

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

S.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Carol Stream, IL, Employer**

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**Docket No. 10-1332
Issued: January 7, 2011**

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 April 16, 2010 appellant filed a timely appeal of the March 22, 2010 decision of the Office of Workers' Compensation Programs denying her request for reconsideration of a November 7, 2005 merit decision. Because more than one year has elapsed from the last merit decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of his case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that her request was untimely filed and failed to establish clear evidence of error.

¹ For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On August 10, 2004 appellant, then a 37-year-old mail processor, filed a claim for an occupational disease. She alleged that she developed a lower back condition due to repetitive lifting, bending, pushing and pulling activities at work.

By decisions dated November 19, 2004 and November 7, 2005, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that her back condition was causally related to her federal employment.²

On September 8, 2009 appellant, through her attorney, stated that a Dr. Montella had requested reconsideration on her behalf by letter dated March 5, 2008.³ In a May 27, 2009 report, Dr. Bruce J. Montella, an orthopedic surgeon, provided a history that appellant had ongoing back problems caused by her job that were consistent with lumbar disc herniation and radiculitis, confirmed by a magnetic resonance imaging scan and electromyography.

On January 11, 2010 appellant submitted a copy of an undated letter from Dr. Nancy Gryniwicz. She alleged that the original letter was sent to the Office on November 28, 2005 and was received by the Office on December 1, 2005.⁴ In this letter, Dr. Gryniwicz stated that appellant's back condition was caused by an incident when she lifted a tray of mail and experienced back pain. She asked the Office to reexamine the case.

By decision dated March 22, 2010, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error in the last merit decision dated November 7, 2005.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁵ 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.⁶

² Appellant has a separate claim accepted for a herniated cervical disc under OWCP File No. xxxxxx872. The cases were not combined.

³ There is no March 5, 2008 letter from Dr. Montella of record.

⁴ The case record does not contain a copy of the letter from Dr. Gryniwicz among the documents received by the Office in 2005.

⁵ 20 C.F.R. § 10.607.

⁶ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004).

ANALYSIS

The merits of appellant's case are not before the Board. Her September 8, 2009 request for reconsideration was submitted more than one year after the Office's November 7, 2005 merit decision and was not timely. The issue is whether appellant demonstrated clear evidence of error in the Office's November 7, 2005 decision denying her claim.

The November 7, 2005 decision denied appellant's claim for a back injury. On September 8, 2009 appellant requested reconsideration of the denial of her claim. In an undated letter, Dr. Gryniewicz stated that appellant's back condition was caused by an incident when she lifted a tray of mail and experienced back pain. The history of a single incident causing a back condition is not consistent with appellant's underlying claim of a back condition caused by repetitive job activities over a period of time. Dr. Gryniewicz did not provide any specific diagnosis. She did not explain how appellant's back condition was caused by specific work activities. The report of Dr. Gryniewicz does not raise a substantial question as to the correctness of the November 7, 2005 merit decision or establish clear evidence of error. The Board has held that even a medical report which, if timely submitted, could cause a conflict in medical opinion is insufficient to establish clear evidence of error.⁷

Appellant's untimely request for reconsideration did not demonstrate clear evidence of error in the November 7, 2005 merit decision. The Office properly denied her request for reconsideration.

On appeal, appellant contends that in 2005 Dr. Gryniewicz timely submitted a request for reconsideration of the November 7, 2005 decision on her behalf. As noted, the physician's letter is not of record until February 23, 2010. The Office properly denied her untimely reconsideration request in its March 22, 2010 decision.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error in the November 7, 2005 merit decision.

⁷ *D.G.*, 59 ECAB 455, 460 (2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 22, 2010 is affirmed.

Issued: January 7, 2011
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