

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

DEBORAH H. MILLIGAN, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 04-2168
Issued: March 18, 2005**

Appearances:
Ronald S. Webster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On September 2, 2004 appellant filed a timely appeal from the August 9, 2004 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration of whether she was entitled to a waiver of overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision. Because the Office has not issued a decision on the merits of the claim within the year prior to the filing of this appeal, the Board has no jurisdiction to review the merits of this case.¹

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

¹ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her present appeal with the Board on September 2, 2004, the only decision properly before the Board is the Office's August 9, 2004 nonmerit decision denying appellant's request for reconsideration. See *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. § 501.3(d)(2).

FACTUAL HISTORY

On March 2, 1994 appellant, then a 37-year-old letter carrier, filed a CA-1 traumatic injury claim form alleging that she injured her ankle while carrying a mailbag. Her claim was accepted for right ankle strain. Appellant was a part-time contractual employee and her contract was not renewed when it expired on September 25, 1994. She underwent several surgeries and was ultimately released to sedentary-level work. Appellant underwent vocational rehabilitation and became employed as a secretary/receptionist and later as a realtor associate.

In an attempt to obtain medical evidence with regard to permanent impairment entitling appellant to a schedule award, the Office made arrangements for a second opinion evaluation on November 16, 2001, which she failed to attend. By decision dated December 4, 2001, the Office suspended appellant's right to compensation due to her obstruction or refusal to submit to a second opinion examination. She missed two later appointments which were scheduled for January 16 and 21, 2002. Appellant appeared for examination on February 18, 2002. By decision dated April 2, 2002, the Office found that the period of total obstruction was December 4, 2001 through January 21, 2002 and reinstated her compensation benefits effective January 22, 2002. The Office's hearing representative affirmed the April 2, 2002 decision on December 19, 2002.

By letter dated December 17, 2001, the Office issued a preliminary finding that appellant had been overpaid benefits in the amount of \$12,309.58. The Office stated that she had been paid based on an incorrect pay rate of \$402.35 instead of the correct rate of \$336.60 for the period May 2, 1994 through October 6, 2001 and that she had been underpaid due to an incorrect loss of wage-earning capacity determination since November 1, 1999. The Office further indicated that the underpayment had been applied to the overpayment amount to reduce the amount of the overpayment. Additionally, the Office found that appellant was without fault in creating the overpayment and advised her to submit any additional evidence in support of a request waiver of the overpayment within 30 days.

On January 23, 2002 the Office finalized its preliminary overpayment decision and found that appellant was not entitled to a waiver in that she did not respond to the preliminary decision. The Office also decided that the debt should be recovered in full since appellant had been suspended from the periodic rolls, due to noncompliance with a second opinion.

A memorandum to the file dated April 15, 2003, reflects that an Office claims examiner left a message on appellant's answering machine to the effect that her compensation benefits were being applied to the overpayment and that she and her attorney "need to follow their appeal rights that were attached to the final decision dated January 23, 2002" if they disagree with the decision.

By letter dated January 6, 2004, appellant stated a desire to "appeal the previous decision on [her] overage payment." By letter received by the Office on July 17, 2004, a paralegal in appellant's attorney's office requested a merit review of the January 23, 2002 decision,²

² It should be noted that the first page of the letter received from a paralegal in appellant's attorney's office was dated May 10, 2004, while the second page was dated July 14, 2004.

contending that waiver was denied due to appellant's suspension from the periodic rolls and that the January 23, 2002 order was erroneously finalized on January 28, 2003, after appellant's benefits were reinstated.³

By decision dated August 9, 2004, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error.⁴

LEGAL PRECEDENT

The Federal Employees' Compensation Act⁵ provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁶

The application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁷

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and reviewed on its merits.⁸ Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁹

20 C.F.R. § 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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 which does not raise a

³ Although appellant's attorney's paralegal states that the January 23, 2002 order was erroneously finalized on January 28, 2003, the record contains no evidence that the order was finalized on January 28, 2003 or that any other order was entered on that date. The record reflects that the January 23, 2002 decision was the last formal decision of the Office on the issue of overpayment prior to its August 9, 2004 decision denying reconsideration.

⁴ The Office's August 9, 2004 decision incorrectly states that appellant requested reconsideration of its January 23, 2003 decision. The record contains no evidence of a decision dated January 23, 2003.

⁵ 5 U.S.C. §§ 8101 *et seq.*

⁶ 20 C.F.R. § 10.605.

⁷ 20 C.F.R. § 10.606.

⁸ *Donna L. Shahin*, 55 ECAB ____ (Docket No. 02-1597, issued December 23, 2003).

⁹ 20 C.F.R. § 10.608.

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ 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. 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 also 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.¹¹

ANALYSIS

The Board finds that the Office properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed within the one-year time limitation and that the application failed to present clear evidence of error.

In the present case, the most recent merit decision on the issue of overpayment was the Office's January 23, 2002 decision. Appellant had one year from the date of that decision to request reconsideration but failed to do so. By letter dated January 6, 2004, she stated a desire to "appeal the previous decision on [her] overage payment" and by letter received by the Office on July 17, 2004, a paralegal in appellant's attorney's office requested a merit review of the January 23, 2002 decision. The Office properly determined that appellant's application for review was not timely filed. Therefore, the Board must address whether she has demonstrated clear evidence of error by the Office.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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.¹² The Office properly found that appellant's contention, that waiver was denied due to her suspension from the periodic rolls and that the January 23, 2002 order was erroneously finalized after her benefits were reinstated, failed to show clear evidence of error.

The underlying issue in this case is waiver of overpayment. On January 23, 2002 the date of the final decision regarding waiver, appellant was suspended from the periodic rolls due to noncompliance with a second opinion. Although on April 2, 2002 her benefits were reinstated effective January 22, 2002 the reinstatement of suspended compensation has no bearing on the issue of waiver. Waiver may only be granted if appellant is not at fault in the creation of the

¹⁰ See *Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005); see also *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004).

¹¹ See *Alberta Dukes*, *supra* note 10.

¹² See *Leona N. Travis*, 43 ECAB 227 (1991).

overpayment and recovery of the overpayment would be against equity and good conscience or recovery would defeat the purpose of the Act.¹³ The Office denied waiver because appellant failed to submit any financial information. Waiver must be denied if no financial information is submitted. No further request for waiver shall be entertained until such time as the requested information is provided.¹⁴ Appellant's argument that waiver should be granted because compensation benefits were reinstated does not establish that the Office erred in denying waiver because she failed to submit the necessary financial information. Therefore, the Board finds that the January 23, 2002 decision was not clearly erroneous and the Office's ruling to recover the debt payment in full was in accordance with Office procedures.¹⁵

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 August 9, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹³ 5 U.S.C. § 8129.

¹⁴ 20 C.F.R. § 10.438.

¹⁵ See *supra* note 3.