

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

ELIZABETH MILAM, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Denver, CO, Employer**

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**Docket No. 03-0359
Issued: February 4, 2004**

Appearances:
John S. Evangelesti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 25, 2002 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated January 11 and October 11, 2002, which denied her reconsideration requests on the grounds that they were untimely filed and failed to establish clear evidence of error. The Office had previously denied appellant's claim on the merits in a decision dated July 1, 1999. Because more than one year has elapsed between the last merit decision dated July 1, 1999 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2). The only decisions properly before the Board are the Office's January 11 and October 11, 2002 decisions denying appellant's requests for reconsideration.

ISSUE

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

FACTUAL HISTORY

On January 16, 1998 appellant, then a 45-year-old distribution clerk, filed an occupational disease claim alleging that the requirements of her job injured her back, which became chronically strained after several years as a result of repeated bending and lifting. Appellant stopped work on January 28, 1997. Appellant indicated that she first realized that the disease or illness was caused or aggravated by her employment on June 24, 1994.

On February 11, 1998 the Office requested additional factual and medical evidence. On June 23, 1998 the Office received a statement from appellant indicating that she was injured in a car accident in 1990.¹ She noted that her work required lifting up to 70 pounds, carrying 45 pounds or more and continuous bundling and lifting of 20 pounds or more, pulling and pushing heavy equipment, loading and unloading, for 5 to 6 hours a day, for 5 to 6 days a week, along with repeated bending and lifting. The Office also received a December 31, 1997 medical report from a physician whose signature was illegible, indicating that appellant was being treated for chronic low back pain with exacerbations.

By decision dated June 13, 1998, the Office denied appellant's claim as the evidence was insufficient to establish an injury due to the claimed employment factors.²

On June 14, 1999 appellant requested reconsideration of the Office's June 13, 1998 decision, and submitted progress notes, medical reports, physical therapy reports, supervisor's statements, accident reports, chiropractic notes, light-duty restrictions and health care certificates.

The additional evidence included reports, dated March 21 and April 4, 1991, from Dr. William E. Gamble, a Board-certified orthopedic surgeon, and a fitness-for-duty examination from Dr. Greg Reichhart, a physician of unknown specialty.

Additionally, the Office received statements from Joelle Roybal, a supervisor, and Anthony Ramirez, the manager of customer services, a March 27, 1991 light-duty restriction from Dr. Judith A. Paley, Board-certified in internal medicine, who indicated that she treated appellant for injuries sustained in an automobile accident on December 23, 1991, a June 21, 1991 light-duty restriction from Dr. Bennett I. Machanic, a Board-certified neurologist, who diagnosed lumbar strain and recommended light-duty restrictions and several disability certificates dated March 1, 1996 and March 11, April 9, May 5 and July 10, 1997, in which Dr. Karen L. Peterson, Board-certified in internal medicine, indicated that appellant was unable to work.

¹ The record indicates that this was not in the performance of duty.

² The Office found that the initial evidence of file supported that appellant actually experienced the claimed employment factors; however, the evidence of record was not sufficient because a diagnosed condition linked to work-related activities was not submitted with the claim.

By decision dated July 1, 1999, the Office modified the June 13, 1998 decision to find medical fact of injury but upheld the denial as the requirement of causal relationship was not met.

By letter dated November 1, 2001, appellant's representative requested that the Office conduct a merit review.³ In support of the request, he referenced previous reports and the report of Dr. Christopher B. Ryan, Board-certified in physical medicine and rehabilitation.

In a September 25, 2001 report, Dr. Ryan noted appellant's history of injury and treatment, including that appellant had a motor vehicle accident, with left-sided lumbosacral disc injury, which resolved. Dr. Ryan indicated that appellant subsequently suffered a low back injury at work, which was probably mildly aggravated in 1994 and then substantially and permanently aggravated in 1996, resulting in a different pain syndrome, with right-sided low-back pain and right lower extremity radiation. He opined that it was "clear that the occupational work exposures aggravated her low back condition, whatever that was, and may very well have caused a *de novo* injury, rather than simply an aggravation of an underlying condition."

By decision dated January 11, 2002, the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error. The Office noted that the record did not contain a rationalized opinion prior to the July 1, 1999 decision.

By letter dated January 15, 2002, appellant's representative indicated that a December 11, 2001 report from Dr. Adele R. Sykes, an internist, was enclosed and requested further merit review. In her report, Dr. Sykes indicated that she had treated appellant for 16 years and she did not treat her for her back problem. She indicated that the two physicians who did treat her were no longer in practice; therefore, she had performed a chart review in order to assess appellant's back problem. She concluded that appellant's back problems from the automobile incident were brief and easily treated and it was clear that her work caused increasing pain and inability to perform routine activities.

Appellant made several requests for merit review dated February 1, March 25 and May 2, 2002; appellant's representative also enclosed a December 11, 2001 report from Dr. Sykes. By letter dated June 3, 2002, appellant's representative subsequently made a request for reconsideration.⁴

By letter dated July 19, 2002, the Office advised appellant's representative that it had no request for reconsideration dated February 1, 2002, and the last request was dated November 1, 2001, and the Office ruled that the request was untimely filed.

By letter dated July 25, 2002, appellant's representative requested that his January 15 and February 1, 2002 requests be treated as requests for reconsideration.

³ It appears that the Office treated this as a request for reconsideration as it was addressed to the Office and the request was identified as a reconsideration request.

⁴ He referred to his February 1, 2002 request as a request for reconsideration.

By decision dated October 11, 2002, the Office denied appellant's July 25, 2002 request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁶ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁷ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁸ In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.⁹ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹¹ The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.¹² Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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 *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.¹⁵

⁵ 5 U.S.C. § 8128(a); see *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607 (1999).

⁸ 20 C.F.R. § 10.607(a) (1999).

⁹ 20 C.F.R. § 10.607(b) (1999).

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS

The Office last issued a merit decision on July 1, 1999, which denied appellant's claim on the basis that the evidence was insufficient to establish that appellant sustained an injury as alleged. Appellant's subsequent requests for reconsideration were dated November 1, 2001 and July 25, 2002. As appellant's requests were filed more than one year after the Office's July 1, 1999 decision, they are not timely filed and appellant must demonstrate "clear evidence of error" on the part of the Office in issuing its July 1, 1999 decision.

Appellant submitted with his reconsideration requests, a September 25, 2001 report from Dr. Ryan, Board-certified in physical medicine and rehabilitation, and a December 11, 2001 report from Dr. Sykes, an internist. Dr. Ryan opined that the motor vehicle accident had resolved and occupational work exposures aggravated appellant's low back injury. However, he did not list any of the occupational work exposures, and was not sure which ones may have caused appellant's condition. Dr. Sykes indicated that she did not treat appellant for her back problem and was merely going through a chart review. She determined that appellant's problems from her automobile injury had resolved and her work caused increasing pain and inability to perform routine activities. Neither physician listed any factors of appellant's employment such as the repeated bending and lifting requirements, and neither physician noted that appellant had not worked for the employing establishment since January 28, 1997. The reports did not address the issue of causal relationship, and whether factors of appellant's employment contributed to or aggravated her condition. Therefore, this evidence is insufficient to show that the Office erred in denying appellant's claim on the grounds that she failed to meet her burden of proof to establish an injury due to the claimed employment factors. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.¹⁶ Appellant presented no other evidence or legal argument showing any error in the Office's January 11 and October 10, 2002 decisions.

CONCLUSION

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

¹⁶ *Annie Billingsley*, 50 ECAB 210, 212, n.12 (1998); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.a (June 2002).

ORDER

The October 11 and January 11, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Issued: February 4, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member