

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

C.H., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Detroit, MI, Employer)

**Docket No. 09-253
Issued: August 12, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Oral Argument June 3, 2009

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 3, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated December 14, 2007 and September 18, 2008 which denied her reconsideration requests on the grounds that they were 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 March 29, 2005 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 requests for reconsideration were untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On March 19, 2000 appellant, then a 48-year-old letter carrier filed an occupational disease claim alleging that she developed bursitis from carrying mail. She became aware of her condition and of its relationship to her work on March 20, 1997. The Office accepted appellant's

claim for temporary aggravation of the left shoulder bursitis and costochondritis of the chest wall and paid compensation benefits. Appellant was granted a disability retirement in October 2001.¹

Appellant was treated for tendinitis with severe costochondritis of the anterior chest wall and left shoulder tendinitis. The Office also referred her to physicians including, an impartial referee, in developing the claim. On April 9, 2003 appellant filed a claim for recurrence of disability alleging that on June 15, 2000 she returned to limited-duty work and experienced chest and shoulder pain causally related to her accepted injury. She stopped work on June 30, 2000. On January 27 and May 5, 2004 appellant filed CA-7 forms, claims for compensation, for the period June 30, 2003 to January 27, 2004 and January 28 to May 30, 2004.

On June 23, 2004 the Office denied appellant's claim for a recurrence of disability. On July 24, 2004 she requested a hearing. In a decision dated September 2, 2004, the Office denied appellant's request for an oral hearing as untimely filed.

In a September 20, 2004 decision, the Office denied the claim for disability beginning June 30, 2000 finding that the evidence did not establish that appellant stopped work due to her accepted conditions.

Appellant requested reconsideration. In a September 30, 2004 report, Dr. Linda E. Dewey, a Board-certified internist, noted appellant's work history and indicated that her injuries and disability were inevitable given the nature of her work.

On October 21, 2004 the Office denied modification of the September 20, 2004 decision.

Appellant requested reconsideration and submitted a December 7, 2004 report from Dr. Gary Chodoroff, a Board-certified physiatrist, who diagnosed severe costochondritis, sternomanubrial joint inflammation, left supraspinatus tendinitis and partial supraspinatus/rotator cuff tear. Dr. Chodoroff noted that appellant's return to restricted work in 2000 escalated her symptoms. He opined that appellant could not work as a letter carrier but could work in another position with restrictions. On January 5, 2005 the Office denied modification of the prior decision.

Appellant requested reconsideration and submitted a February 7, 2005 report from Dr. Chodoroff who noted findings on examination and opined that her condition was due to her work injury.

In a March 29, 2005 decision, the Office denied modification of the prior decisions.

On March 24, 2006 appellant requested reconsideration. She submitted a report from Dr. Carol Stratman, a licensed clinical psychologist, dated March 15, 2005. Appellant was seen for depression. She submitted reports from Dr. Chodoroff dated April 14, 2005 to January 27, 2006, for sternomanubrial joint swelling. Dr. Chodorff opined that the June 30, 2000 work

¹ On July 26, 2000 appellant filed a claim for recurrence of chest pain that was later developed as a new claim for injury, which was denied by the Office on December 28, 2000, claim number xxxxxx214. She filed a claim for an emotional condition in 2000 which was denied on January 18, 2001, claim number xxxxxx052. These other claims are not before the Board on this appeal.

activities directly related to appellant's current condition and returned her to work with restrictions. In a March 13, 2006 report, Dr. Dewey advised that increased usage of appellant's shoulders and muscles associated with her costochondritis severely exacerbated her symptoms. On May 20, 2006 Dr. Anita Moncrease, a Board-certified family practitioner, noted that she had treated appellant since 1998 for costochondritis. She opined that appellant's condition was related to her work duties.

On July 6, 2006 the Office denied appellant's reconsideration request finding that it was not timely filed and did not present clear evidence of error.

On October 18, 2006 appellant requested reconsideration. She submitted an August 17, 2006 computerized tomography scan of the chest that showed a lucent lesion in the mid-superior manubrium. A September 27, 2006 report from Dr. A. Martin Lerner, a Board-certified internist, diagnosed a mid-superior manubrium lucent lesion and severe arthritic degenerative disease in the manubrium sternum. He opined that appellant's symptoms were the result of letter carrying from 1974 to 2000.

In a December 4, 2006 decision, the Office denied appellant's reconsideration request, finding that it was not timely filed and did not present clear evidence of error.

On September 8, 2007 appellant requested reconsideration. She submitted an August 9, 2007 decision from the Social Security Administration which granted her disabled widow's benefits beginning June 30, 2000. In a September 7, 2007 report, Dr. Ernest P. Chiodo, a Board-certified internist, treated appellant for costochondritis, left shoulder tendinitis and rotator cuff tear. He noted that appellant worked as a letter carrier for 28 years and carried mail over her shoulder and in 1988 began experiencing pain and stopped work in June 2000. Dr. Chiodo diagnosed left shoulder impingement and costochondritis and opined that the cumulative stress on her left shoulder and chest from carrying a letter satchel caused her disability.

By decision dated December 14, 2007, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that she did not present clear evidence of error by the Office.

On April 2, 2008 appellant requested reconsideration. She asserted that her employer submitted prejudicial information about her when controverting her claim and she was never provided a copy to rebut the allegations. In 2000 the employing establishment systematically attacked injured workers and that managers were instructed to reduce limited-duty personnel. Appellant asserted that a prior referee physician was incompetent and changed his opinion on disability based on instructions from the Office. She submitted correspondence from the employing establishment dated April 13 to November 17, 2000 which addressed leave without pay, failure to report for work, requests for medical documentation, a challenge to appellant's claim and a notice of removal. On January 12, 2008 appellant was treated in the emergency room for chest pain and was diagnosed with history of costochondritis. An April 14, 2008 report from Dr. Chiodo opined that her traumatic occupational injury on March 20, 1997 caused her musculoskeletal disease which resulted in her current disability. An August 9, 2006 bone scan revealed an increased tracer appearance in the sternum and mild capsule inflammation of the shoulder. An x-ray of the ribs/sternum dated August 9, 2006 revealed no significant

abnormality. A chest x-ray dated August 9, 2006 revealed two calcified granulomas. A chest x-ray dated January 12, 2008 revealed a singular nodule which could represent a granuloma or carcinoma.

By decision dated September 18, 2008, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that she did not establish clear evidence of error by the Office in the rejection of her claim.

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

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the 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 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

² 5 U.S.C. § 8128(a).

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

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).

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 the December 14, 2007 and September 19, 2008 decisions, the Office properly determined that appellant failed to file timely applications for review. The most recent merit decision is the March 29, 2005 denial of her recurrence of disability claim. Appellant's requests for reconsideration were dated September 8, 2007 and April 2, 2008, more than one year after March 29, 2005. Thus, her requests were not timely filed.

The Board also finds that appellant has not established clear evidence of error on the part of the Office. Appellant's September 8, 2007 request was accompanied by an August 9, 2007 decision from the Social Security Administration that granted her disabled widow's benefits beginning June 30, 2000. This evidence is insufficient to raise a substantial question as to the correctness of the Office's decision denying appellant's claim for recurrence of disability. The Board has held that entitlement to benefits under another federal statute does not establish entitlement to benefits under the Federal Employees' Compensation Act. The findings of the Social Security Administration are not determinative of disability under the Federal Employees' Compensation Act.¹⁰ The Board has noted that there are different standards for medical proof on the question of disability under the Federal Employees' Compensation Act and under the Social Security Act.¹¹ Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

Appellant submitted a September 7, 2007 report from Dr. Chiodo who provided left shoulder diagnoses and opined that the cause of her disability was the cumulative stress on her left shoulder and chest from carrying a letter satchel. This evidence is insufficient to raise a substantial question as to the correctness of the Office's decision denying appellant's recurrence of disability beginning June 30, 2000. The Board notes that clear evidence of error is intended to represent a difficult standard. The submission of 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.¹² Appellant has not

⁷ *Id.*

⁸ *Id.*

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

¹⁰ *Freddie Mosley*, 54 ECAB 255 (2002).

¹¹ *Daniel Deparini*, 44 ECAB 657 (1993).

¹² *D.G.*, 59 ECAB ____ (Docket No. 08-137, issued April 14, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

otherwise provided any argument or evidence sufficient to raise a substantial question as to the correctness of the Office's decision.

With regard to her April 2, 2008 reconsideration request, appellant asserted that her employer submitted prejudicial information about her and she was not allowed to rebut this. She alleged that in 2000 the employing establishment sought to reduce limited-duty personnel. Appellant also asserted that the referee physician was incompetent and changed his opinion regarding her disability status based on Office instructions. While she addressed her disagreement with the Office's decision to deny her recurrence claim and with the findings and partiality of the impartial medical specialist,¹³ her general allegations do not establish clear evidence of error as her arguments do not raise a substantial question as to the correctness of the Office's decision. The Board notes that the underlying issue is medical in nature and that appellant submitted no new medical evidence sufficient to establish that the Office erred in denying her recurrence of disability beginning June 30, 2000. Therefore the Office properly found that her statement and letter of April 2, 2008 did not establish clear evidence of error. It properly denied appellant's reconsideration request.

Appellant submitted correspondence from the employing establishment dated April 13 to November 17, 2000, but the Office had previously considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise and explicit in manifesting on its face that the Office committed an error. It is not apparent how resubmission of these documents is sufficient to raise a substantial question as to the correctness of the Office's decision.

Appellant also submitted diagnostic test reports, an emergency room report from January 12, 2008 and an April 14, 2008 from Dr. Chiodo who opined that appellant's occupational injury on March 20, 1997 caused her musculoskeletal disease and current disability. This medical evidence is insufficient to establish that the Office erred in its denial. As noted, clear evidence of error is intended to represent a difficult standard.¹⁴ The Board finds that this evidence is insufficient to raise a substantial question as to the correctness of the Office's decision. Consequently, the Office properly found that appellant's reconsideration does not establish clear evidence of error.

On appeal, appellant reiterates that Office referral physicians involved in her claim were biased and incompetent and that the employing establishment was prejudiced against her. However, as discussed, such general allegations are not sufficient to establish clear evidence of error.

¹³ See *James F. Weikel*, 54 ECAB 660, 663 (2003) (allegations of bias are not sufficient to establish the fact; an impartial specialist properly selected under the Office's procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise).

¹⁴ *Supra* note 12.

CONCLUSION

The Board finds that appellant's requests for reconsideration dated September 8, 2007 and April 2, 2008 were untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2008 and December 14, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 12, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board