

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

LEE E. MAJOR, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Detroit, MI, Employer**

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**Docket No. 05-918
Issued: August 2, 2005**

Appearances:
Steve Burt, for the appellant
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 March 10, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated March 3, 2005 which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the last merit decision dated November 26, 2003 and the filing of this appeal on March 10, 2005, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2 and 501.3.

ISSUE

The issue on appeal is whether the Office properly determined that appellant's request for reconsideration dated February 4, 2005 was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On April 19, 1999 appellant, then a 41-year-old letter carrier, filed a claim for an April 17, 1999 back injury sustained in a motor vehicle accident while delivering mail. The Office accepted appellant's claim for chest wall strain and lumbosacral contusion. Appellant did not stop work.

Appellant came under the care of Dr. Ruth B. Campbell, a Board-certified general surgeon, who noted treating appellant on April 19, 1999 for chest wall strain and abrasion of the right middle back. She returned appellant to work subject to restrictions.

On May 4, 1999 appellant filed a CA-2a, notice of recurrence of disability noting that on April 20, 1999 she was working light duty and experienced back, shoulder and spine pain which was causally related to her work injury of April 17, 1999. Appellant stopped work on April 22, 1999 and returned on May 4, 1999.

In a decision dated August 6, 1999, the Office denied appellant's claim. On September 3, 1999 appellant requested an oral hearing before an Office hearing representative. Appellant submitted additional medical evidence from Dr. Grant J. Hyatt, a Board-certified orthopedist, dated July 29 to November 16, 1999 and Dr. Abelardo G. Contreras, a Board-certified neurologist, dated June 11 to November 15, 1999.

Appellant came under the treatment of John J. Blasé, a psychologist, who noted performing neuropsychological testing and an evaluation of appellant on October 25, 1999. He advised that appellant experienced a significant psychological and chronic pain reaction to the work injury of April 17, 1999 and diagnosed pain disorder, depression and anxiety secondary to trauma of April 17, 1999. On December 10, 1999 an Office medical adviser recommended that counseling for appellant's chronic pain and psychological condition should be authorized as work related.¹

The hearing was held on March 28, 2000. In a decision dated June 21, 2000, the hearing representative affirmed the decision of the Office dated August 6, 1999.

On April 19, 2000 appellant underwent a fitness-for-duty examination performed by Dr. John V. Corbett, a Board-certified orthopedist, who noted that appellant sustained a contusion and sprain of the spine and right shoulder for which she still experienced moderate symptoms. He opined that appellant could return to work with restrictions on bending, overhead work and lifting.

Appellant submitted a February 12, 2001 report from Dr. Contreras who noted appellant's continued complaints of low back pain, cervical and right shoulder pain. He advised that diagnostic tests and a neurological examination revealed no abnormalities. Dr. Contreras noted that appellant was also treated for depression and anxiety. He opined that, due to a lack of response to treatment and emotional lability, appellant was not able to return to a position that required driving, walking distances or carrying more than 25 pounds.

¹ While the Office authorized this treatment, the Office did not accept an emotional condition.

On December 12, 2001 the Office referred appellant to Dr. Thomas Ditkoff, a Board-certified orthopedist, for a second opinion evaluation. In a report dated January 21, 2002, Dr. Ditkoff discussed appellant's work history and advised that the examination failed to reveal any objective physical findings which correlated with appellant's present complaints. He noted that a magnetic resonance imaging (MRI) scan was normal. Dr. Ditkoff concluded that appellant did not have any continuing orthopedic problems or disability and could resume her regular activities as a letter carrier without restrictions.

The Office found that a conflict of medical opinion had been established between Dr. Contreras, for appellant, and Dr. Ditkoff, an Office referral physician, regarding whether appellant had residuals of her accepted injury. To resolve the conflict, the Office referred appellant to Dr. Sidney H. Goldman, a Board-certified orthopedic surgeon, who indicated, in a report dated May 15, 2002, that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury. Dr. Goldman noted an essentially normal physical examination. Dr. Goldman opined that appellant had no disabling orthopedic condition and advised that her lumbosacral contusion has improved and she has reached maximum medical improvement. He indicated that appellant could return to regular duty in her job as a letter carrier.

On June 11, 2002 the Office referred appellant to Dr. Elliot Wolf, a Board-certified psychiatrist, for a second opinion evaluation to determine if appellant had any psychiatric residuals of her April 17, 1999 work injury. In a report dated September 30, 2002, Dr. Wolf discussed appellant's work history. He noted an essentially normal examination. Dr. Wolf opined that there was no evidence of a diagnosable psychiatric disorder which was related to the motor vehicle accident on the job on April 17, 1999. He advised that appellant was fit for duty without restrictions.

On December 4, 2002 the Office issued a notice of proposed termination of compensation benefits on the grounds that Drs. Goldman and Wolf's reports dated November 15 and September 30, 2002 established no residuals of the work-related employment injury.

Appellant submitted a CA-17, duty status report, dated January 27, 2003, prepared by Dr. Contreras which noted that appellant could work subject to various restrictions.

By decision dated February 3, 2003, the Office terminated appellant's compensation benefits effective that same day.

In letters dated August 26 and November 14, 2003, appellant requested reconsideration and submitted additional reports from Dr. Jerome V. Ciullo, a Board-certified orthopedist, dated March 20 to August 14, 2003. In his report of March 20, 2003, Dr. Ciullo noted appellant's persistent complaints of right shoulder pain. He diagnosed a possible partial thickness tear of the rotator cuff and recommended a diagnostic arthroscopy. In the physician's report of August 14, 2003, he noted performing a thermal capsular shift for instability subacromial impingement repair. Dr. Ciullo advised that appellant was progressing slowly postoperatively and could return to work subject to various restrictions.

In a merit decision dated November 26, 2003, the Office denied modification of the prior decision.

On February 4, 2005 appellant through her representative requested reconsideration and submitted another report from Dr. Ciullo dated October 19, 2004. Dr. Ciullo noted treating appellant since February 12, 2002 for a right shoulder injury. Appellant report that she was involved in a motor vehicle accident on April 17, 1999 while at work and sustained a shoulder injury. He noted positive findings upon physical examination and noted that diagnostic testing revealed a partial-sided tear of the supraspinatus tendon inside the joint. Dr. Ciullo performed arthroscopic surgery of the shoulder on July 30, 2003. He concluded that, based on appellant's history of her shoulder injury and given her lack of previous symptoms, it was most likely that the motor vehicle accident of April 17, 1999 caused appellant's right shoulder injury.

By decision dated March 3, 2005, the Office denied appellant's request for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

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.”²

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 the Office will not review a decision unless the application for review is filed within one year of the date of that decision.³

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. 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 be manifested on its face that the Office committed an error.⁴

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁴ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁵

Evidence that 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 the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁸ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.⁹

ANALYSIS

In its March 3, 2005 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on November 26, 2003 and appellant's request for reconsideration was dated February 4, 2005 which was more than one year after November 26, 2003. Accordingly, appellant's request for reconsideration was not timely filed.

The Board has also reviewed the evidence submitted with appellant's untimely reconsideration request and concludes that a merit review is also not warranted as appellant has not established clear evidence of error on the part of the Office in its most recent merit decision.

The report from Dr. Ciullo dated October 19, 2004 advised that he treated appellant since February 12, 2002 for a right shoulder injury appellant reported was caused by a motor vehicle accident on April 17, 1999 while at work. However, this report is irrelevant to the termination of compensation benefits for the accepted conditions of chest wall strain and lumbosacral contusion. The Board notes that Dr. Ciullo addressed a right shoulder injury; however, appellant's condition was not accepted for a right shoulder injury, rather the Office accepted a chest wall strain and lumbosacral contusion. He did not review nor address whether appellant had residuals of the accepted conditions of chest wall strain and lumbosacral contusion. The Board finds that this evidence is insufficient to raise a substantial question as to the correctness of the Office decision and does not establish that the termination of appellant's compensation benefits was improper. Finally, Dr. Ciullo's report concluded that, based on appellant's history of her shoulder injury and given her lack of previous symptoms, "it is most likely that the motor vehicle accident of April 17, 1999 was the cause of her right shoulder injury." Although

⁵ *Annie L. Billingsley*, *supra* note 3.

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

⁸ *Id.*

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

Dr. Ciullo noted that there it was “most likely” that appellant’s current condition was caused by the accident of April 17, 1999, he couched his opinion in speculative terms. The Board has held that medical opinions which are speculative or equivocal in character have little probative value.¹⁰ The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in appellant’s favor. The Board finds that this evidence does not establish that the termination of appellant’s benefits on November 26, 2003 was improper.

The Board, therefore, finds these records are insufficient to raise a substantial question as to the correctness of the Office’s merit decision and the Office properly denied appellant’s reconsideration request.¹¹

CONCLUSION

The Board, therefore, finds that the Office properly determined that appellant’s request for reconsideration dated February 4, 2005 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2005 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: August 2, 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

¹⁰ See *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

¹¹ Appellant submitted new evidence on appeal; however, the Board cannot consider new evidence on appeal. See 20 C.F.R. § 501.2(c).