

FACTUAL HISTORY

On December 26, 2003 appellant, then a 30-year-old mail processor, filed an occupational disease claim alleging that she sustained an injury to her back, neck, legs and left side of the body as a result of her employment duties. The Office accepted her claim for aggravation of cervical, lumbar and thoracic strains as well as cervical, lumbar and thoracic myofascitis.

On August 4, 2004 appellant filed two notices of recurrence claiming total disability for the time periods June 4 to 11, 27 and July 22 to 25, 2004. She also filed several claims for compensation for the periods May 16 to June 11, June 27 to July 25 and August 6 to 28, 2004.

On September 14, 2004 the Office denied appellant's recurrence and subsequent wage losses for the period June 3 to 11 and June 27 to July 25, 2004.

On September 20, 2004 the Office issued a revised decision which again denied appellant's claim.

On September 23, 2004 the Office issued a modified decision replacing the September 14 and 20, 2004 decisions and stating that the wage-loss claim for the period June 27 and July 22 to 25, 2004 was being developed and was not denied at that time.

Appellant filed additional claims for compensation for the time periods September 2 to 10 and 16 to 29, 2004. She had been working in limited duty since April 2004.

On September 30, 2004 appellant requested reconsideration and submitted additional information.

In a November 9, 2004 merit decision, the Office denied modification of the September 23, 2004 decision which denied appellant's claim for recurrence.

Appellant filed additional claims for recurrence and compensation for the following time periods October 1, 14 and 17, October 3 to November 5, November 21 to December 5 and November 26 to December 8, 2004, January 19 to February 4, February 5 to 18 and February 19 to March 4, 2005.

On December 29, 2004 the Office accepted appellant's claim for the following conditions: aggravation of cervical strain; cervical and thoracic myofascitis; thoracic sprain; lumbar sprain and lumbar myofascitis.

In an April 8, 2005 decision, the Office denied appellant's claim for recurrence and subsequent claims for compensations for the time periods June 27, August 11 to 27 and October 1 to November 5, 2004, January 19 to February 4 and February 5, 2005 and continuing finding that the evidence did not establish that appellant was unable to perform restricted-duty work due to a worsening of her accepted conditions.

Appellant filed additional claims for recurrences and compensation for the time periods January 9 to 19, January 9 to 16, March 21 to May 20 and April 7 to May 20, 2005.

On May 27, 2005 appellant requested reconsideration.

In a July 19, 2005 merit decision, the Office denied modification of the April 8, 2005 decision.

On March 22, 2006 the Office issued an amended decision modifying the April 8, 2005 decision to include the period November 21 to December 5, 2004 to the list of time periods denied compensation.

Appellant filed additional claims for compensation for the periods November 4, 2005 to March 31, 2006, and March 17 to May 3, 2006.

On June 20, 2006 appellant requested reconsideration of the March 22, 2006 decision.

Appellant filed additional claims for compensation for the periods May 5 to July 14 and July 21 to August 18, 2006.

On September 20, 2006 the Office modified the March 22, 2006 decision to accept that appellant sustained a recurrence on June 3, 2004 and was entitled to compensable wage loss for the period June 3 to 11, 2004 and wage loss for medical care on August 15, October 14 and 15, 2004 for a total of 61.33 hours of combined wage loss.

In a September 20, 2006 letter, Dr. Annemarie Poleck, an osteopath, provided impairment rating of appellant's conditions.

Appellant submitted office notes from the Eisman Clinic, which stated that she had an appointments on certain dates in 2006 and 2007. In a November 20, 2006 letter, Dr. Jeffrey Eisman, a chiropractor, listed the dates appellant was seen in the office during the fall of 2006. In a May 1, 2007 letter, Dr. Polek addressed the Office's questions regarding appellant's current condition. In a June 14, 2006 letter, Dr. Eisman addressed the second opinion physician's report regarding appellant's need for continuing treatment.

In a September 21, 2007 letter, appellant requested reconsideration of the September 20, 2006 decision.

On October 25, 2007 the Office issued a nonmerit decision denying reconsideration on the grounds that appellant's request was untimely and did not present clear evidence that the Office's last merit decision was incorrect.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.¹ The Office 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.² When an application for review is

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.³ The Office procedures states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows clear evidence of error on the part of the Office.⁴ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence which 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. 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. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinions 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.⁷ 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.⁸

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹ In this case, appellant's September 21, 2007 letter requesting reconsideration was submitted more than one year after the last merit decision issued on September 20, 2006 and is therefore untimely. As

³ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁴ See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of it in its most recent decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b).

⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁶ *Leon J. Modrowski*, 55 ECAB 196 (2004); *Dorletha Coleman*, 55 ECAB 143 (2003).

⁷ *Id.*

⁸ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

⁹ *Veletta C. Coleman*, 48 ECAB 367 (1997).

appellant's request was untimely she must demonstrate clear evidence of error by the Office in denying her recurrence and claims for compensation.¹⁰

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its September 20, 2006 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error. The September 20, 2006 decision modified the March 22, 2006 decision which denied appellant's claim on the grounds that she did not establish that her claims for recurrences and subsequent claims for compensation for the periods June 27, August 11 to 27,¹¹ October 1 to November 5,¹² November 21 to December 5, 2004, January 19 to February 4 and February 5 to March 4, 2005¹³ were causally related to her accepted conditions.

Appellant did not submit any evidence relevant to the time periods at issue therefore she did not raise a substantial question concerning the correctness of the Office's October 25, 2007 decision and the Office properly determined that appellant did not show clear evidence of error in the decision.

CONCLUSION

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

¹⁰ 20 C.F.R. § 10.607(b).

¹¹ Except August 15, 2004 which was accepted for wage loss in the September 20, 2006 decision.

¹² Except October 14 and 15, 2004 which were accepted for wage loss in the September 20, 2006 decision.

¹³ The original denial on April 8, 2005 stating the time period was "February 5, 2005 and continuing" but as appellant has filed additional claims for compensation the closed time period of "February 5 to March 4, 2005" will be used.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 25, 2007 decision is affirmed.

Issued: June 10, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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