



## **FACTUAL HISTORY**

On September 3, 1998 appellant, then a 36-year-old laborer, filed an occupational disease claim alleging that she sustained tendinitis as a result of the duties of her federal employment. On February 3, 1999 the Office accepted appellant's claim for left lateral epicondylitis and bilateral carpal tunnel syndrome. Appellant returned to light-duty work on July 17, 1998. She was off work from July 27 to August 4, 1998. She returned to normal duties on August 5, 1998. She was terminated from her employment on September 30, 1998.

By letter dated April 27, 1999, the employing establishment noted that appellant had been on a temporary assignment that terminated September 30, 1998. On May 5, 1999 she underwent surgery for a left submuscular ulnar nerve transposition and release. On December 18, 2000 the Office granted a schedule award for a five percent impairment of the left arm. The Office found that there was zero percent impairment to the right arm. The Office based its decision on the report of Dr. William F. Wagner, a Board-certified orthopedic surgeon specializing in surgery of the hand. He applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed.) and concluded that appellant had a five percent impairment of the left upper extremity based on residual symptoms of pain and sensory changes related to the ulnar nerve.

On May 14, 2003 appellant filed a claim for compensation benefits from September 1998 to present. By decision dated September 12, 2003, the Office denied her claim. The Office noted that appellant was a temporary employee who returned to full duty prior to the completion of her term of employment in October 1998. The Office indicated that there was no medical evidence which established any period of total disability between October 1998 and May 1999.

On March 6, 2005 appellant requested that her case be reopened "starting from December 2002." She submitted a November 9, 2004 report from Dr. Stephen B. Schnall, a Board-certified orthopedic surgeon specializing in surgery of the hand. He reviewed appellant's medical record and listed findings on examination. Dr. Schnall concluded that the evaluations of appellant had been "commensurate with her problems and treatments." He did not recommend further occupational or physical therapy.

In a December 1, 2004 report, Dr. Norman P. Zemel, a Board-certified orthopedic surgeon specializing in surgery of the hand, indicated that appellant developed complaints in her left upper extremity beginning in September 1998 and subsequently developed complaints in her right upper extremity. Dr. Zemel noted that her persistent complaints indicated compression or irritation of the median and ulnar nerves in both upper extremities, and recommended further diagnostic studies. On December 20, 2004 he reviewed the results of electrodiagnostic tests, which indicated compression of the ulnar nerve at both elbows but no compression of the median nerve in the extremities. Dr. Zemel recommended that appellant utilize a wrist splint and did not recommend surgery. In a March 2, 2005 report, he noted that appellant had complaints of pain in both upper extremities and had not worked since May 2001. He was uncertain as to why she experienced pain, particularly in the right upper extremity, neck and shoulder, and recommended that she see an orthopedic surgeon.

In a December 20, 2004 report, Dr. Luga Podesta, a Board-certified physiatrist, interpreted nerve conduction studies as consistent with ulnar nerve entrapment, neuropathy of the right cubital tunnel and ulnar nerve entrapment of the left cubital tunnel.

By decision dated June 7, 2005, the Office denied appellant's request for reconsideration as untimely filed and insufficient to establish clear evidence of error.

### **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.”

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 an application for reconsideration must be set within one year of the date of the [Office] decision for which review is sought. The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>1</sup>

The Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must undertake a limited review to determine whether the application shows clear evidence of error.<sup>2</sup> 20 C.F.R. § 10.607(b) provides: [The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>3</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>4</sup> It is not enough merely to show that

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<sup>1</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>2</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>3</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>4</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

the evidence could be construed so as to produce a contrary conclusion.<sup>5</sup> 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.<sup>6</sup> 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 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 decision.<sup>7</sup> 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.<sup>8</sup>

### ANALYSIS

The most recent merit decision by the Office was issued on September 12, 2003. Appellant had one year from the date of that decision to request reconsideration but did not do so until March 6, 2005. The Board finds that the Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office also properly found that appellant's request for reconsideration did not demonstrate clear evidence of error. In order to establish clear evidence of error, the newly submitted evidence must be relevant to the issue which was decided by the Office and must be positive, precise and explicit that the Office committed an error. The Board notes that the medical reports submitted in support of the reconsideration request do not address her disability for the claimed period. Appellant has not established that she was totally disabled from October 1998 through May 1999. Dr. Schnall concluded that the previous evaluations of appellant had been "commensurate with her problems and treatments." He did not address the issue of whether appellant was disabled from October 1998 through May 1999. Dr. Zemel indicated that he was uncertain as to why appellant was presently in pain and recommended that she see an orthopedic surgeon. He did not address the issue of her disability for work during the period October 1998 through May 1999. Accordingly, none of the evidence appellant submitted after the Office's most recent merit decision establishes that the Office clearly erred in denying her claim.

By decision dated June 7, 2005, the Office denied appellant's request for reconsideration for the reason that it was untimely filed and appellant failed to establish clear evidence of error.

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<sup>5</sup> See *Leona N. Travis*, *supra* note 4.

<sup>6</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>7</sup> *Leon D. Faidley, Jr.*, *supra* note 1.

<sup>8</sup> *Gregory Griffin*, *supra* note 2.

**CONCLUSION**

The Board finds that the Office properly found that appellant's March 6, 2005 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 7, 2005 is affirmed.

Issued: January 13, 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