

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

C.K., Appellant

and

DEPARTMENT OF HOMELAND SECURITY,
Bellingham, WA, Employer

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**Docket No. 07-1888
Issued: April 10, 2008**

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 July 2, 2007 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs' decision dated June 29, 2007 and nonmerit decisions dated May 3 and June 26, 2007. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant was entitled to compensation between April 29, 2005 and May 1, 2007 causally related to her federal employment; (2) whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error; and (3) whether the Office properly denied appellant's request for an oral hearing before an Office hearing representative.

FACTUAL HISTORY

On November 8, 2003 appellant, a 50-year-old transportation security screener, sustained injury to her lower left back while lifting luggage. She filed a claim for benefits, which the Office accepted for a lumbar strain.

In a report dated April 2, 2004, Dr. David L. Goldman, Board-certified in neurosurgery, noted the history of injury and stated findings on examination. In addition to her low back symptoms, appellant experience neck pain and stiffness since the November 2003 work injury. Dr. Goldman related appellant's belief that she sustained both a cervical strain and a lumbar strain as a result of the November 2003 incident. He noted that a magnetic resonance imaging (MRI) scan raised the possibility of a severe cervical strain and cervical myelopathy. In a May 7, 2004 report, Dr. Goldman stated:

“[Appellant] is a 50-year[-]old woman who works for [the employing establishment] as a screener and her job requires repetitive lifting and moving of luggage. She reported that she was not having problems with back pain or lumbar radicular pain until a work-related accident that occurred on November 8, 2003.... [Appellant] was subsequently treated for a lumbar strain.... Following this injury, she also had a progression of neck pain and stiffness.”

Dr. Goldman noted that an MRI scan showed severe spinal stenosis at C5-6 associated with flattening of the spinal cord and bilateral C6 neural foraminal narrowing. He diagnosed cervical myeloradiculopathy and recommended surgery. Dr. Goldman performed a cervical discectomy and fusion procedure on appellant to ameliorate her condition of cervical myeloradiculopathy on May 8, 2004.

In a report dated May 23, 2004, Dr. John H. Weaver diagnosed lumbar radiculopathy. He noted Dr. Goldman's opinion that appellant had injured her neck during the same incident in which she injured her lower back.

In a May 27, 2004 letter to the Office, appellant requested that her claim be expanded to include her cervical condition.

By decision dated August 11, 2004, the Office denied appellant's claim, finding that the medical evidence was insufficient to establish that her cervical condition was causally related to the November 8, 2003 employment injury. The Office noted that none of the medical reports contemporaneous with the November 8, 2003 injury indicated that appellant had sustained a cervical strain on that date.

On April 6, 2007 appellant requested an oral hearing.

By decision dated May 3, 2007, the Office denied appellant's request for an oral hearing. The Branch of Hearings and Review found that appellant's request was postmarked April 6, 2007, which was more than 30 days after the issuance of the Office's August 11, 2004 decision. Therefore, appellant was not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the

grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

Appellant submitted a May 5, 2007 Form CA-7 requesting compensation for wage loss for April 28, 2005 to May 1, 2007. She submitted a May 11, 2005 report from Dr. Weaver, who stated that appellant was unable to perform her job as airport screener due to neck and lower back pain which was 100 percent progressive since November 2003. In a November 7, 2006 report, Dr. David E. Baker, Board-certified in neurological surgery, stated:

“[T]his is a fifty-three-year old female who sustained an on-the-job injury on November 8, 2003. [Appellant] was lifting heavy bags. She injured both her neck and lower back. The patient underwent conservative treatment for her back injury. [Appellant] had an MRI scan after the injury, which showed evidence of diffuse degenerative changes through to the lumbar spine without evidence of significant lateral recess of foraminal narrowing. The only abnormality was moderate L4-5 lateral recess and anterior neural foraminal stenosis. Patient has had chronic back and right radicular symptoms. She subsequently retired on April 14, 2005. In the interval, she underwent an anterior cervical dis[c]ectomy and fusion on May 7, 2004 and was able to return back to work activities.”

Dr. Baker stated that on examination appellant showed no percussive tenderness along the posterior cervical, thoracic or lumbar spine. He noted that his examination of the head and neck region was atraumatic and normocephalic. Dr. Baker diagnosed lower back and right leg pain, most consistent with L4 radiculopathy, secondary to far lateral intraforaminal disc herniation at L4-5.

By letter dated May 3, 2007, the Office asked appellant to submit additional medical evidence to support disability for the period claimed.

In a memorandum dated November 23, 2005, received by the Office on June 4, 2007, the employing establishment indicated that its Disciplinary Review Board had formally removed appellant as of April 29, 2005 due to her failure to pass an annual recertification requirement as a screener.

On June 15, 2007 appellant requested reconsideration of the August 11, 2004 decision. She submitted a March 7, 2007 report from Dr. Goldman, who stated:

“I was asked by [appellant] to explain the relationship of cervical myelopathy to complaints of back pain. I would like to point out that I very carefully documented this patient’s history in her initial consultation from April 2, 2004. I reported that she injured her neck and back performing heavy lifting, in moving luggage, as part of her job. She sustained both a cervical and lumbar strain injury from this work[-]related accident on November 8, 2003 on a more probable than not basis and this was documented in her original consultation.

“The patient became very focused on her back pain because she has severe lumbar spasms. However she was also having problems of bladder sensitivity at the same time. The lumbar spasms and bladder spasticity were caused by her

cervical myelopathy. Pressure on the spinal cord can cause spasms of the lumbar spine, bladder spasticity, as well as dysesthesias in the lower extremities. The patient had all of these problems. She had a preexisting narrow canal. This was not caused by the accident. This was caused by the normal wear and tear of aging. The work injury caused a tightening of the musculature of the neck, which reduces the space within the canal by bunching together the ligamentous structures, which then causes pressure on the spinal cord, swelling of the spinal cord and a progression of the symptoms of cord compression.

“It should be noted that the cervical strain caused by [appellant’s] work-related injury on November 8, 2003 caused the cervical cord compression and caused her symptoms of bladder spasticity and lumbar spasms. It is for this reason that the strain injury to the neck causes the cord compression on a more probable than not basis. It is not unusual for this to present primarily as low back pain, muscle spasms and bladder spasticity. [Appellant] was initially categorized as primarily a back injury and this categorization was a mistake, an error, caused by the physicians who initially evaluated her. When [she] was seen in my office she was being evaluated by a neurosurgeon, someone with expertise to correctly categorize her as a combination of a neck injury and a low back injury.

“It is my professional opinion that [appellant] had a neck injury caused by her work accident and that this work injury should be covered. It is my feeling that [the original physicians] made a mistake by categorizing her injury as strictly a low back injury.”

In a May 2, 2007 report, Dr. Weaver stated that appellant had complaints of neck pain in the shoulder blades, radiating down to both arms and her fingers. He reiterated the diagnoses of lumbar and cervical radiculopathy. In a December 27, 2006 report, Dr. Sanford J. Wright, Board-certified in neurological surgery, reviewed the history of injury and listed findings on examination. He indicated that appellant was experiencing chronic low back and neck pain. Dr. Wright stated that cervical MRI scan results from May 17, 2006 showed cervical spondylosis, but no critical stenosis. He opined that appellant did not have any severe neurological deficit in the lower extremities.

In reports dated April 5 and 12, 2007, Dr. Peter W. Ambrose, Board-certified in preventive medicine, diagnosed low back pain, cervical spine strain, residual right L5 neuropathy with paresthesias in her right leg and numbness in her right calf. In a May 7, 2007 report, he listed the history of injury and noted that appellant had underwent cervical discectomy. Dr. Ambrose indicated that appellant continued to have low back pain. In a Form CA-20 dated June 11, 2007, he found that appellant had an extruded disc at L4-5 as shown by MRI scan and chronic pain. Dr. Ambrose checked a box indicating that he believed the condition found was caused or aggravated by lifting baggage at work. Appellant also submitted a lumbar MRI scan which diagnosed multilevel degenerative disc disease, spondylosis and facet arthropathy, with encroachment on the L4 nerve root due to asymmetric disc protrusion.

By decision dated June 26, 2007, the Office denied appellant's request for reconsideration without a merit review, finding she had not timely requested reconsideration and failed to submit evidence sufficient to establish clear evidence of error.

By decision dated June 29, 2007, the Office denied appellant's claim for compensation based on wage loss for the period April 29, 2005 until May 1, 2007. The Office found that appellant failed to submit medical evidence to support that she was disabled due to residuals of her accepted injury. The Office noted that the employing establishment had terminated appellant on April 29, 2005 due to her failure to pass an annual recertification requirement as a screener.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing that the essential elements of his or her claim by the weight of the evidence.² Under the Act, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.³ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.⁴ Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁵ The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.⁶ The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his disability and entitlement to compensation.⁷

ANALYSIS -- ISSUE 1

Appellant submitted a Form CA-7, claim for compensation, for the period April 29, 2005 and May 1, 2007. She has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her disability commencing April 29, 2005 and the accepted employment-related injury. This burden includes providing medical evidence from a physician who concludes that the disabling condition is causally related to employment

¹ 5 U.S.C. §§ 8101-8193.

² *Joe D. Cameron*, 41 ECAB 153 (1989).

³ *See Prince E. Wallace*, 52 ECAB 357 (2001).

⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁵ *Gary L. Watling*, 52 ECAB 278 (2001).

⁶ *Manual Garcia*, 37 ECAB 767 (1986).

⁷ *Amelia S. Jefferson*, 57 ECAB ____ (Docket No. 04-568, issued October 26, 2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

factors and supports that conclusion with sound medical reasoning.⁸ The Office properly denied compensation because appellant failed to provide sufficient medical evidence to support that she was disabled due to residuals of her accepted lumbar strain.

Dr. Weaver's May 11, 2005 report noted that appellant was unable to perform her job as airport screener due to neck and lower back pain which was 100 percent progressive since November 2003. Dr. Baker's November 7, 2006 report noted MRI scan results, stated findings on examination, and indicated that appellant had experienced chronic back and right radicular symptoms and lower back and right leg pain. These reports, however, did not provide probative, rationalized medical opinion explaining how appellant was disabled due to her accepted lumbar condition.⁹ The Board notes that the Office did not accept that appellant's cervical condition was caused or contributed to by her injury of November 8, 2003.

The reports of the physicians of record are of limited probative value as they do not address how appellant's claimed cervical condition was related to the accepted injury.¹⁰ The Office noted that the medical evidence contemporaneous to the injury did not list any cervical complaints. In turn, Dr. Goldman did not treat appellant until April 2, 2004, five months following the injury. Causal relationship must be established by rationalized medical opinion evidence based on an accurate history. Appellant has failed to submit such evidence.

The Board notes that appellant was terminated from her job as screener on April 29, 2005. The Board has held that an employee is not disabled within the meaning of the Act where there is no evidence that she was terminated due to her physical inability to perform her assigned duties. There is no evidence that appellant stopped work due to residuals of her accepted lumbar strain.¹¹ Appellant has not met her burden of proof in this regard.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.¹² Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence. Consequently, appellant has not met her burden of proof, as she failed to establish that she sustained any employment-related disability between April 29, 2005 and May 5, 2007. The Board affirms the Office's June 29, 2007 decision, as appellant failed to provide medical evidence establishing that she sustained disability causing wage loss for the periods claimed.

⁸ See *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁹ *William C. Thomas*, 45 ECAB 591 (1994).

¹⁰ *Id.*

¹¹ *Major W. Jefferson, III*, 47 ECAB 295 (1996).

¹² *Id.*

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act¹³ does not entitle an employee to a review of an Office decision as a matter of right.¹⁴ 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).¹⁵ 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.¹⁶ 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 granted under 5 U.S.C. § 8128(a).¹⁷

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.¹⁸ 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 the appellant’s application for review shows “clear evidence of error” on the part of the Office.¹⁹

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.²⁰ The evidence must be positive, precise and explicit and

¹³ 5 U.S.C. § 8128(a).

¹⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁵ 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) advances 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).

¹⁶ 20 C.F.R. § 10.607(b).

¹⁷ *See* cases cited *supra* note 2.

¹⁸ *Rex L. Weaver*, 44 ECAB 535 (1993).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

²⁰ *See Dean D. Beets*, 43 ECAB 1153 (1992).

must be manifested on its face that the Office committed an error.²¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.²² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²³ 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.²⁴ 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.²⁵ 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.²⁶

ANALYSIS -- ISSUE 2

The Board finds that the Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its most recent merit decision in this case on August 11, 2004. Appellant requested reconsideration on June 15, 2007; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

The Board notes that a claimant must submit both a timely request for reconsideration and new and relevant medical evidence within one year of the most recent merit decision of the Office.²⁷

The Board finds that appellant's June 15, 2007 request for reconsideration failed to establish clear evidence of error. The medical reports appellant submitted from Drs. Goldman, Weaver, Ambrose and Wright indicated that appellant had findings and symptoms of cervical radiculopathy and cervical myelopathy subsequent to her November 2003 work injury. While these reports did provide reasoned medical opinion on the relevant issue of whether appellant's claimed cervical condition was causally related to the November 8, 2003 accepted lumbar strain injury, they do not constitute medical evidence, manifest on its face, which establishes that the Office committed an error. The reports appellant submitted, therefore, do not contain 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 August 11, 2004 decision.

²¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

²² See *Jesus D. Sanchez*, *supra* note 14.

²³ See *Leona N. Travis*, *supra* note 21.

²⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

²⁵ *Leon D. Faidley*, *supra* note 14.

²⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

²⁷ See *Richard J. Chabot*, 43 ECAB 357 (1991).

Consequently, they are insufficient to establish clear evidence of error. In addition, the June 11, 2007 Form CA-20 from Dr. Ambrose which stated findings regarding appellant's low back condition is of limited probative value as it did not provide a reasoned medical opinion on the relevant issue of whether appellant's claimed cervical condition was causally related to the November 8, 2003 accepted lumbar strain injury.²⁸ Appellant also resubmitted a number of reports which were previously considered by the Office in the August 11, 2004 decision; these reports are cumulative and repetitive of reports previously rejected by the Office. No other evidence was received by 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.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office's final decision.²⁹ A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.³⁰ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.³¹ In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.³²

ANALYSIS -- ISSUE 3

In the present case, because appellant's April 6, 2007 request for a hearing was postmarked more than 30 days after the Office's August 11, 2004 decision denying compensation for a claimed cervical condition, she is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that she could pursue her claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing. The Board therefore affirms the Office's May 7, 2007 decision denying appellant an oral hearing by an Office hearing representative.

²⁸ The Board notes that form reports which support causal relationship with a checkmark are insufficient to establish the claim. The Board has held that without further explanation or rationale, a checked box is not sufficient to establish causation. *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

²⁹ 5 U.S.C. § 8124(b)(1).

³⁰ 20 C.F.R. § 10.131(a)(b).

³¹ *William E. Seare*, 47 ECAB 663 (1996).

³² *Id.*

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she was entitled to compensation for wage loss from April 29, 2005 and May 1, 2007 causally related to her federal employment. The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration request dated June 15, 2007. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on June 26, 2007. The Board finds the Office properly denied appellant's request for an oral hearing before an Office hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the June 29 and 26, and May 3, 2007 decisions of the Office of Workers' Compensation Programs' be affirmed.

Issued: April 10, 2008
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