

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

PHYLLIS A. EVANS, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Decatur, GA, Employer**

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**Docket No. 06-758
Issued: June 16, 2006**

Appearances:
Phyllis A. Evans, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 13, 2006 appellant filed a timely appeal from a September 8, 2005 decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On February 13, 2001 appellant, then a 58-year-old outpatient clerk, filed an occupational disease claim asserting that on or before August 14, 2000, she sustained neck pain with radiculopathy into the left upper extremity and the left side of her body due to keyboarding at work. She submitted nurse's notes dated August 2000 to January 2001. December 2000 cervical x-rays showed degenerative disc disease. In a March 2, 2001 letter, her supervisor described

appellant's data entry and clerical duties. The Office advised appellant in a March 15, 2001 letter of the necessity of submitting rationalized medical opinion explaining the claimed causal relationship between her clerical duties and cervical radiculopathy.

By decision dated April 16, 2001, the Office denied appellant's claim on the grounds that the medical evidence was insufficiently rationalized to establish causal relationship.¹

In a letter dated April 21, 2005, appellant requested reconsideration of the April 16, 2001 decision, asserting that computer data entry tasks, answering the telephone and other clerical duties caused her claimed neck condition. She submitted additional evidence.

Appellant sought treatment for cervical radiculopathy from three physicians.² In reports from January to June 2004, Dr. Kaushik Amin, an attending Board-certified internist, diagnosed cervical spondylosis with neuropathy. In an April 1, 2004 report, Dr. Karuna Shah, an attending osteopath Board-certified in neurology, related appellant's account of using a computer and telephone at work and her pain symptoms. On May 11, 2004 Dr. Shah diagnosed cervical spondylosis, greatest at C4-5, based on an April 10, 2004 magnetic resonance imaging scan of the cervical spine and a normal nerve conduction velocity study of both upper extremities. In an August 4, 2004 report, Dr. Christopher E. Wilson, an attending Board-certified physiatrist, related appellant's history of neck and shoulder pain.

Appellant also submitted documents from November 1994 to September 2005, regarding knee, hip and wrist conditions. She submitted therapy notes dated from January 2001 to April 2004, nurse's notes dated from August 1995 to June 2004, May 2004 laboratory test results and a position description.

By decision dated September 8, 2005,³ the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.⁴ The Office found that appellant's April 21, 2005 request was not filed within one year of the April 16, 2001 decision, the final decision in the case. The Office further found that the evidence submitted did not establish clear evidence of error as it did not address causal relationship, the crucial issue in the case at the time of the April 16, 2001 decision.

¹ On March 9, 2004 appellant filed a second occupational disease claim for cervical radiculopathy commencing on August 14, 2000 due to keyboarding and clerical duties at work. The Office assigned the claim file number 062116804. In an October 26, 2004 letter, the Office advised appellant that it had deleted file number 062116804 as it was duplicative of file number 062028723. The Office noted that all records from both files would be combined under file number 062028723.

² December 6, 2000 cervical spine x-rays showed degenerative disc disease.

³ The Office originally issued the decision on August 10, 2005, but mailed it to an incorrect address. Therefore, the Office reissued the decision on September 8, 2005.

⁴ Appellant submitted additional evidence accompanying her request for appeal. The Board may not consider evidence for the first time on appeal that was not of record at the time the Office issued the final decision in the case. 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁷ The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁸ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁹

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.¹⁰ Office regulation states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ To

⁵ 5 U.S.C. § 8128(a).

⁶ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁷ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁸ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁹ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 6; *Jesus D. Sanchez*, *supra* note 7.

¹⁰ *Thankamma Mathews*, *supra* note 6.

¹¹ 20 C.F.R. § 10.607(b).

¹² *Thankamma Mathews*, *supra* note 6.

¹³ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁴ *Jesus D. Sanchez*, *supra* note 7.

¹⁵ *Leona N. Travis*, *supra* note 13.

¹⁶ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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's decision.¹⁷ The Board must make 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.¹⁸

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on April 16, 2001, denying appellant's claim for cervical radiculopathy on the grounds that causal relationship was not established. Appellant's April 21, 2005 letter requesting reconsideration was untimely as it was submitted more than one year after the last merit decision.¹⁹ The issue is whether appellant's April 21, 2005 request for reconsideration demonstrated clear evidence of error in the Office's April 16, 2001 decision.

In support of her April 21, 2005 request for reconsideration, appellant submitted reports from three attending physicians. Dr. Amin, a Board-certified internist and Dr. Shah, an osteopath Board-certified in neurology, both diagnosed cervical spondylosis. Dr. Wilson, an attending Board-certified physiatrist, did not provide a diagnosis. Although Dr. Shah noted that appellant used a computer and telephone at work, he did not explain how and why these duties would cause or contribute to the claimed cervical radiculopathy. Dr. Amin and Dr. Wilson did not mention work factors.

The Board finds that these reports are insufficient to establish that the Office erred in issuing the April 16, 2001 decision as they do not address the relevant issue of causal relationship. The reports do not raise a substantial question as to the correctness of the Office's April 16, 2001 decision, which found that appellant had not established causal relationship.²⁰ Therefore, they are insufficient to establish clear evidence of error.²¹

Appellant also submitted documents regarding other musculoskeletal conditions, a position description, therapy notes, nurse's notes and laboratory reports. These statements do not contain relevant evidence regarding whether work factors caused or aggravated the claimed condition. Thus, these statements do not raise a substantial question as to whether the Office's April 16, 2001 decision was in error or *prima facie* shift the weight of the evidence in appellants favor. Therefore, they are insufficient to establish clear evidence of error.

¹⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁸ *Gregory Griffin*, *supra* note 8.

¹⁹ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

²⁰ *Thankamma Matthews*, *supra* note 6.

²¹ *Id.*

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of her April 21, 2005 request for reconsideration do not *prima facie* shift the weight of the evidence in her favor or raise a substantial question as to the correctness of the Office's April 16, 2001 decision and are thus insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error in the Office's April 16, 2001 decision, the last merit decision in the case. Therefore, the September 8, 2005 decision of the Office denying appellant's April 21, 2005 request for reconsideration was proper under the law and facts of this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 8, 2005 is affirmed.

Issued: June 16, 2006
Washington, DC

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

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