

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

M.R., Appellant

and

**DEPARTMENT OF COMMERCE, CENSUS
BUREAU, Youngstown, OH, Employer**

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**Docket No. 07-417
Issued: September 10, 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 December 6, 2006 appellant filed a timely appeal of the August 28, 2006 decision of the Office of Workers' Compensation Programs denying her request for reconsideration as untimely and failing to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated May 18, 2005 and the filing of this appeal, the Board does not have jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On May 23, 2000 appellant, then a 50-year-old office clerk, filed a traumatic injury claim alleging that on May 5, 2000 she injured her left ankle and foot when she tripped on some file

boxes. On June 30, 2000 the Office accepted her claim for left ankle sprain/strain. On July 3, 2003 appellant filed a claim alleging a recurrence of her May 5, 2000 employment injury on or about June 17, 2003. By decision dated October 1, 2003, the Office denied appellant's claim for a recurrence. On October 8, 2003 appellant requested an oral hearing. In a decision dated September 7, 2004, the Office hearing representative affirmed the denial of the recurrence claim. Appellant appealed to the Board and in a decision dated May 18, 2005, the Board affirmed the Office's September 7, 2004 decision.¹

In a letter dated May 17, 2006, appellant requested reconsideration of the denial of recurrence. The letter was sent by facsimile with a date stamp of May 18, 2006. The document was dated as received by the Office on May 23, 2006. Appellant contended that the absence of medical reports was due to the Office's failure to approve needed treatment and that her claim was prematurely closed. She did not submit any new medical evidence.

By decision dated August 28, 2006, the Office denied appellant's request for reconsideration as it was not timely filed and failed to demonstrate clear evidence of error.²

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶ In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents clear evidence of error on the part of the Office in its most recent merit decision.⁷

¹ Docket No. 05-441 (issued May 18, 2005).

² The Office explained in part that the implementing regulations at 20 C.F.R. § 10.607(a) "do not intend to address faxed reconsideration requests as they clearly limit the scope of 20 C.F.R. § 10.607(a) to mailed requests."

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

⁴ Under section 8128(a) of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607 (1999).

⁶ 20 C.F.R. § 10.607(a) (1999). This section also provides: "If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits may be used to establish the mailing date."

⁷ 20 C.F.R. § 10.607(b) (1999).

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

The one-year limitation for filing a request for reconsideration begins to run on the date following the date of the original Office decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹³ Therefore, appellant had one year from the Board's May 18, 2005 merit decision to file her request for reconsideration.

The Office did not receive appellant's request for reconsideration until May 23, 2006 as indicated by the Office's date stamp on the document. Accordingly, it did not receive the document within one year of the May 18, 2005 merit decision. The document indicates that it was sent by facsimile on May 18, 2006. Although the Office's regulations provide procedures for accepting a request for reconsideration that is received after the one-year date if it was mailed prior to the one-year date, no such regulations address the case with facsimiles.¹⁴ The Board notes that the date stamp on facsimile machines can be altered and accordingly is not consistent with the higher level of proof of a date stamp postmark on a letter sent through the United States Postal Service. Furthermore, there is no evidence that this request was timely mailed as demonstrated by certified mail receipts, certificates of service or affidavits. Accordingly, the Board finds that the Office properly found that appellant did not timely file her request for reconsideration.

The Board further finds that appellant did not establish clear evidence of error. Appellant did not submit any new medical evidence. Furthermore, she made no convincing argument

⁸ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *Id.*

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹³ *Donna M. Campbell*, 55 ECAB 241 (2004).

¹⁴ See 20 C.F.R. § 10.607(a).

clearly demonstrating that the Office erroneously denied her claim for recurrence. The Board finds that the Office did not abuse its discretion in denying further merit review.¹⁵

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 28, 2006 is affirmed.

Issued: September 10, 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

¹⁵ *Donna M. Campbell, supra* note 13.