

FACTUAL HISTORY

On September 13, 2001 appellant, then a 49-year-old medical clerk, filed a traumatic injury claim alleging that she sustained neck, shoulder and back injuries due to pulling a heavy filing cabinet drawer and typing a purchase order at work on July 16, 2001. Appellant was working in a light-duty clerical position at the time of her claimed injury.²

Appellant submitted an August 21, 2001 note in which Dr. Thomas M. Ward, an attending physician Board-certified in physical medicine and rehabilitation, indicated that she would not be able to return to work on September 11, 2001.

By letter dated October 30, 2001, the Office requested that appellant submit additional factual and medical evidence in support of her claim. The Office advised appellant that her case would be held open for 30 days to afford her the opportunity to submit the requested evidence.³

Appellant submitted an August 2, 2001 report in which Dr. Ward stated that she reported in July 2001 that her light-duty position required muscular activities, which were no less injurious than those required by her regular nursing work for the employing establishment. Dr. Ward indicated that appellant's neck, upper extremity and back symptoms were related to the "proposed injury." In an August 16, 2001 report, Dr. Ward reported the findings of diagnostic testing, which showed multilevel degenerative disc disease of the cervical spine and recommended that appellant not return to work. In a September 11, 2001 report, Dr. Ward stated that the majority of appellant's neck pain was caused by "the repetitive trauma and chronic irritation in her neck that simply never has a chance to improve with extended periods of rest and postural and mechanical improvements over that ensuing recovery."

By decision dated November 28, 2001, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained an injury in the performance of duty on July 16, 2001.

On December 3, 2001 the Office received an undated statement in which appellant provided additional description of her work activities on July 17, 2001 and detailed the history of her symptoms and medical treatment.⁴

² Appellant took sick leave and stopped work for periods after July 16, 2001. It appears that appellant previously sustained an injury at work in December 1998, but the precise nature of this injury is unclear from the record and is not the subject of the present appeal.

³ The Office requested that appellant submit a "comprehensive medical report" which included a diagnosis of her medical condition and a medical explanation as to how the reported work incident caused or aggravated the claimed injury.

⁴ The Office also received a cover letter dated November 25, 2001 in which appellant indicated that she was submitting "additional information as requested concerning my medical claim." On January 2, 2002 the Office received a December 17, 2001 report in which Dr. Ward discussed treatment appellant received on December 17, 2001. Appellant later submitted January 28 and May 8, 2002 reports in which Dr. Ward further discussed her medical treatment and her work capabilities.

On December 5, 2001 the Office received an October 31, 2001 report in which Dr. Ward stated that he treated appellant for an “alleged July 16, 2001 work-related injury.” He indicated that appellant attributed her “subjective complaints of increased pain” to an attempt to open a filing cabinet while working as a medical clerk. Dr. Ward discussed the results of diagnostic testing, which showed multilevel degenerative disc disease of the cervical spine and detailed his treatment of appellant’s neck, upper extremity and back complaints. He stated that appellant’s treatment “was medically necessary following an alleged injury at work related to medical clerk job duties” and noted that it was “not unlikely that the work she was doing caused her increased cervical, shoulder and arm symptoms and as such this would be an exaggeration or an aggravation of a preexisting condition more than any clinical diagnosis or entity in her case.”

By letter dated July 15, 2005, appellant, through her attorney, requested reconsideration of the Office’s November 28, 2001 decision. Appellant argued that the November 28, 2001 decision was improper because it was issued less than 30 days after the October 30, 2001 letter in which the Office requested that she submit additional evidence. Appellant also argued that the Office never requested that she provide additional medical evidence to establish causal relationship. She claimed that she submitted evidence in a timely manner, which was not processed until after the November 28, 2001 decision was issued and asserted that this evidence, including Dr. Ward’s October 31, 2001 report and a supplemental factual statement, showed that she sustained an employment-related injury on July 16, 2001.

In connection with the reconsideration request, appellant’s attorney resubmitted a copy of Dr. Ward’s October 31, 2001 report, which the Office originally received on December 5, 2001, as well as copies of the undated factual statement and November 25, 2001 cover letter, which the Office originally received on December 3, 2001.

By decision dated August 15, 2005, the Office denied appellant’s request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees’ Compensation Act.⁶

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”⁷ The Office regulations and procedure provide that the

⁵ 20 C.F.R. § 10.607(a).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.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 decision.¹⁴

ANALYSIS

In its August 15, 2005 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on July 15, 2005, more than one year after the Office's November 28, 2001 decision and therefore she must demonstrate clear evidence of error on the part of the Office in issuing this decision.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its November 28, 2001 decision, which denied her claim that she sustained an employment injury on July 16, 2001.¹⁵ The evidence and argument submitted by appellant in connection with her

⁸ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁵ Appellant alleged that she sustained neck, shoulder and back injuries due to pulling a heavy filing cabinet drawer and typing a purchase order at work on July 16, 2001.

reconsideration request does not raise a substantial question concerning the correctness of the Office's decision.

Appellant argued that the Office's November 28, 2001 decision was improper because it was issued less than 30 days after the October 30, 2001 letter in which the Office requested that she submit additional evidence within 30 days. However, this argument is irrelevant as appellant did not explain how the fact that the November 28, 2001 decision was issued 29 days rather than 30 days after the October 30, 2001 letter would constitute clear evidence of error regarding the Office's determination that she did not establish the occurrence of an employment-related injury. The record reveals that appellant did not submit any evidence or argument within 30 days of the October 30, 2001 letter, which was not considered in the Office's November 28, 2001 decision. Under these circumstances, it is unclear how the Office's issuance of its decision on November 28, 2001 would constitute clear evidence of error with respect to the disposition of the main issue of the present case, *i.e.*, whether appellant submitted sufficient medical evidence to establish that she sustained an injury in the performance of duty on July 16, 2001. Appellant also argued that the Office never requested that she provide additional medical evidence to establish causal relationship, but a cursory review of the Office's October 30, 2001 letter shows that the Office requested that she submit a "comprehensive medical report" which included a medical explanation as to how the reported work incident caused or aggravated the claimed injury.

Appellant also asserted that her claim was established by the submission of a supplemental factual statement, which provided additional description of her medical history and July 16, 2001 work duties and an October 31, 2001 report of Dr. Ward, an attending physician Board-certified in physical medicine and rehabilitation.¹⁶ The submission of the factual statement would not show clear evidence of error because it is not relevant to the main issue of the present case, which is medical in nature and generally would be resolved by the submission of medical evidence. Appellant's submission of the October 31, 2001 report of Dr. Ward is not relevant because the report does not contain a clear opinion that she sustained an employment injury on July 16, 2001. In his report, Dr. Ward noted that appellant had alleged the occurrence of an injury on July 16, 2001 and had reported experiencing increased pain after an attempt to open a filing cabinet while working as a medical clerk. Although Dr. Ward suggested that appellant's reported increase in cervical, shoulder and arm symptoms was related to her work duties, his comments in this regard were vague in nature and he did not clearly indicate that appellant sustained injury on July 16, 2001 due to the implicated employment factors or identify a specific medical condition that she might have sustained on that date.¹⁷

For these reasons, the evidence and argument submitted by appellant in connection with her reconsideration request do not have sufficient probative value to *prima facie* shift the weight

¹⁶ Appellant suggested that she submitted these documents in a timely manner, but that the Office failed to process them until after the November 28, 2001 decision was issued. She did not, however, provide any support for this assertion.

¹⁷ Appellant submitted other medical reports but these reports were irrelevant as they did not contain an opinion that she sustained an employment-related injury on July 16, 2001.

of the evidence in favor of the claimant or otherwise raise a substantial question as to the correctness of the Office's November 28, 2001 decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 15, 2005 decision is affirmed.

Issued: January 23, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board