

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BESSIE O. SMITH and U.S. POSTAL SERVICE,  
FULTON INDUSTRIAL BRANCH, Atlanta, GA

*Docket No. 03-979; Submitted on the Record;  
Issued June 2, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that the request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

This case has previously been on appeal before the Board. In a May 25, 2001 decision, the Board affirmed the Office's June 22, 2000 decision finding the evidence of record insufficient to establish that appellant's carpal tunnel syndrome was aggravated by factors of her federal employment.<sup>1</sup> In a July 11, 2002 letter, appellant requested that the Office "reevaluate" her claim. By decision dated August 14, 2002, the Office denied appellant's request for merit review of her claim on the grounds that it was untimely filed and did not establish clear evidence of error.

The Board finds that the Office properly found that the request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant filed her appeal with the Board on January 7, 2003 the only decision properly before the Board is the Office's August 14, 2002 decision denying appellant's request for reconsideration.

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<sup>1</sup> Docket No. 02-2416 (issued May 25, 2001).

<sup>2</sup> 20 C.F.R. §§ 501.2(c); 501.3(d)(2); *see John Reese*, 49 ECAB 397, 399 (1998).

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>5</sup>

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>6</sup>

The last merit decision in this case was issued by the Board on May 25, 2001, wherein the Board affirmed the Office's June 22, 2000 decision finding that appellant failed to establish that her carpal tunnel syndrome was aggravated by factors of her employment. Because appellant's July 11, 2002 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

Section 10.607(b) of the Office's implementing regulations 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>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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 that 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

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> *Larry L. Litton*, 44 ECAB 243 (1992).

<sup>7</sup> 20 C.F.R. § 10.607(b).

<sup>8</sup> *Nancy Marciano*, 50 ECAB 110, 114 (1998).

<sup>9</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>10</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

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

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 be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also 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.<sup>13</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 a merit review in the face of such evidence.<sup>14</sup>

The issue for purposes of establishing clear evidence of error in this case is whether appellant submitted evidence establishing that there was an error in the Office's determination that she failed to establish that her carpal tunnel syndrome was aggravated by factors of her employment.

In this case, the evidence submitted by appellant does not establish clear evidence of error. The January 25, 2000 treatment notes from a physician whose signature is illegible revealed findings on physical examination. A July 15, 2002 work capacity evaluation of Dr. Joseph N. Saba, a Board-certified neurologist, provided appellant's physical restrictions. The above medical evidence is irrelevant inasmuch as it does not address whether appellant's carpal tunnel syndrome was caused or aggravated by factors of her employment, and thus, cannot establish clear evidence of error.

A June 5, 2000 report and June 19, 2000 disability certificate from Dr. Scott M. Levere, a Board-certified orthopedic surgeon, provided a diagnosis of bilateral carpal tunnel syndrome. Dr. Levere's June 19, 2000 treatment notes indicated that results from an electromyogram showed that appellant's carpal tunnel syndrome were worse on the left than the right. A January 18, 2001 nerve conduction report from a physician whose signature is illegible indicated that appellant's bilateral carpal tunnel syndrome was worse on the left side than on the right side. Dr. Levere's report, disability certificate and treatment notes, and the nerve conduction report do not specifically address appellant's burden of proof to establish that her carpal tunnel syndrome was aggravated by factors of her employment.

For these reasons, the Office properly found that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error.

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

<sup>13</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>14</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

The August 14, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
June 2, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member