

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

WANDA J. POOLE, Appellant

and

**DEPARTMENT OF THE ARMY,
Fort Campbell, KY, Employer**

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**Docket No. 04-503
Issued: June 28, 2004**

Appearances:
Wanda J. Poole, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 9, 2003 appellant filed a timely appeal from an October 22, 2003 decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration as not timely filed and not establishing clear evidence of error. Because more than one year elapsed between the Office's last merit decision of September 26, 2002 and the filing of this appeal on December 9, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d).

ISSUE

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

FACTUAL HISTORY

On January 28, 2002 appellant, then a 60-year-old medical clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury to her right knee on January 25, 2002

when she slipped and fell on a floor while in the performance of duty. Appellant did not stop work.

In a March 27, 2002 report, Dr. Douglas Weikert, a Board-certified orthopedic surgeon, indicated that appellant came in for treatment of her right hand.

In a June 7, 2002 report, Dr. David P. Bealle, a Board-certified orthopedic surgeon, indicated that appellant had articular cartilage wear of the medial compartment but it did not show definitive evidence of meniscal tear or injury and noted that there were degenerative changes of her meniscus. He advised an injection of a corticosteroid.

Appellant filed a recurrence of disability on May 22, 2002.

On August 6, 2002 the Office advised appellant of the additional factual and medical information needed to establish her claim.

By decision dated September 26, 2002, the Office denied appellant's claim.¹ The Office accepted the claimed employment incident of January 25, 2002 but found that the medical evidence was insufficient to establish an injury.

In an undated letter received by the Office on September 30, 2003, appellant requested reconsideration.

In an October 6, 2003 report, Dr. Bealle indicated that appellant fell at work with a twisting injury. He diagnosed a recurrent effusion, with a probable medial meniscus tear.

By decision dated October 22, 2003, the Office denied appellant's 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 vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

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(a) provides that “An application for reconsideration must be sent within one year of the date of the

¹ The Office also advised appellant that, since her claim was denied, she could not file a recurrence.

[Office] decision for which review is sought.” The Board has found that the imposition of this one-year limitation does not constitute an abuse of discretionary authority granted the Office under 5 U.S.C. § 8128(a).²

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine when the application shows “clear evidence of error” on the part of the Office.³ 20 C.F.R. § 607(b) provides: “[the Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.”

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁴ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁵ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ 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.⁸ 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

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ *Charles J. Prudencio*, 41 ECAB 104 (1989); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁵ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁶ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ *See Leona N. Travis*, *supra* note 5.

⁸ *Nelson T. Thompson*, 43 ECAB 919 (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.⁹ The Office's procedure manual states:

“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 and would not require a review of the case....”¹⁰

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 must grant a merit review in the face of such evidence.¹¹

ANALYSIS

In the present case, the most recent merit decision was issued on September 26, 2002. Appellant had one year from the date of that decision to request reconsideration and did not do so until her undated letter was received by the Office on September 30, 2003. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

Appellant's request for reconsideration did not demonstrate clear evidence of error. Appellant did not make any arguments or present any evidence to show that the Office made an error in its decision. Appellant's untimely request for reconsideration does not establish, on its face, that the decision to deny her claim was erroneous. She is not entitled to a merit review of her claim.

Appellant submitted a report dated October 6, 2003 in which Dr. Bealle indicated that appellant sustained a twisting injury with recurrent effusion and a probable medial meniscus tear. This report was insufficient in that it did not contain rationale sufficient to demonstrate that the Office's decision was erroneous or shift the weight of the medical evidence in favor of appellant.¹² The Board finds that the medical evidence is not sufficient to establish error by the Office in denying appellant's claim and does not *prima facie* shift the weight of the medical evidence in favor of the claim.

⁹ *Leon D. Faidley, Jr.*, *supra* note 2.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (June 2002).

¹¹ *Gregory Griffin*, *supra* note 3.

¹² Medical reports not containing rationale on causal relationship are entitled to little probative value and are generally insufficient to meet an employee's burden of proof. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

The Board therefore finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decisions and is insufficient to demonstrate clear evidence of error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 22, 2003 is hereby affirmed.

Issued: June 28, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member