

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

H.C., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, St. Louis, MO, Employer

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**Docket No. 07-710
Issued: July 10, 2007**

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 January 23, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 15, 2006 which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated August 24, 2004 and the filing of this appeal on February 27, 2007, 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).

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This is the third appeal before the Board. Appellant, a 51-year-old dental hygienist, filed a Form CA-2 claim for bilateral carpal tunnel syndrome on August 7, 2000. The Office accepted

the claim for right carpal tunnel syndrome and authorized surgery for right carpal tunnel release, which appellant underwent on August 21, 2000. On October 4, 2001 the Office informed appellant that a position as information clerk was available within her physical restrictions. Appellant refused to accept the position and did not submit medical evidence from her treating physician stating that the job was not suitable. By decision dated January 29, 2002, the Office terminated appellant's compensation benefits on the grounds that she refused to accept suitable work. In a November 21, 2002 decision, the Board affirmed the January 29, 2002 Office decision.¹ Appellant requested reconsideration and submitted an October 27, 2003 report from Dr. Syed Ali, a neurologist, who stated that she had carpal tunnel syndrome and tennis elbow which would be aggravated by chronic repetitive movements of the hands and wrists. Dr. Ali opined that appellant was not able to perform any kind of work involving repetitive use of her hands, wrists, elbows and arms. He attributed appellant's symptoms to her intermittent computer use and keyboarding for four to eight hours between August 2000 and July 2002. By decision dated January 9, 2004, the Office denied modification of the January 29, 2002 termination decision. In an August 13, 2004 decision, the Board affirmed the January 9, 2004 Office decision.² The complete facts of this case are set forth in the Board's November 21, 2002 and August 13, 2004 decisions and are herein incorporated by reference.

On July 19, 2005 appellant requested reconsideration. In a May 13, 2005 report, Dr. Ali stated:

“[Appellant] could not perform the offered light[-]duty position as information clerk, which was offered on August 24, 2001.... The medical reason for that is that the information clerk will have to use the hands in a repetitive manner and considering the fact that she did have carpal tunnel syndrome that will preclude her working in that position.”³

By decision dated October 11, 2005, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

By letter received September 11, 2006, appellant requested reconsideration. She alleged in her request for reconsideration that her benefits had not been properly terminated because she

¹ Docket No. 02-1832 (issued November 21, 2002).

² Docket No. 04-905 (issued August 13, 2004). The Board noted that Dr. Ali's opinion was of diminished probative value regarding the issue presented because he did not provide a complete and accurate history or a reasoned medical opinion with respect to appellant's ability to perform the offered position as of January 29, 2002. In addition, Dr. Ali erroneously stated that appellant worked intermittently at keyboarding from August 2000, which is contrary to the record. Appellant stopped working on February 17, 2000 and was offered a position as an information clerk. Dr. Ali did not demonstrate his familiarity with the offered position or its physical requirements.

³ In a letter dated September 13, 2005, the Office informed appellant that her application for reconsideration under 5 U.S.C. § 8128 warranted a merit review. However, in light of the Office's October 11, 2005 nonmerit decision, it appears that this letter was sent by mistake.

still had residuals of her accepted condition, carpal tunnel. Appellant submitted a February 18, 2004 report from Dr. Ali who stated:

“This 53-year-old African-American woman is followed up for chronic disabling pain at multiple sites. Her diagnosis has been cervical radiculopathy, lumbar radiculopathy, and carpal tunnel syndrome and ulnar neuropathy. The patient has been suffering from this the past several years. It is apparent that [appellant’s] disability started on February 17, 2000. She was recommended to do the light[-]duty work, however it is also apparent that in August 2001, she could not do light[-]duty work because of the continued amount of symptoms of the carpal tunnel syndrome, pain and paresthesias in the arms and neck.... Her pertinent physical findings of the decreased range motion of the neck and back, collapsing extremities with dysesthesias in the hands and arms and the diagnosis remains chronic pain syndrome related to carpal tunnel syndrome, ulnar neuropathy, cervical radiculopathy and lumbar radiculopathy. [Appellant] was clearly in my opinion unable to do light[-]duty work, as it was alleged in August 2001.”

Appellant also resubmitted prior reports from Dr. Ali, prior reports from Dr. Bruce Kraemer dated June 13 and December 13, 2001, a prior May 20, 2001 nerve conduction study, as well as prior radiology reports from a Veterans Administration hospital.

By decision dated September 15, 2006, the Office denied appellant’s request for reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees’ Compensation Act⁴ does not entitle an employee to a review of an Office decision as a matter of right.⁵ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ As one such limitation, the Office has stated that it 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.⁷ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁸

In those cases where a request for reconsideration is not timely filed, the Board had held however that 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.⁹ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.¹⁰

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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.¹⁶ The Board makes

⁶ Although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) constituting relevant and pertinent new evidence not previously considered by the Office. See 20 C.F.R. § 10.606(b).

⁷ 20 C.F.R. § 10.607(b).

⁸ See cases cited *supra* note 5.

⁹ *Rex L. Weaver*, 44 ECAB 535 (1993).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹¹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ See *Jesus D. Sanchez*, *supra* note 5.

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Leon D. Faidley*, *supra* note 5.

an independent determination of whether an appellant 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.¹⁷

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. The last merit decision in this case was the Board's last decision dated August 13, 2004. Appellant requested reconsideration on September 11, 2006; thus, the reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's September 11, 2006 request for reconsideration failed to show clear evidence of error. Appellant noted that as a courtesy she was resubmitting a number of reports which were previously considered by the Office and the Board. She stated that these reports established that she still had residuals of her carpal tunnel syndrome, such that the Office did not meet its burden of proof to terminate her benefits in January 2002. Appellant's request for reconsideration misstates the issue. The Office did not terminate compensation because appellant no longer had residuals of the accepted injury, but rather because appellant refused an offer of suitable work.

The only new medical report submitted in support of the untimely request for reconsideration was the February 18, 2004 report from Dr. Ali, whose February 18, 2004 report is of limited probative value as it did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether appellant established as of January 29, 2002 that her refusal of suitable work was justified.

Dr. Ali stated that appellant was unable to perform light-duty work as of August 17, 2001 due to chronic, disabling pain caused by cervical radiculopathy, lumbar radiculopathy, carpal tunnel syndrome, ulnar neuropathy, pain and paresthesias in the arms and neck and collapsing extremities with dysesthesias in the hands and arms. However, he did not consider the suitability of the *offered* position. A determination that an offered position is medically suitable is based on medical evidence at the time the position is offered and includes consideration of nonemployment-related conditions as well as employment related.¹⁸ Appellant failed to submit any medical evidence with respect to her inability to perform the information clerk position as of January 29, 2002 due to her accepted right carpal tunnel condition. As the Board noted in its November 21, 2002 and August 13, 2004 decisions, a review of the medical evidence of record does not establish that the Office erred in finding the offered position was medically suitable. Dr. Ali's February 18, 2004 report was not contemporaneous with the offer of the position and the termination of benefits in 2002. Further, the report was cumulative and repetitive of reports previously rejected by the Board and the Office. No other evidence was received by the Office. Therefore, appellant has failed to demonstrate clear evidence of error on the part of the Office.

¹⁷ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁸ *See Janice S. Hodges*, 52 ECAB 379 (2001).

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.¹⁹

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration request dated September 11, 2006. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on September 15, 2006.

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 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

¹⁹ The Board notes that appellant submitted additional evidence to the record following the October 26, 2004 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c). Appellant's attorney alleges that this evidence was received by the Office prior to its January 8, 2007 decision. However, this evidence is not contained in the instant record and appellant's attorney has provided no documentary support for this assertion.