

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

JOSEPHINE M. MERCER, Appellant

and

**DEPARTMENT OF THE AIR FORCE,
NEWARK AIR FORCE STATION, Newark, OH
Employer**

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**Docket No. 04-2251
Issued: August 1, 2005**

Appearances:
Josephine M. Mercer, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On August 30, 2004 appellant filed a timely appeal of an August 4, 2004 decision of the Office of Workers' Compensation Programs which denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error.¹ Because more than one year has elapsed between the most recent merit decision dated June 26, 1995, 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) and 501.3(d)(2).

¹ Appellant, on appeal, indicated that she wanted to appeal the November 14, 2003 Board's decision in Docket No. 03-2179. However, the Board no longer has jurisdiction in that matter since the Board's decision became final 30 days following the issuance of that decision. The Board's records for that appeal do not indicate that appellant filed a petition for reconsideration with the Board within 30 days from the date of issuance of the Board's November 14, 2003 decision. See 20 C.F.R. § 501.7.

ISSUE

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

FACTUAL HISTORY

This case has twice previously been on appeal before the Board.² In the last appeal, the Board issued a November 14, 2003 decision, which found that appellant's untimely request for reconsideration failed to demonstrate clear evidence of error in the Office's last merit decision dated June 26, 1995, which denied modification of a March 13, 1995 decision, denying appellant's claim for continuing medical benefits and compensation, on the grounds that the medical evidence did not establish that the current condition and need for treatment were the result of an employment injury sustained 27 years earlier. The facts and the history contained in the prior appeal are incorporated by reference.³

Subsequent to the Board's November 14, 2003 decision, appellant requested reconsideration by letter dated July 20, 2004. In her letter, she indicated that she was submitting new medical evidence. Appellant also alleged that she continued to suffer from her injury and that it continued to be painful and was worsening. She referred to a newspaper article about a golfer who underwent a similar ulnar nerve surgery. Appellant also submitted two additional medical reports.

In a May 10, 2004 report, Dr. Joshua Nelson, a Board-certified neurologist noted appellant's February 12, 1968 employment injury and advised that appellant related that she was still having problems with her left arm. He also noted that she had neck pain in 1984. Dr. Nelson diagnosed cervical radiculopathy and paresthesias, and recommended a magnetic resonance imaging (MRI) scan of the lumbar spine. He also noted that appellant's arm was so obese it was difficult to judge any atrophy. Dr. Nelson indicated that regarding appellant's carpal tunnel syndrome, ulnar nerve neuropathy and brachial plexitis, there was insufficient information to make a definitive diagnosis."

In a July 20, 2004 report, Dr. Nelson again noted appellant's history of injury and treatment, which included whiplash in 1984. He conducted an examination and advised that an MRI scan of the neck showed spondylosis at C4-5 and C5-6 but that "there was no definite nerve pinching." Dr. Nelson diagnosed cervical radiculopathy, ulnar nerve neuropathy, carpal tunnel syndrome and tremor.

² Docket No. 03-2179 (issued November 14, 2003) and Docket No. 84-1353 (issued November 6, 1984). In the November 6, 1984 decision, the Board found that appellant was not entitled to more than a 17 percent permanent loss of use of the left arm for which she received a schedule award.

³ Appellant, then a 48 year-old clerk typist, injured her left arm on February 12, 1968 when she opened a door at work. The Office accepted her claim for left lateral humeral epicondylitis, tear of extensor aponeurosis and lateral condyle of the humerus with functional overlay.

In a letter dated July 23, 2004, appellant related that she had discussed her medical issues with Dr. Nelson and that she had asked him if the ulnar nerve caused the problems with her left hand such as the spreading of the fingers, pain, weakness and loss of use and indicated that he stated, “absolutely.” She related that she believed she should be paid benefits for her pain since 1968.

By decision dated August 4, 2004, 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 Act⁴ 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.”⁵

The Office’s imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).⁶ This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through 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.⁷

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.⁸

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8128(a).

⁶ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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. Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.⁹ 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. 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 merit review in the face of such evidence.¹⁰

Office procedures provide that 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which 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 would not require a review of a case.¹¹

ANALYSIS

The record reflects that the Office accepted appellant's claim for left lateral humeral epicondylitis, tear of extensor aponeurosis and lateral condyle of the humerus with functional overlay and that she received a schedule award for 17 percent permanent loss of use of the left arm.

In its August 4, 2004 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on June 26, 1995. Appellant's July 20, 2004 letter requesting reconsideration was submitted more than one year after the June 26, 1995 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

⁹ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

¹⁰ *Id.*

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

The Board 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 decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether the Office on June 26, 1995 properly determined that appellant did not meet her burden of proof to establish that her claim for compensation and ongoing medical benefits were causally related to her February 12, 1968 employment injury.

Appellant submitted two reports from Dr. Nelson dated May 10 and July 20, 2004. He noted that appellant was still having problems with her left arm and indicated that her arm was so obese it was difficult to judge any atrophy. Appellant provided a diagnosis of cervical radiculopathy, ulnar nerve neuropathy, carpal tunnel syndrome and tremor. However, these conditions were not accepted by the Office. Dr. Nelson did not provide any opinion with respect to how the carpal tunnel syndrome, spondylosis, cervical radiculopathy or the tremors were related or subsequently developed as a result of her accepted employment injury.¹² The Board had held that medical opinions not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet appellant's burden of proof.¹³

Appellant alleged that she continued to suffer from her injury and that it continued to be painful and was worsening. However, she had previously made these arguments, which were considered. Evidence that duplicates evidence already of record is insufficient to establish clear evidence of error.¹⁴ Appellant also referred to a newspaper article about a golfer who underwent a similar ulnar nerve surgery. However, she did not submit medical evidence showing how this was relevant to her claim.¹⁵ Appellant also alleged that she had discussed her medical issues with Dr. Nelson and he advised her that the ulnar nerve had caused the problems with her left hand. However, she did not provide a report from Dr. Nelson regarding this or otherwise submit evidence sufficient to *prima facie* shift the weight of the evidence in her favor. Therefore, her argument is not sufficient to establish clear evidence of error as the underlying issue is medical in nature.

The Board finds that the evidence submitted with appellant's untimely reconsideration request is insufficient to raise a substantial question as to the correctness of the Office's decision. Because appellant's untimely request for reconsideration failed to demonstrate clear evidence of error in the Office's decision denying appellant's claim for continuing benefits and compensation, the Office properly denied a merit review of her claim.

¹² *Charles E. Burke*, 47 ECAB 185 (1995).

¹³ *Caroline Thomas*, 51 ECAB 451 (2000).

¹⁴ *George C. Vernon*, 54 ECAB ____ (Docket No. 02-1954, issued January 6, 2003).

¹⁵ The Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee. *William C. Bush*, 40 ECAB 1064, 1075 (1989).

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.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 4, 2004 is affirmed.

Issued: August 1, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board