsed, the Board does not have jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

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.

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<sup>1</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

On appeal, appellant contends that the Office committed clear evidence of error of fact and law as it violated federal regulations and statutes in the processing and adjudication of her recurrence and emotional condition claims and requests for reconsideration.

### **FACTUAL HISTORY**

This case has previously been before the Board. In an October 23, 1998 decision, the Board affirmed an Office hearing representative's October 31, 1996 decision which found that appellant did not sustain a recurrence of total disability commencing June 25, 1993 causally related to her accepted employment-related bilateral carpal tunnel syndrome and emotional condition while in the performance of duty.<sup>2</sup> In a January 13, 2006 decision,<sup>3</sup> the Board affirmed the Office's May 17, 2005 decision, denying appellant's March 13, 2005 request for reconsideration of her recurrence of disability and emotional condition claims on the grounds that it was not timely filed and failed to establish clear evidence of error.<sup>4</sup> In an April 12, 2007 decision, the Board affirmed the Office's July 21, 2006 decision denying appellant's February 6, 2006 request for reconsideration without merit review of her claims pursuant to 5 U.S.C. § 8128(a).<sup>5</sup> The facts of the case as set forth in the prior decisions are incorporated herein by reference. The facts and history relevant to the present issue are hereafter set forth.<sup>6</sup>

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<sup>2</sup> Docket No. 97-1656 (issued October 23, 1998). On December 12, 1984 appellant, then a 28-year-old clerk, filed an occupational disease claim for carpal tunnel syndrome. The Office accepted her claim for bilateral carpal tunnel syndrome and authorized surgical release which was performed on March 27, 1985. In a January 19, 1989 decision, it granted appellant a schedule award for a 12 percent impairment of the right arm and a 10 percent impairment of the left arm. Subsequently, appellant accepted the employing establishment's job offer for a limited-duty distribution window clerk position and returned to work on May 18, 1992. By letter dated September 3, 1992, the Office accepted that appellant sustained a cervical subluxation while performing her work duties on August 5, 1992. On May 8, 1993 appellant was involved in a nonwork-related automobile accident. She voluntarily resigned as of June 25, 1993. On August 25, 1994 appellant claimed wage-loss compensation due to the employing establishment's failure to comply with the physical restrictions set forth by Dr. Thomas J. Nordland, an attending Board-certified orthopedic surgeon. In a November 21, 1995 decision, the Office denied her claim, finding that the limited-duty distribution window clerk position was suitable and did not exceed her work limitations. It also found that the evidence was insufficient to establish that she sustained an emotional condition while in the performance of duty.

<sup>3</sup> Docket No. 05-1353 (issued January 13, 2006).

<sup>4</sup> In a January 25, 2007 order, in Docket No. 07-298, the Board dismissed appellant's appeal of an Office "decision" dated January 13, 2006 and cancelled her request for oral argument. The Board also found that there was no final decision of the Office dated January 13, 2006 from which appellant could properly file an appeal with the Board. The Office further found that her submission was not deemed as a timely petition for reconsideration of the Board's January 13, 2006 decision in Docket No. 05-1353 as it was not filed within 30 days of the issuance of the decision. Docket No. 07-298 (issued January 25, 2007). By order dated December 20, 2007, the Board denied appellant's petition for reconsideration of its January 25, 2007 order. Docket No. 07-298 (issued December 20, 2007).

<sup>5</sup> Docket No. 07-737 (issued April 4, 2007).

<sup>6</sup> In a March 23, 2010 order for the current appeal, the Board denied appellant's request for oral argument on the grounds that she did not provide a further need for oral argument in light of all of her prior Board appeals.

By letter dated September 10, 2009, appellant requested reconsideration of the denial of her recurrence of disability and emotional condition claims. She contended that the Office and employing establishment committed clear evidence of error by violating federal regulations and statutes in the processing and adjudication of her claims and by denying reconsideration.

In a decision dated December 3, 2009, the Office denied appellant's September 10, 2009 request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error. It found that her request was not timely filed within one year of the most recent merit decision. The Office also found that the evidence submitted failed to establish clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>7</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>8</sup> 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 regulations provide that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>9</sup>

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.<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 be manifest on its face that the Office committed an error.<sup>12</sup> Evidence that 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 so as to produce a contrary conclusion.<sup>14</sup> This entails a limited review by the Office of

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> *Id.* at § 10.607(b).

<sup>11</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>12</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>13</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>14</sup> *Leona N. Travis*, *supra* note 12.

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>

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 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>16</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 the Office abused its discretion in denying merit review in the face of such evidence.<sup>17</sup>

### ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.<sup>18</sup> However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>19</sup>

The most recent merit decision in this case was the Board's October 23, 1998 decision. The Board affirmed the Office's denial of appellant's recurrence of disability and emotional condition claims. As appellant's September 10, 2009 letter requesting reconsideration by the Office was made more than one year after the October 23, 1998 merit decision, the Board finds that it was not timely filed.

The Board finds that appellant's September 10, 2009 letter does not raise a substantial question as to whether she sustained a recurrence of disability causally related to her accepted employment-related bilateral carpal tunnel syndrome and an emotional condition. Appellant's contention that the Office and employing establishment committed clear evidence of error due to violations of federal laws in the processing of her recurrence of disability and emotional condition claims and requests for reconsideration is substantially the same argument previously considered in the prior appeals. The Board finds that her contention is insufficient to establish clear evidence of error. The Board noted that the argument raised by appellant is similar to that set forth in her September 10, 2009 request for reconsideration. As stated, this contention was previously considered by the Board in its prior decisions. Appellant's argument is repetitious and does not establish that the Office committed clear evidence of error in denying appellant's recurrence of disability and emotional condition claims.

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

<sup>16</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>17</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>18</sup> 20 C.F.R. § 10.607(a); see *A.F.*, 59 ECAB \_\_\_\_ (Docket No. 08-977, issued September 12, 2008).

<sup>19</sup> *D.G.*, 59 ECAB \_\_\_\_ (Docket No. 08-137, issued April 14, 2008); *Robert F. Stone*, 57 ECAB 292 (2005).

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Board's decision and order. Consequently, the Office properly denied appellant's reconsideration request as her request does not establish clear evidence of error.

**CONCLUSION**

The Board finds that appellant's September 10, 2009 request for reconsideration was untimely filed and failed to show clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 3, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 3, 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