

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

DELORES K. LEEDS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Portland, OR, Employer**

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**Docket No. 04-486
Issued: May 13, 2004**

Appearances:
Delores K. Leeds, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 15, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 7, 2003, which denied her reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the Office's last merit decision dated September 24, 2002 and the filing of the appeal on December 15, 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)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as it was untimely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On June 8, 2002 appellant, then a 47-year-old receptionist clerk, filed an occupational claim alleging that in 1990 she aggravated her neck while working the telephones and placing her neck in a downward position.¹ She stopped working on June 7, 2002.

Appellant submitted a report dated June 20, 2004 from Dr. David P. Ashman, Board-certified in occupational medicine. He considered appellant's history of injury, noting that he had treated her for carpal tunnel syndrome, which was due to computer terminal work at the employing establishment. Dr. Ashman stated that appellant also complained of pain to her forearms and neck. He performed a physical examination and diagnosed carpal tunnel syndrome. Dr. Ashman stated that appellant was known to have rather significant preexisting degenerative joint disease in the cervical spine and was not related to her employment with the employing establishment.

In a report dated June 26, 2002, Dr. Jeffrey C. Pierson, a specialist in general preventive medicine, reviewed appellant's history of injury, noting her prior treatment for carpal tunnel syndrome and a trigger finger and complaint of neck pain. He performed a physical examination, reviewed x-rays and diagnosed chronic neck pain and chronic severe degenerative disc disease of the cervical spine. Dr. Pierson opined that the condition was not caused by appellant's work "but simply feels worse with activities." He stated that he could make no determination whether her neck condition had been aggravated by her work unless he had a full description of her duties.

By letter dated July 2, 2002, the Office informed appellant that additional evidence was needed, including a narrative report from her treating physician addressing how her current condition arose from her employment activities.

In a progress note dated July 30, 2002, Dr. Pierson stated that appellant's duties were not a risk for material worsening of her neck condition and her condition should not be treated as an occupational claim.

By decision dated September 24, 2002, the Office denied the claim, finding that the medical evidence was insufficient to establish that her cervical disc degenerative disease was caused or aggravated by factors of her employment.

By letter dated October 29, 2003, appellant requested reconsideration of the September 29 2002 decision, but did not submit any additional evidence. She contended that there were numerous documents in her file from physicians who stated that her neck was aggravated by stress. Appellant stated that a "Dr. Karlan" documented that her work aggravated her neck and stress.

By decision dated November 7, 2003, the Office denied appellant's claim, stating that her October 29, 2003 letter requesting reconsideration was filed more than a year after the Office's

¹ The Office had previously accepted appellant's claims for stress, No. 142012618 and a neck strain, No. 142012617. She also indicated that she had a claim for carpal tunnel syndrome with the Office.

September 24, 2002 merit decision and was untimely. The Office also found that appellant did not establish clear evidence of error.

LEGAL PRECEDENT

The Office, through its regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² Section 10.607(a) of the implementing regulation provides that an application for reconsideration must be filed within one year of the date of the Office merit decision for which review is sought.³ The imposition of a one-year time limitation, within which to file an application for reconsideration as part of the requirement for obtaining a merit review does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).⁴ This section does not mandate that the Office review a final decision simply upon request by a claimant.

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.⁵ To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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's decision.¹¹ This entails a limited review by the Office of how

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a).

⁴ *Diane Matchem*, 48 ECAB 532 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *Id.*

⁶ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁹ *Leona N. Travis*, *supra* note 7.

¹⁰ *Annie Billingsley*, 50 ECAB 210 (1998).

¹¹ *George C. Vernon*, 54 ECAB __ (Docket No. 02-1954, issued January 6, 2003).

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.¹² 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.¹³

ANALYSIS

Appellant's letter requesting reconsideration was dated October 29, 2003, more than one year after the September 24, 2002 merit decision and was, therefore, untimely. She must, therefore, establish 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.

In the September 24, 2002 decision, the Office found that the evidence of record did not establish that appellant's neck condition was caused or aggravated by her employment. Drs. Ashman and Pierson both diagnosed degenerative disc disease which the physicians indicated was a preexisting condition. Dr. Pierson, for instance, stated that appellant had degenerative disc disease for several years. Both doctors, however, opined that the degenerative disc disease was not work related or aggravated by her federal employment job duties.

Appellant contended in her request for reconsideration that she had medical documentation showing that her neck condition was aggravated by her employment. However, she did not submit any medical evidence to substantiate her contentions. Appellant has, therefore, presented no evidence to establish clear error in the Office's September 24, 2002 decision denying her claim.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for review on November 7, 2003. The Board finds that appellant failed to submit evidence establishing clear error on the part of the Office in her reconsideration request dated October 29, 2003. As her reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further merit review.

¹² *Jimmy L. Day*, 48 ECAB 654 (1997).

¹³ *Thankamma Mathews*, 44 ECAB 765 (1993).

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: May 13, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member