

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

B.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Deville, LA, Employer**

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**Docket No. 07-1504
Issued: November 2, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 11, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' nonmerit decision dated April 3, 2007, denying her request for reconsideration. The Board's jurisdiction to consider final decisions of the Office extends only to final decisions issued within one year prior to the filing of the appeal.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board does not have jurisdiction over the merit decisions of the appeal.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

¹ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

FACTUAL HISTORY

This is the third appeal in this case.² By decision dated April 12, 2006, the Board affirmed a February 23, 2005 decision denying appellant's request for reconsideration and a September 22, 2004 decision denying modification of Office decisions that denied her claim for a right leg injury sustained on December 2, 2002. By decision dated June 17, 2004, the Board affirmed Office merit decisions dated October 1 and January 23, 2003 that denied appellant's claim for a right leg injury.³ The Board's prior decisions are incorporated herein by reference. The facts of the case as set forth in the prior decisions are incorporated herein by reference.

On March 9, 2007 appellant requested reconsideration and submitted additional evidence. In reports dated December 17, 2002, March 25, 2003 and August 1 and 24, 2006, Dr. M. Lawrence Drerup provided a history that appellant dropped a box at work on September 14, 2002 and developed severe pain in her legs and hips. He diagnosed chronic lower extremity pain and neurogenic claudication secondary to severe acquired segmental stenosis at L3-4 and L4-5. Dr. Drerup did not explain the cause of the neurogenic claudication. He indicated that the chronic lower extremity pain was of unclear etiology. On August 11, 2006 Dr. H. Stanley Culbertson reviewed appellant's history and noted that the results of electrodiagnostic testing of her lower extremities were normal. He did not address the issue of whether appellant had a lower extremity condition causally related to her September 14, 2002 work incident. Appellant provided copies of reports of objective tests of her lower extremities performed in 2002, 2003 and 2006, including electromyograms, nerve conduction studies, computerized tomography scans, myelograms and x-rays. These test reports did not address the issue of causal relationship.

By decision dated April 3, 2007, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed within one year of the last merit decision dated September 22, 2004 and the evidence did not establish clear evidence of error in the 2004 decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision

² See Docket No. 05-1291 (issued April 12, 2006); Docket No. 04-496 (issued June 17, 2004).

³ On December 2, 2002 appellant, then a 58-year-old distribution window clerk, filed a claim alleging that on September 14, 2002 she reached for a drop box and her right leg "snapped."

⁴ 5 U.S.C. § 8128(a).

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁶ *Id.* at 768.

denying or terminating a benefit unless the request for reconsideration 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 the Office under 5 U.S.C. § 8128(a).⁸

Section 10.607(b) of the Office's regulations states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.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 so as to produce a contrary conclusion.¹³ 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.¹⁴ The Board makes 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.¹⁵

ANALYSIS

On prior appeal, the Board reviewed the merits of this claim by decision dated April 12, 2006. A merit decision of the Board extends a one-year period to request reconsideration of a final decision before the Office.¹⁶ Appellant's request for reconsideration was dated March 9, 2007. As this request was filed within one year after the Board's merit decision, it is timely.

⁷ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

⁸ *Thankamma Mathews*, *supra* note 5 at 769.

⁹ 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB 241 (2004).

¹⁰ *Dean D. Beets*, 43 ECAB 1153 (1992).

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

¹² *Darletha Coleman*, 55 ECAB 143 (2003).

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

¹⁴ *Darletha Coleman*, *supra* note 12.

¹⁵ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁶ *Howard Y. Miyashiro*, 51 ECAB 253 (1999); *Veletta C. Coleman*, 48 ECAB 367 (1997).

As appellant filed a timely request for reconsideration, the Office improperly evaluated appellant's request for reconsideration pursuant to the clear evidence of error standard. The case will therefore be remanded to the Office for a decision regarding whether the evidence submitted with the March 9, 2007 request for reconsideration was sufficient to warrant a review of the merits of appellant's claim under 20 C.F.R. § 10.606(b).

CONCLUSION

The Board finds that appellant filed a timely request for reconsideration. Accordingly, this case must therefore be remanded to the Office for an appropriate decision consistent with this opinion.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 3, 2007 is set aside and this case is remanded for further development consistent with this opinion.

Issued: November 2, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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