

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

M.H., Appellant

and

**DEPARTMENT OF JUSTICE, U.S. ATTORNEY'S
OFFICE, WESTERN DISTRICT OF TENNESSEE,
Memphis, TN, Employer**

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) **Docket No. 06-1876**
) **Issued: April 13, 2007**
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Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 11, 2006 appellant filed a timely appeal of a July 5, 2006 decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error. Because more than one year has elapsed between the last merit decision dated May 4, 2005 and the filing of this appeal on August 11, 2006, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's May 5, 2006 request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error.

FACTUAL HISTORY

On January 25, 2005 appellant, then a 37-year-old legal assistant, filed an occupational disease claim (Form CA-2) asserting that she sustained a herniated cervical disc in the performance of duty on or before March 15, 2000. She attributed her condition to overwork in early 2000 and lifting heavy boxes of files from early 2000 onward. Appellant noted that she had previously claimed a ganglion cyst of the right wrist. She submitted medical evidence.

In an August 28, 2001 report, Dr. Michael J. Sorenson, an attending orthopedist, diagnosed right carpal tunnel syndrome, cervical spine pain and possible radicular pain. He noted appellant's employment as a "legal secretary" at the employing establishment for the past 20 months. In an October 3, 2002 report, Dr. Freddie Everson, an attending Board-certified family practitioner, diagnosed a right wrist ganglion and right shoulder pain. In a January 19, 2005 report, Dr. Francis X. Camillo, an attending Board-certified orthopedic surgeon, diagnosed neck pain. In a January 24, 2005 report, he attributed appellant's symptoms to a left-sided C5-6 herniation with foraminal narrowing. Dr. Camillo submitted February 18 and April 6, 2005 follow-up reports prescribing medication and physical therapy.¹

In a February 15, 2005 letter, the employing establishment controverted the claim, asserting that appellant did not notify her supervisor of any back pain until January 25, 2005 and that she was not ordered to lift file boxes.

In a March 9, 2005 letter, the Office advised appellant of the additional evidence needed to establish her claim. The Office emphasized the need to submit rationalized medical evidence from her attending physician explaining how and why work factors would cause the claimed herniated cervical disc.

In an April 15, 2005 letter, appellant asserted that a supervisor ordered her to lift boxes of files. She listed contact information for several coworkers to verify her account of lifting file boxes.

By decision dated May 4, 2005, the Office denied appellant's claim on the grounds that causal relationship was not established.

In a letter dated May 4, 2006 and postmarked May 5, 2006, appellant requested reconsideration.² She asserted that the medical evidence of record was sufficient to establish causal relationship. Appellant asserted that the Office erred by not contacting individuals she named as witnesses. She submitted a January 20, 2005 magnetic resonance imaging (MRI) scan report showing disc bulging at C4-5, C5-6, an April 13, 2005 state compensation form and copies of Dr. Camillo's reports previously of record.

¹ Appellant submitted physical therapy notes dated from January to March 2005.

² Appellant also submitted an undated appeal rights form requesting reconsideration of an unspecified decision. In a May 18, 2006 letter, the Office requested that she clarify which appeal right she asserted. Appellant responded on June 1, 2006 that she requested reconsideration. She also submitted a May 30, 2006 appeal rights form requesting reconsideration of the May 4, 2005 decision.

By decision dated July 5, 2006, the Office denied appellant's May 5, 2006 request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. The Office found that appellant's May 5, 2006 request was untimely as it was filed more than one year after the May 4, 2005 merit decision. The Office further found that appellant's May 4, 2006 letter and the accompanying evidence did not establish that the Office erred in denying her claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵ 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.⁶ 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).⁷

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.⁸ 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.⁹

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

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁶ 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).

⁷ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 4 at 769; *Jesus D. Sanchez*, *supra* note 5 at 967.

⁸ *Thankamma Mathews*, *supra* note 4 at 770.

⁹ 20 C.F.R. § 10.607(b).

¹⁰ *Thankamma Mathews*, *supra* note 4 at 770.

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Jesus D. Sanchez*, *supra* note 5 at 968.

so as to produce a contrary conclusion.¹³ 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.¹⁴ 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's decision.¹⁵ 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.¹⁶

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 May 4, 2005. Appellant's request for reconsideration was untimely filed as it was postmarked on May 5, 2006, more than one year after the last merit decision.¹⁷ It must now be determined whether appellant's May 5, 2006 request for reconsideration demonstrated clear evidence of error in the Office's May 4, 2005 decision.

Appellant's May 4, 2006 letter asserted that the medical evidence was sufficient to establish causal relationship between a herniated cervical disc and work factors. The Board finds that this letter does not raise a substantial question as to whether the Office's May 4, 2005 decision was in error or *prima facie* shift the weight of the evidence in appellant's favor. Therefore, it is insufficient to establish clear evidence of error. The MRI scan report, state compensation form and Dr. Camillo's reports do not contain medical rationale addressing the critical issue of causal relationship and are thus irrelevant to the claim. Therefore, they are insufficient to raise a substantial question as to the correctness of the Office's May 4, 2005 decision.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of her May 5, 2006 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 May 4, 2005 decision and are thus insufficient to demonstrate clear evidence of error.

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁶ *Gregory Griffin*, *supra* note 6.

¹⁷ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error in the Office's May 4, 2005 decision, the last merit decision in the case. Therefore, the July 5, 2006 decision of the Office denying appellant's May 5, 2006 request for reconsideration was proper under the law and the facts of this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 5, 2006 is affirmed.

Issued: April 13, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board