

FACTUAL HISTORY

On January 20, 2005 appellant, then a 56-year-old retired manager of training, filed an occupational disease claim alleging that she sustained carpal tunnel syndrome due to factors of her federal employment. She indicated that she became aware of her condition and its relationship to her federal employment on August 9, 1993. Appellant retired on May 25, 2001.

By decision dated December 7, 2004, the Office denied appellant's claim as untimely filed pursuant to 5 U.S.C. § 8122. It noted that she experienced pain and numbness using a computer in 1993 and was diagnosed with carpal tunnel syndrome. Appellant was last exposed to the conditions to which she attributed her condition on May 25, 2001 and there was no evidence that the employing establishment had knowledge of her condition.

On May 14, 2007 appellant requested reconsideration. She attributed her delay in requesting reconsideration to her need to care for her husband, who was diagnosed with cancer in July 2006. Appellant stated, "I am claiming [a] date of injury retroactive to August 9, 1993; this was the date when my condition was discovered. Before my disability retirement was approved, I felt discomfort on both hands, but being a management employee and a responsible person who was loyal to the [employing establishment], I did not file a claim." She attributed her hand pain after retirement to fibromyalgia but found out in September 2004 that her carpal tunnel syndrome had worsened such that she required surgery. Appellant noted that the employing establishment's physician referred her for an evaluation with Dr. Jan Pierre Zegarra, in 1993. She questioned why the Office did not consider the merits of her claim.²

Appellant submitted a medical report dated April 11, 2007 from her husband's physician, Dr. Jorge Luis Rivera-Herrera, a Board-certified urologist, who related that he diagnosed her husband with prostate cancer on July 7, 2006 and that she provided care and support for her husband.

In a report dated May 2, 2007, Dr. Zegarra, a Board-certified surgeon, related that he treated appellant beginning in 1993 for cumulative trauma disorders of the bilateral upper extremities causally related to the performance of her work duties. He performed a right carpal tunnel release on November 5, 2004 and a left carpal tunnel release on November 30, 2004.

On May 14, 2007 appellant's attorney asserted that the employing establishment created a hostile work environment for employees who filed claims for compensation with the Office. He noted that the employing establishment did not notify her of its controversion of her claim and requested that the Office consider her request for reconsideration under principles of equity.

On September 24, 2007 appellant's attorney contended that the employing establishment violated due process by failing to apprise him of the status of appellant's claim. He submitted a July 26, 2007 medical certificate from Dr. Zegarra, who indicated that appellant underwent a de Quervain's release on July 17, 2007.

² By letter dated May 10, 2007, appellant's husband described his wife's condition and requested that the Office consider the merits of her claim.

By decision dated November 23, 2007, the Office denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error. It determined that the evidence submitted was not relevant to the issue of whether she timely filed her occupational disease claim.

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.³ 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.⁴ When an application for review is 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.⁵ Office procedures state 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.⁶ 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.⁷

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 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.⁸ 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 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.⁹ The Board makes an

³ 5 U.S.C. §§ 8101-8193.

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

⁵ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁶ *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).

⁷ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *Leon J. Modrowski*, 55 ECAB 196 (2004); *Dorletha Coleman*, 55 ECAB 143 (2003).

⁹ *Id.*

independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it improperly denied merit review in the face of such evidence.¹⁰

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.¹¹ A right to reconsideration within one year also accompanies any subsequent merit decision.¹² As appellant's May 14, 2007 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim for compensation.¹³

Appellant argued that she was unable to file a timely request for reconsideration as she was providing care for her ill husband. Section 10.607(a), however, is unequivocal in setting forth the time limitation period of one year and does not indicate that late filing may be excused by extenuating circumstances.¹⁴

The Office, in its December 7, 2005 decision, denied appellant's occupational disease claim as it was untimely under section 8122. In her May 10, 1007 request for reconsideration, she acknowledged that she became aware of her condition in August 1993 but indicated that she attributed her hand pain after retirement to fibromyalgia. Appellant did not find out until September 2004 that her carpal tunnel syndrome had worsened. However, an employee's awareness that she has a condition adversely affected by factors of her federal employment starts the time limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such effect would be temporary or permanent.¹⁵ Consequently, appellant's contention is insufficient to show clear evidence of error.¹⁶

Appellant contended that the Office should consider the merits of her claim and submitted medical evidence diagnosing upper extremity conditions related to factors of her

¹⁰ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹¹ 20 C.F.R. § 10.607(a).

¹² *Robert F. Stone*, 57 ECAB 292 (2005).

¹³ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁴ *Id.* at § 10.607(c); *Donald Booker-Jones*, 47 ECAB 685 (1996). The Office's regulations do provide that the time to file a request for reconsideration shall not include any periods subsequent to the decision for which the claimant can establish through probative medical evidence that she was unable to communicate in any way and her testimony is necessary to obtain modification. Appellant has not submitted such evidence. See *John Crawford supra* note 10.

¹⁵ *Larry E. Young*, 52 ECAB 264 (2001).

¹⁶ Appellant's attorney asserted that the employing establishment violated due process in failing to notify him of the status of the claim. As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim such as that made by counsel. See *Robert F. Stone, supra* note 12.

federal employment. The relevant issue, however, is whether she timely filed her January 2005 occupational disease claim. Appellant has submitted no evidence relevant to the issue of whether she timely filed a claim for compensation and thus has not established clear evidence of error.¹⁷

As the evidence submitted by appellant is insufficient to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's last merit decision, she has not established clear evidence of error.¹⁸

On appeal, appellant argues that the employing establishment had actual knowledge of her carpal tunnel syndrome within 30 days. She noted that a physician with the employing establishment referred her to Dr. Zegarra in 1993 and that she informed her supervisor at that time of her diagnosis. Appellant however, did not submit clear evidence to the Office in her request for reconsideration showing that it erred in finding that her occupational disease claim was untimely filed. Thus, she has not established clear evidence of error.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as it was not timely filed and did not demonstrate clear evidence of error.

¹⁷ *Howard Y. Miyashiro*, 51 ECAB 253 (1999) (in order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office).

¹⁸ *See Veletta C. Coleman*, *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 23, 2007 is affirmed.

Issued: September 16, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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