

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

A.N., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Jamestown, NY, Employer)

**Docket No. 07-1511
Issued: November 5, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 8, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated April 10, 2007 which denied her 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 4, 2003 and the filing of this appeal, 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 second appeal before the Board. Appellant, a 41-year-old flat sorter, filed a Form CA-2 claim for benefits on December 5, 2000, alleging that she developed a bursitis condition causally related to factors of her federal employment. The Office accepted the claim

for exacerbation of degenerative arthritis of the right hip. The Office paid appropriate compensation for temporary total disability and placed her on the periodic rolls. By decision dated August 4, 2003, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable employment. By letter dated February 7, 2006, appellant requested an oral hearing. By decision dated March 15, 2006, an Office hearing representative denied appellant's hearing request as untimely pursuant to section 8124. The Office found that the issue could be equally well addressed through the submission of new and relevant evidence accompanying a valid request for reconsideration.

By letter received May 2, 2006, appellant requested reconsideration of the termination of her compensation for refusing suitable work. She stated that her treating physician outlined work restrictions in 2001 which precluded her from performing the job offered by the employing establishment. Appellant asserted that she had enclosed medical evidence indicating that she was not able to accept the job offer for this reason. She submitted additional medical evidence with her reconsideration request; including: (a) an April 4, 2006 report from Dr. C. Gregory Kang, a physiatrist, indicating that appellant was treated for sleep apnea; (b) an April 20, 2006 treatment note from a registered nurse; (c) a treatment report dated April 6, 2006 from a psychological counseling center; (d) an undated work limitation form received by the Office on May 2, 2006; and (e) reports from February 2001, September and October 2002 and March, April and August 2003.

By decision dated May 9, 2006, the Office denied reconsideration on the grounds that it was untimely and did not show clear evidence of error. In a March 2, 2007 decision,¹ the Board affirmed the Office's March 15, 2006 decision denying appellant's request for an oral hearing on the basis of untimeliness. However, the Board set aside the May 9, 2006 Office decision denying reconsideration, finding that the Office failed to discuss or consider the factual and medical evidence appellant submitted with her request. The Board noted that the Office was required to make findings of fact and a statement of reasons regarding the material facts in the case. The Board therefore found that the Office failed to properly adjudicate the issue of whether appellant established clear evidence of error.

By decision dated April 10, 2007, the Office denied appellant's request for reconsideration without a merit review, finding that she 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.

¹ Docket No. 06-1476 (issued March 2, 2007).

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle an employee to a review of an Office decision as a matter of right.³ 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.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ 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.⁵ 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).⁶

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.⁷ 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.⁸

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ Thus, 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).

⁵ 20 C.F.R. § 10.607(b).

⁶ *See* cases cited *supra* note 2.

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.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 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.¹⁵

ANALYSIS

The Board found in its March 2, 2007 decision that the Office properly determined in this case that appellant failed to file a timely application for review.

The Board finds that appellant's May 2, 2006 request for reconsideration failed to show clear evidence of error. The only new medical reports submitted in support of the untimely request for reconsideration were Dr. Kang's April 4, 2006 report documenting appellant's treatment for sleep apnea and the April 6, 2006 treatment report from a psychological counseling center. These reports do not establish clear evidence of error as they did not provide a reasoned medical opinion on the underlying issue; *i.e.*, whether appellant established as of August 4, 2003 that her refusal of suitable work was justified.

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 conditions.¹⁶ The work limitation form received by the Office on May 2, 2006 was not signed by a physician and was not dated; thus, there is no evidence that this report was contemporaneous with the offer of the position and the termination

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, *supra* note 3.

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley*, *supra* note 3.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁶ See *Janice S. Hodges*, 52 ECAB 379 (2001).

of benefits in 2003. The April 20, 2006 treatment note from a registered nurse was not written by a physician and therefore does not constitute medical evidence under section 8101(2). Appellant therefore failed to submit any medical evidence with respect to her inability to perform the job offered by the employing establishment as of August 4, 2003 due to her accepted bursitis condition. Further, appellant resubmitted a number of reports which were previously considered by the Office in prior decisions; these reports are cumulative and repetitive of reports previously rejected by the Office. No other evidence was received by the Office. Appellant has failed to establish clear evidence of error on the part of the Office.

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.

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 May 2, 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 April 10, 2007.

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2007
Washington, DC

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

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

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