

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

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**EARIE J. SEALS, Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Iowa City, IA, Employer**

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**Docket No. 06-707  
Issued: June 9, 2006**

*Appearances:*  
*Earie J. Seals, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge

**JURISDICTION**

On February 3, 2006 appellant filed a timely appeal of the December 21, 2005 decision of the Office of Workers' Compensation Programs denying her request for reconsideration as untimely and failing to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated June 1, 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). Accordingly, the only decision properly before the Board is the November 8, 2005 decision denying her request for reconsideration.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

On September 5, 1997 appellant, then a 48-year-old physical therapist, filed a claim alleging that she experienced pain and tightness in her lower back on that date while assisting in a transfer of an obese patient from a wheelchair to a mat.<sup>1</sup>

By decision dated August 20, 1998, the Office denied appellant's claim, finding that the medical evidence submitted was insufficient to establish a causal relationship between appellant's claimed medical condition and factors of employment.

Appellant submitted numerous requests for reconsideration. By decision dated September 11, 1998, the Office denied appellant's September 9, 1998 request in that her letter was insufficient to warrant a review of the August 20, 1998 decision. On December 2, 1999 the Office found that although appellant had established that an injury had occurred on September 5, 1997, she had failed to establish a causal relationship between the injury and her diagnosed condition. On that basis, the Office denied modification of the August 20, 1998 decision. By decision dated September 7, 2000, the Office again denied modification on the grounds that appellant had failed to establish causal relationship. On March 6, 2003 the Office denied modification of its prior decision, finding that the medical evidence failed to provide a rationalized medical opinion connecting appellant's medical condition to the September 5, 1997 work injury.

In its most recent merit decision dated June 1, 2004, the Office denied modification on the grounds that appellant had failed to establish a causal relationship between her diagnosed condition and the September 5, 1997 work injury.

In a letter dated May 31, 2005, which the Office received on June 6, 2005, appellant requested reconsideration of the Office's June 1, 2004 decision. The envelope containing the reconsideration request is not of record. Her request was accompanied by reports from Dr. Patrick Hitchon, a Board-certified neurosurgeon, dated November 21, 1997 and February 5, 2004. Dr. Hitchon opined that appellant's current low back condition was causally related to her "September 17, 1997" work injury. Appellant also submitted a May 24, 2005 report from Dr. Richard F. Neiman, a Board-certified neurologist, who opined that appellant's cervical disc disease was causally related to "September 17, 1997" and May 11, 2002 work injuries.

By decision dated December 21, 2005, the Office denied appellant's request for reconsideration, finding that it was untimely filed and did not establish clear evidence of error.

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<sup>1</sup> The record reflects that appellant filed another traumatic injury claim on June 16, 2002 for injuries sustained to her back while lifting a patient from a wheelchair to a standing position, No. 112009794. The Office accepted appellant's claim on January 2, 2003 for aggravation of lumbosacral degenerative joint disease.

## LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation 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 regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<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. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>7</sup> Therefore, appellant had one year from June 1, 2004 to submit a timely request for reconsideration. The Office received appellant's May 31, 2005 request for reconsideration on June 6, 2005. Because the request was received more than one year after the June 1, 2004 merit decision, the Office found the request to be untimely.

The Board notes that Office regulations and Chapter 2.1602.3(b)(1) of the Office procedure manual provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope.<sup>8</sup> The Board notes that

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<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, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607 (1999).

<sup>5</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>6</sup> 20 C.F.R. § 10.607(b) (1999). 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's 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 decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>7</sup> *Donna M. Campbell*, 55 ECAB \_\_\_\_ (Docket No. 03-2223, issued January 9, 2004).

<sup>8</sup> *See* 20 C.F.R. § 10.607(a). The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

the envelope containing the request was not retained in the record. The Office procedure manual states that, when there is no evidence to establish the mailing date, the date of the letter itself should be used.<sup>9</sup> For this reason, the Board finds that as appellant's reconsideration request was dated May 31, 2005 and there is no other evidence to establish the mailing date, her request for reconsideration was timely filed. As she timely filed her request for reconsideration within one year of the June 1, 2004 merit decision, the Office improperly denied appellant's reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case to the Office for review of this evidence under the proper standard of review for a timely reconsideration request.

### **CONCLUSION**

The Board finds that appellant's May 31, 2005 request for reconsideration was timely filed.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 21, 2005 decision of the Office of Workers' Compensation Programs is set aside and remanded for action consistent with this opinion.

Issued: June 9, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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<sup>9</sup> *Id.* See also *Donna M. Campbell*, *supra* note 7.