

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

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**J.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
St. Petersburg, FL, Employer**

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**Docket No. 06-1093  
Issued: August 28, 2006**

*Appearances:*  
*Dean Albrecht, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 10, 2006 appellant filed a timely appeal of the January 17, 2006 decision of the Office of Workers' Compensation Programs, which denied further merit review on the basis that her request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated March 14, 2004 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).

**ISSUE**

The issue is whether the Office properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

**FACTUAL HISTORY**

On January 22, 2004 appellant, then a 49-year-old sales associate, filed a traumatic injury claim alleging that, on January 16, 2004, as a result of lifting a heavy package, she sustained pain in her lower back. The employing establishment controverted the claim.

Appellant submitted reports by her treating chiropractor, Dr. Suzanne H. Thatcher, who diagnosed a lumbar sprain/strain and sacroilitis causally related to her federal employment. She indicated that appellant was temporarily totally disabled from February 3 to 16, 2004. Dr. Thatcher referred appellant to Dr. Haig Yardumian, an osteopath, for further treatment. Appellant also submitted a handwritten report from Dr. Yardumian dated January 23, 2004. Dr. Yardumian indicated that appellant had an acute lumbar sprain/strain, acute thoracic strain, acute sacroiliac strain and major generalized degenerative joint disease.

By decision dated March 10, 2004, the Office denied appellant's claim for compensation. The Office found that, although the incident of January 16, 2004 occurred as alleged, there was no medical evidence establishing a diagnosis connected to this event. The Office noted that the chiropractor's report was not considered medical evidence under the Federal Employees' Compensation Act as it did not diagnose a subluxation of the spine as demonstrated by x-ray.

On September 24, 2004 the employing establishment sent the Office a September 17, 2004 letter that it received from appellant, who requested that her file be "reviewed and reopened." Appellant alleged that she had not notified that the claim was disapproved. She listed the claim number she was appealing, indicated that the appeal was with regard to the on-the-job injury she sustained in January 2004 and alleged that all forms were submitted in a timely manner. Appellant enclosed medical evidence that was previously submitted. In a February 13, 2004 return to work slip, Dr. Thatcher indicated that appellant could return to work as of February 17, 2004. The Office received these letters on September 27, 2004, but did not respond. On May 23, 2005 appellant filed an appeal with this Board. On October 12, 2005 the Board dismissed appellant's appeal as there was no final adverse decision in appellant's case issued within one year of her appeal to the Board.<sup>1</sup>

On October 20, 2005 the Office received a facsimile from Dr. Thatcher indicating, "[January 23, 2004] -- show [through] x-rays subluxation get 60 days manual manipulation."

By letter to the Office dated November 14, 2005, appellant's representative indicated that there had been no decision on appellant's request dated September 24, 2004.

The Office treated the November 14, 2005 letter as a request for reconsideration. In a decision dated January 17, 2006, the Office denied appellant's request as it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>2</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>3</sup> The Office, through

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<sup>1</sup> *Joyce M. Sutherland* (Docket No. 05-1279, issued October 12, 2005).

<sup>2</sup> 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

regulations, has imposed limitations on the exercise of its discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>4</sup> One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>5</sup> In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents clear evidence of error on the part of the Office in its most recent merit decision.<sup>6</sup>

### ANALYSIS

The one-year time limitation begins to run on the date following the date of the original Office decision. Therefore, appellant had one year from March 14, 2004 to submit a timely request for reconsideration. The Office found that, as it received appellant's November 14, 2005 letter, which it found to be a request for reconsideration, over one year after the March 14, 2004 merit decision, the request was untimely.

However, the Board notes that the Office also received a September 17, 2004 letter from appellant on September 27, 2004, in which she requested that her claim be "reviewed and reopened," and submitted additional evidence. The Board finds that appellant's September 17, 2004 letter constituted a request for reconsideration. Although appellant's letter did not mention the word reconsideration, the Board has held that a request for reconsideration need not contain the word "reconsideration." In *Vicente P. Taimanglo*,<sup>7</sup> *Gladys Mercado*,<sup>8</sup> and *Jack D. Johnson*,<sup>9</sup> the Board found that letters written by the employees constituted timely requests for reconsideration even though they did not mention the word reconsideration. In *Taimanglo*, the Board noted that, while no special form is required, the request must be made in writing, identify the decision and the specific issue(s) for which reconsideration is being requested and be accompanied by relevant and pertinent new evidence or argument not considered previously.<sup>10</sup>

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<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> 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. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>7</sup> *Vicente P. Taimanglo*, 45 ECAB 504 (1984).

<sup>8</sup> *Gladys Mercado*, 52 ECAB 255 (2001).

<sup>9</sup> *Jack D. Johnson*, 57 ECAB \_\_\_\_ (Docket No. 06-433, issued May 17, 2006).

<sup>10</sup> Federal (FECA Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2(a) (January 2004); *Vicente P. Taimanglo*, *supra* note 7.

In *Taimanglo*, claimant had identified the Office decision in his letter, indicated that additional medical evidence had been submitted and stated that he was waiting for a response. The Board found that the letter constituted a timely request for reconsideration. In *Mercado*, the claimant asked the Office to help her reopen her case, provided her case number and submitted additional medical evidence. The Board found that the claimant's letter constituted a timely request for reconsideration. In *Johnson*, the claimant advised the Office that he was enclosing pertinent information related to his claim and provided his file number. The Board found that this letter was a timely request for reconsideration.

In the present case, appellant submitted a letter to the employing establishment which was forwarded to the Office. She identified her claim number and indicated that she was appealing the decision with regard to her January 2004 injury. Appellant argued that she had not received notice that her claim was disapproved and also contended that all information was submitted in a timely manner. She submitted a February 13, 2004 return to work slip by Dr. Thatcher which was not previously in the record. Considering these factors, the Board finds that appellant's September 17, 2004 letter, filed within one year of the March 14, 2004 merit decision, constituted a timely request for reconsideration.

As appellant timely requested reconsideration, the Office improperly denied her reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. The Board will remand the case to the Office for review of the new medical evidence under the proper standard of review for a timely reconsideration request, to undertake any appropriate additional development it deems necessary and to issue an appropriate decision.

### **CONCLUSION**

The Board finds that appellant's September 17, 2004 letter constituted a request for reconsideration which was timely as it was filed within one year of the March 10, 2004 decision. The Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 17, 2006 is vacated and the case remanded to the Office for further proceedings consistent with this opinion of the Board.

Issued: August 28, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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