

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

K.H., Appellant)
)
and) **Docket No. 07-905**
) **Issued: August 1, 2007**
U.S. POSTAL SERVICE, POST OFFICE,)
St. Louis, MO, Employer)

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 February 2, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 21, 2006 nonmerit decision denying her request for further review of her case on the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of the Office was its November 25, 2003 decision denying appellant's recurrence of disability claim. Because more than one year has elapsed between the last merit decision and the filing of this appeal on February 2, 2007, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

The issue is whether 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.

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On February 3, 1996 appellant, then a 39-year-old mail handler, filed an occupational disease claim alleging that she sustained injury on February 3, 1996 when a pack of magazines struck the top of her head. The claim was given file number 11-0147420. The Office accepted that appellant sustained a neck sprain and head trauma/contusion. Appellant later alleged that she sustained a recurrence of total disability on May 7, 2003 due to her February 3, 1996 employment injury. In a November 25, 2003 merit decision, the Office denied appellant's recurrence of disability claim.

On June 17, 2003 appellant filed an occupational disease claim alleging that she sustained injury beginning in March 2003 due to the performance of various repetitive work duties over time. The claim was given file number 11-2016761. In an August 20, 2003 merit decision, the Office denied appellant's occupational disease claim.

In April 2004 appellant requested a hearing before an Office hearing representative in connection with the Office's November 25, 2003 decision.² In a May 17, 2006 decision, the Office denied appellant's hearing request on the grounds that she had previously requested reconsideration of the November 25, 2003 decision on December 2, 2003. In an October 5, 2006 order remanding case, the Board set aside the Office's May 17, 2006 decision and remanded the case to the Office for assemblage of the December 2, 2003 reconsideration request and the Office's December 18, 2003 decision mentioned in the May 17, 2006 decision. The Office added appellant's December 2, 2003 reconsideration request letter and its December 18, 2003 decision to the record. In the December 2, 2003 letter, appellant's representative requested reconsideration of the Office's November 25, 2003 decision on appellant's behalf without providing any argument.

In a November 8, 2006 letter, received by the Office on November 13, 2006, appellant requested reconsideration of her file numbers 11-0147420 and 11-2016761. She stated, "These cases were returned back to the [d]istrict Office from [the Employee's Compensation Appeals Board] further adjudication being for the record new information had been submitted, that was not considered in your decision of 2003."

By decision dated November 21, 2006, 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. The Office found that appellant did not show clear evidence of error in the Office's August 20, 2003 decision associated with file number 11-2016761 or the Office's November 25, 2003 decision associated with file number 11-0147420.

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.³

² In April 4, 2006 letters, appellant argued that she sustained a recurrence of disability in May 2003 because she experienced the same pain symptoms while keying mail that she had experienced in the past.

³ 20 C.F.R. § 10.607(a).

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 Act.⁴

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.”⁵ Office regulations and procedure provide that the 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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ 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.¹²

ANALYSIS

In its November 21, 2006 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant’s reconsideration request was filed on

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ 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.

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² *Leon D. Faidley, Jr.*, *supra* note 4.

November 13, 2006, more than one year after the Office's August 20 and November 25, 2003 decisions, and therefore she must demonstrate clear evidence of error on the part of the Office in issuing these decisions.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its August 20 and November 25, 2003 decisions. She did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In a November 8, 2006 letter, received by the Office on November 13, 2006, appellant requested reconsideration of the Office's August 20, 2003 decision associated with file number 11-2016761 and the Office's November 25, 2003 decision associated with file number 11-0147420. She did not provide any argument in this letter other than to suggest that the documents assembled by the Office in connection with the Board's October 5, 2006 order remanding case would establish her case. The only documents that the Office added to the record as a result of the Board's order were appellant's December 2, 2003 reconsideration request letter and its December 18, 2003 decision. In the December 2, 2003 letter, appellant's representative requested reconsideration of the Office's November 25, 2003 decision on appellant's behalf without providing any argument. These documents do not show clear evidence of error in the Office's August 20 and November 25, 2003 decisions as they bear no relevance to the merit issues addressed in the August 20 and November 25, 2003 decisions, *i.e.*, appellant's occupational disease claim and recurrence of total disability claim.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's August 20 and November 25, 2003 decisions and the Office properly determined that appellant did not show clear evidence of error in those decisions.

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' November 21, 2006 decision is affirmed.

Issued: August 1, 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