

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

LORRAINE E. WESSON, Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Los Angeles, CA,
Employer**

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**Docket No. 06-271
Issued: March 16, 2006**

Appearances:
Lorraine E. Wesson, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 14, 2005 appellant filed a timely appeal from the August 12, 2005 nonmerit decision of the Office of Workers' Compensation Programs which denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the reconsideration issue.

ISSUE

The issue is whether the Office properly denied appellant's April 13, 2005 request for reconsideration.

FACTUAL HISTORY

On January 27, 2003 appellant, then a 53-year-old mail processor, filed a claim alleging that she developed several conditions in the performance of duty, including a herniated disc at L5-S1 with displacement of the left S1 nerve root; a condition at C2-3 and C4-5; painful knees, hips and legs; and tendinitis of the hand and arm with swelling. She had a prior lumbosacral

strain injury on or about April 2, 1985 from lifting at work.¹ Appellant also had a prior low back injury on or about March 15, 1999 from sorting flats.²

In a decision dated April 1, 2003, the Office denied appellant's claim on the grounds that the evidence failed to establish that the claimed medical conditions resulted from the accepted work-related events.

On appeal³ the Board found that appellant failed to establish that she developed neck, arm, hand or knee conditions causally related to factors of her federal employment. As the record contained only scant factual information on the aspects of appellant's employment that she claimed led to the development of these conditions. Moreover, she did not submit a rationalized medical opinion to establish a causal relationship. The Board also found, however, that the case was not in posture for decision on whether appellant sustained an employment-related herniated disc at L5-S1 with associated leg symptoms. A second opinion physician concluded that her current back condition occurred within the course of her duties and that the diagnosed severe degenerative disc disease and herniated disc at L5-S1 were medically connected to factors of employment by direct cause. He stated that appellant's lumbar strain and herniated disc permanently aggravated her preexisting degenerative disc disease. Finding that the medical evidence raised an uncontroverted inference of causal relationship, the Board remanded the case for further development of the evidence. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On remand the Office referred appellant, together with the record and a statement of accepted facts, to Dr. Joseph Pierce Conaty, a Board-certified orthopedic surgeon. In a report dated November 28, 2003, he reviewed the statement of accepted facts and appellant's medical records. Appellant confirmed that she injured her back on January 27, 2003. In the course of her work that day, her back suddenly "went out" and she experienced a significant increase in back discomfort. Dr. Conaty reported his findings on physical examination and the results of x-rays. He stated that appellant had a long-standing and severe degenerative disc disease of L5-S1 with associated herniated nucleus pulposus and evidence of a Grade 1 spondylolisthesis of L4 on L5. Dr. Conaty stated that it was his opinion that the incident of January 27, 2003 resulted in a temporary increase in appellant's back discomfort related to the presence of her long-standing degenerative disease and the disc disease that was chronically present at the lumbosacral level, resulting in an aggravation. He reported that the January 27, 2003 injury was temporary, a soft-tissue injury that would resolve within six weeks or at most three months, at which time her complaints would then be attributed to the preexisting degenerative condition. Dr. Conaty stated that appellant did not have residuals of the January 27, 2003 work incident. Her current symptoms were the result of the normal manifestation of her well-documented preexisting disease.

¹ Office File No. 13-0763219.

² Office File No. 13-1201115.

³ Docket No. 03-1325 (issued July 18, 2003).

On February 2, 2004 the Office issued a notice of proposed termination of compensation on the grounds that the weight of the medical evidence, as represented by Dr. Conaty's report, established that appellant no longer had residuals of her work-related conditions and that her current back conditions were not causally related to her employment injury of January 27, 2003.⁴

In a decision dated March 8, 2004, the Office finalized its notice of proposed termination and terminated benefits effective that date. In an attached statement of appeal rights, the Office notified appellant that any request for reconsideration must be made within one calendar year of the date of the decision.

On or about April 13, 2005 appellant requested reconsideration. She submitted electrodiagnostic findings on her right knee, left knee, right shoulder and lumbar spine. Appellant also submitted a March 9, 2005 report from Dr. William J. Mealer, a Board-certified orthopedic surgeon. After relating her history, he reported that appellant had sustained significant injuries to her neck, lower back, right shoulder, right arm and both knees as a direct result of her federal employment. Dr. Mealer described the physical requirements of her position and attributed her various medical complaints to these activities. He reported that on March 15, 1999 she sustained a significant herniated disc at L5-S1 with displacement of the left S1 nerve root. Dr. Mealer stated that this condition progressed due to extensive sitting, bending and twisting throughout the day, causing increased lower back pain.

In a decision dated August 12, 2005, the Office denied appellant's request for reconsideration. The Office found that her request was untimely and failed to present clear evidence of error, that the most recent merit decision was incorrect. The Office noted that the underlying issue in the case was appellant's lumbar spine condition and that any other injuries that Dr. Mealer discussed were irrelevant.

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.”⁵

⁴ Appellant appealed to the Board but on August 27, 2004 the Board issued an order dismissing the appeal for want of jurisdiction because the notice of proposed termination was not a final decision of the Office. Docket No. 04-0971 (issued August 27, 2004).

⁵ 5 U.S.C. § 8128(a).

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 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application 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.⁶

The term “clear evidence of error” is intended to represent a difficult standard. 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.⁷ If clear evidence of error has not been presented, the Office should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁸

ANALYSIS

With respect to appellant’s low back condition, the most recent decision on the merits of her case is the Office March 8, 2004 decision terminating benefits effective that date. She had one year from the date of that decision or until March 8, 2005, to make a timely request for reconsideration. Because appellant did not make her request until April 13, 2005, the Office properly found that her request was untimely.

To obtain a review of the merits of her case, therefore, appellant must present clear evidence of error in the Office’s March 8, 2004 decision. In that decision, the Office found that Dr. Conaty’s opinion represented the weight of the medical evidence and established that appellant no longer suffered residuals of the employment-related temporary aggravation of her preexisting lumbosacral condition. The electrodiagnostic studies that appellant submitted to support her request for reconsideration do not address this issue and do not establish that the Office’s March 8, 2004 decision was clearly erroneous.

With respect to appellant’s low back, Dr. Mealer’s report is not inconsistent with Dr. Conaty’s. Both physicians reported that appellant, who had a herniated disc at L5-S1, later experienced a significant increase in lower back discomfort in the course of her employment. Dr. Conaty explained that this aggravation was temporary, while Dr. Mealer simply stated that the pain she was suffering was industrial in origin. But he did not clarify whether he meant that appellant was currently experiencing low back pain as a result of her March 15, 1999 injury -- which is not the subject of the underlying claim -- or that she was continuing to have residuals of her subsequent, accepted aggravation. The Board finds that appellant has not presented clear evidence of error in the Office’s March 8, 2004 decision.

⁶ 20 C.F.R. § 10.607 (1999).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

⁸ *Id.* Chapter 2.1602.3.d(1).

CONCLUSION

The Board finds that the Office properly denied appellant's April 13, 2005 request for reconsideration. Her request was untimely and failed to present clear evidence of error in the Office's most recent merit decisions. Appellant is, therefore, not entitled to a merit review of her case.

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 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