

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

J.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Newark, NJ, Employer**

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**Docket No. 08-251
Issued: April 25, 2008**

Appearances:

*Aaron, B. Aumiller, Esq., for the appellant
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 November 1, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated June 5, 2007 which denied her reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the most recent Office merit decision of July 18, 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.

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely and failed to present clear evidence of error.

FACTUAL HISTORY

On November 18, 1979 appellant, then a 30-year-old security police officer, filed a traumatic injury claim alleging that she sustained a back injury when she slipped and fell while in the performance of duty. The Office accepted her claim for lumbosacral sprain and a

herniated disc at L4-5. Appellant stopped work on November 18, 1979 and did not return. She was removed from her job on February 1, 1980.

Appellant came under the treatment of Dr. Kunikata Hamada, a Board-certified orthopedic surgeon, from November 19, 1979 to July 18, 1984. Dr. Hamada diagnosed acute sprain of the lumbosacral spine, right sciatica, herniated lumbar disc at L4-5. She treated appellant conservatively with pelvic traction and physical therapy. Dr. Hamada opined that appellant was totally disabled.

On February 14, 2001 the Office referred appellant for a second opinion to Dr. Robert M. Moore, a Board-certified orthopedic surgeon, who in a March 5, 2001 report, noted reviewing the records and performed a physical examination. Dr. Moore diagnosed chronic low back pain secondary to lumbar degenerative disc disease and deconditioning. He opined that appellant had no residuals of the accepted lumbar strain and herniated disc at L4-5. Dr. Moore advised that appellant's current orthopedic condition represented the progression of her underlying lumbar degenerative disc disease rather than a continuation of lumbar strain or herniated disc at L4-5. He indicated that appellant could return to work with restrictions due to her nonwork-related lumbar degenerative disc disease.

On March 20, 2001 the Office issued a notice of proposed termination of appellant's compensation benefits on the grounds that Dr. Moore's report established that she had no residuals of the work-related employment injury.

On April 21, 2001 appellant disagreed with the notice of proposed termination and asserted that she had residuals of her work-related injury.

By decision dated May 24, 2001, the Office terminated appellant's compensation benefits effective that date on the grounds that the weight of the medical evidence established that she had no continuing disability resulting from her accepted employment injury.

Appellant requested an oral hearing which was held on February 28, 2002. She submitted reports from Dr. H.J. Davis, a Board-certified internist, dated August 6 to December 10, 2001, who treated appellant for low back and hip pain. The reports of Dr. Richard M. Leighton, an osteopath, from December 18, 2001 to April 4, 2002 noted degenerative disc disease of the lumbar spine, degenerative joint disease of the left hip, left sacroiliitis and left trochanteric bursitis.

In a decision dated September 23, 2002, the hearing representative affirmed the termination decision.

Appellant appealed her claim to the Board.¹ By decision dated February 27, 2003, the Board remanded the case to the Office for reconstruction of the case record, to be followed by an appropriate decision.

¹ Docket No. 03-504 (issued February 27, 2003).

In a decision dated July 18, 2003, the Office noted that the record had been reconstructed and affirmed the termination of benefits.

In an undated letter, appellant requested reconsideration.

In a decision dated August 11, 2005, the Office denied appellant's reconsideration request on the grounds that her request was insufficient to warrant further merit review. The decision was sent to appellant's address of record; however, she no longer resided at this location.

On March 22, 2006 the Office reissued the August 11, 2005 decision and sent it to appellant's current address.

In a letter dated March 8, 2007, appellant requested reconsideration and requested a complete copy of her case file. In an April 30, 2007 letter, she provided a history of her injury and subsequent treatment. Appellant noted that the Board remanded her case for reconstruction of the case file. She indicated that she requested a copy of the entire case file; however, a review of the file revealed that many documents were missing, including Dr. Leighton's reports of January 14 and February 25, 2002, Dr. Moore's March 5, 2001 report and other documents, records, notes and correspondence beyond the date of the Board's decision of February 27, 2003. Appellant asserted that there was a conflict in medical opinion between her treating physician and the Office referral physician.

By decision dated June 5, 2007, the Office denied appellant's request for reconsideration on the grounds that it was not timely and that she did not present clear evidence of error by the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

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

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.³

² 5 U.S.C. 8128(a).

³ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁴

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁵

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁸ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.⁹

ANALYSIS

In its June 5, 2007 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on July 18, 2003. Appellant's request for reconsideration was dated March 8, 2007 which was more than one year after July 18, 2003. Accordingly, her request for reconsideration was not timely filed.

The Board also finds that appellant did not submit any evidence with her reconsideration request sufficient to *prima facie* shift the weight of the evidence in her favor. Appellant has not established clear evidence of error. In a letter dated April 30, 2007, she provided a history of her injury and subsequent treatment. Appellant requested a copy of the entire case file and contended that many documents beyond the date of the Board's February 27, 2003 decision were missing. She also asserted that there was a conflict in medical opinion. The Board finds that appellant's reconsideration request does not establish clear evidence of error. Her request does not raise a substantial question as to the correctness of the Office's most recent merit decision which affirmed the termination of her compensation. The underlying issue in the case is

⁴ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁵ *Annie L. Billingsley*, *supra* note 3.

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

⁸ *Id.*

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

medical. There is no showing of an incomplete medical record when the Office terminated her benefits nor has appellant submitted any new medical evidence that raises a substantial question concerning the correctness of the Office's decision to terminate her benefits. Regarding appellant's assertion that there is a conflict in the medical evidence, the Board has noted that the term "clear evidence of error" is intended to represent a difficult standard. Evidence, such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁰

Appellant's statement of April 30, 2007 does not establish clear evidence of error. The Office properly denied her reconsideration request.

CONCLUSION

The Board finds that appellant's request for reconsideration dated March 8, 2007 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 25, 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

¹⁰ See *Joseph R. Santos*, 57 ECAB ____ (Docket No. 06-452, issued May 3, 2006).