

FACTUAL HISTORY

On October 17, 2001 appellant, then a 34-year-old mail processor, filed a traumatic injury claim alleging that she injured her lower abdomen when a bird flew toward her face and she abruptly bent forward to avoid it.² At the time of this incident, appellant was performing light-duty work due to her pregnancy.

In an August 15, 2001 report, Dr. Rehana Sajjad, an attending obstetrician, indicated that appellant had a history of a previous delivery by caesarean section and hypertension. She recommended that appellant rest until August 17, 2001 due to abdominal pain.

In an October 18, 2001 report, Dr. Sajjad noted that appellant had abdominal pain due to the October 17, 2001 incident at work and recommended rest until October 24, 2001. An October 24, 2001 note indicated that appellant should rest at home until November 7, 2001 due to her high risk pregnancy and backache. On November 14, 2001 Dr. Sajjad indicated that appellant should be off work until March 4, 2002, because of the risk of preterm labor contractions.

In response to a November 9, 2001 letter from the employing establishment on November 15, 2001, Dr. Sajjad initialed a statement, which indicated that appellant was “totally disabled due to the incident of [October 17, 2001].” However, on November 20, 2001 Dr. Sajjad initialed the statement which indicated that appellant was “totally disabled due to condition other than the [October 17, 2001] incident.”

By decision dated June 1, 2002, the Office denied appellant’s claim on the grounds that the evidence failed to establish that she sustained an injury on October 17, 2001 at the time, place and in the manner alleged, causally related to her employment.

In a June 19, 2002 report, Dr. Sajjad stated that on October 17, 2001 appellant was injured when a bird entered the workplace and frightened her, causing her to bend down suddenly to avoid being struck. She began having preterm labor contractions and was hospitalized. Dr. Sajjad recommended bed rest at home. She indicated that appellant delivered her baby prematurely on November 18, 2001.

By decision dated October 11, 2002, the Office denied modification of its June 1, 2002 decision.

In a letter dated October 8, 2003, dated stamped by the Office on October 10, 2003, appellant, through her attorney, stated:

“[Appellant] received a decision dated October 12, 2002 [sic] denying her compensation benefits due to a lack of sufficient medical evidence which supported an injury on October 17, 2001.

² Appellant alleged that she felt pressure and constant cramping in her abdomen.

“That decision essentially noted previous abdominal pain issues prior to the date of injury. Prior to October 17, 2001, [appellant] was pregnant and was not suffering from any medical issues or complaints. Her previous complaint of abdominal pain was in August 2001, which did not cause any difficulty with her pregnancy nor did her complaints at the time cause any preterm labor.

“It was not until October 17, 2001 did she suffer an injury so significant that it caused a condition which was never experienced by her on any prior occasion. The act of ducking to avoid a flying bird in the workplace, while unusual, was sudden enough to cause the preterm labor issues. Dr. Sajjad has submitted a letter to that effect which is enclosed herein.

“The [Office] duly noted abdominal pain and understandably questioned whether this prior experience could be a preexisting condition which resulted in her preterm labor issues.

“[Appellant] told Dr. Sajjad that she never experienced an event such as the one she experienced on October 17, 2001. This caused the doctor to immediately place her on home rest which thankfully resulted in the birth of a healthy baby in November 2001.

“The point here is that the medical records[,] while indicative of prior abdominal pain, never caused immediate bed rest as stated herein. It was a substantial event which caused the doctor to immediately order bed rest. The result was positive and[,] while your review certainly is legitimate, her physician does not reference any prior condition which would have given rise to this condition.

“[W]e appreciate your consideration of this matter and hope that you take into consideration this evidence.”

In an October 6, 2003 report, received by the Office on October 10, 2003, Dr. Sajjad stated that, following the October 17, 2001 incident at work, she experienced preterm labor contractions on and off and was advised to rest at home. She indicated that appellant delivered prematurely on November 18, 2001. Dr. Sajjad opined that if appellant had not rested at home it was possible that she would not have been able to prolong her pregnancy and the health of her baby could have been compromised. She stated that appellant needed to be off work and should be compensated.

On February 23, 2004 appellant requested reconsideration. She stated: “This is in reference to my letter dated ... October 8, 2003.”

By decision dated April 22, 2004, the Office denied appellant’s February 23, 2004 request for reconsideration on the grounds that it was not timely submitted and failed to show clear evidence of error in the October 11, 2002 merit decision.

On June 2, 2004 appellant requested reconsideration of the April 22, 2004 decision and submitted additional evidence.³

By decision dated October 26, 2004, the Office reissued its April 22, 2004 decision because it was not clear whether appellant's authorized representative had been provided with a copy of that decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ 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 compensation.⁶ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.⁷ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁸ 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.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed

³ Appellant submitted a July 23, 2004 report from Dr. Sajjad. The Office did not consider this evidence when it reissued its April 22, 2004 decision on October 26, 2004. The Board has no jurisdiction to consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. § 8128(a).

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁶ *Id.* at 768.

⁷ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

⁸ *Thankamma Mathews*, *supra* note 5 at 769.

⁹ 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

¹⁰ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *Leona N. Travis*, 43 ECAB 227 (1991).

¹² *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003).

so as to produce a contrary conclusion.¹³ 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 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.¹⁴ 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.¹⁵

ANALYSIS

The Board finds that appellant's October 8, 2003 letter constituted a timely request for reconsideration.

Section 8128(a) of the Act¹⁶ vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

“The Secretary of Labor may review an award for or against payment of compensation at any time on [her] 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.”

20 C.F.R. § 10.606 states that an employee seeking reconsideration should send the application for reconsideration to the address as instructed in the final decision and that the application must be submitted in writing and must set forth arguments and contain evidence that shows that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹⁷

With regard to the contents of a request for reconsideration, the Office's procedure manual provides: “While no special form is required, the request must be in writing, identify the decision and the specific issue(s) for which reconsideration is being requested and be accompanied by relevant new evidence or argument not previously considered.”¹⁸

¹³ *Leona N. Travis*, *supra* note 11

¹⁴ *Darletha Coleman*, *supra* note 12.

¹⁵ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁶ 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.606. *See also Larry G. Schlosser*, 54 ECAB ___ (Docket No. 02-2169, issued December 23, 2002).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2a (June 2002).

Appellant's October 8, 2003 letter, stamped as received by the Office on October 10, 2003, constituted a timely request for reconsideration. It was addressed to the address provided with the October 11, 2002 decision to be used for requests for reconsideration, it identified the decision and the specific issue for which reconsideration was being requested and it was accompanied by relevant and pertinent evidence not previously considered by the Office.¹⁹ The request was date stamped as received by the Office within one year of the October 11, 2002 decision.

CONCLUSION

The Board finds that the Office improperly denied appellant's request for reconsideration as untimely. The case is remanded for a review of appellant's timely request for reconsideration and the evidence submitted under the appropriate standard of review.²⁰

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 26, 2004 is set aside and the case remanded for further development consistent with this decision.

Issued: December 16, 2005
Washington, DC

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

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ The October 6, 2003 report of Dr. Sajjad addressed the issue of causal relationship between appellant's disability and the October 17, 2001 incident at work.

²⁰ The Board notes that on June 2, 2004 appellant submitted a request for reconsideration of the April 22, 2004 decision and submitted additional medical evidence in the form of a July 23, 2004 report from Dr. Sajjad. However, this medical report was not considered by the Office before it reissued its April 22, 2004 decision on October 26, 2004.