

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

E.D., Appellant

and

**DEPARTMENT OF THE NAVY, MARINE
CORPS BASE, Camp LeJeune, NC, Employer**

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**Docket No. 08-1508
Issued: March 3, 2009**

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 April 29, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 25, 2008 nonmerit decision denying her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated December 13, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely and failed to demonstrate clear evidence of error.

¹ See 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

On September 17, 2001 appellant, then a 43-year-old licensed practical nurse, sustained injuries to her back and left knee when she fell while trying to sit on a chair. Her claim was accepted for internal derangement of the left knee and thoracic strain. After briefly returning to restricted duty, appellant stopped working on January 6, 2003 and was placed on the periodic rolls.

Dr. Gregg Hardy, a treating physician, stated that appellant was unable to work due to her accepted conditions. On January 7, 2005 an Office second-opinion physician, Dr. Max R. Kasselt, a Board-certified orthopedic surgeon, opined that appellant had no residuals from the September 17, 2001 injury and was able to work full time with restrictions. The Office found a conflict in the medical opinion evidence between appellant's treating physician and the Office's referral physician. In order to resolve the conflict, it referred appellant to Dr. Robert M. Moore, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated April 21, 2005, Dr. Moore provided a history of injury, as well as detailed findings on examination. He reviewed the entire medical record and advised that there were no objective findings to support residuals from the accepted injury. Dr. Moore opined that the accepted conditions, namely thoracic strain and internal derangement of the left knee, had resolved. He indicated that appellant's accepted conditions would have resolved within a few months of the injury. Dr. Moore diagnosed thoracic degenerative disc disease and osteoarthritis of the left knee, as evidenced on magnetic resonance imaging (MRI) scan reports. He found that appellant was not disabled as a result of the September 17, 2001 work injury, stating that her inability to perform the duties of a licensed practical nurse (LPN) because of her limited lifting ability, was not the result of the accepted injury, but due to her underlying thoracic degenerative disc disease and osteoarthritis of the left knee.

On May 2, 2005 the Office proposed to terminate appellant's compensation and medical benefits. Based on Dr. Moore's April 21, 2005 report, it concluded that appellant no longer had any disability or residuals causally related to her accepted injury. By decision dated June 6, 2005, the Office finalized the termination of appellant's medical and compensation benefits effective June 11, 2005.

Appellant requested an oral hearing, which was held on October 15, 2005. At the hearing, she testified that she continued to experience pain due to her accepted conditions and that she had been unable to obtain a job that she felt she was capable of performing.

By decision dated December 13, 2005, an Office hearing representative affirmed the June 6, 2005 decision. The representative found that the weight of the medical evidence was represented by Dr. Moore's referee medical opinion. It established that appellant had no disability or residuals that were causally related to her accepted injury.

On January 8, 2008 appellant requested reconsideration of the hearing representative's December 13, 2005 decision. She also requested retroactive compensation for the period June 2005 to November 2005, as well as a schedule award. Appellant stated that her delay in

providing medical evidence was due to her inability to retain a physician who would accept workers' compensation cases.

In a December 11, 2007 report, Dr. Sanjay Kumar, a Board-certified physiatrist, indicated that appellant, had fractured her thoracic spine at T2 in a work-related injury on September 17, 2001. He stated that her spinal injury had caused derangement of the left knee, resulting in the development of a popliteal cyst and instability in the left knee joint. Dr. Kumar noted that appellant's knee locked up intermittently, putting her at risk for falls and that she continued to experience neuropathic pain radiating from the left hip to the left knee, secondary to her injury. He diagnosed fibromyalgia, chronic lumbar and left knee pain, and neuropathic pain.

In a decision dated January 25, 2008, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.² 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.³ In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁴

When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.⁵ Its 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

² 5 U.S.C. §§ 8101-8193.

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

⁴ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

⁵ *Id.*

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).

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 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.¹⁰

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Its 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 on the issues.¹² As appellant's request for reconsideration, dated January 8, 2008, was submitted more than one year after the most recent merit decision of record on December 13, 2005, it was untimely. Consequently, she must demonstrate clear evidence of error on the part of the Office in terminating her benefits.¹³ The Board finds that the evidence submitted is insufficient to establish clear evidence of error.

Appellant submitted a statement alleging that her benefits were improperly terminated based on the medical evidence of record. Her contention does not establish error on the part of the Office, but merely repeats arguments considered previously by the Office. Appellant's reported inability to locate a doctor is not evidence of error.

Dr. Kumar's December 11, 2007 report generally supported appellant's contention that she continues to experience problems with her left knee and spine. However, his report does not constitute positive, precise and explicit evidence, which manifests on its face that the Office committed an error. It fails to raise a substantial question as to the correctness of its decision to terminate benefits. On December 11, 2007 Dr. Kumar stated that appellant's spinal injury had

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

⁹ *Id.*

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).

caused derangement of the left knee, resulting in the development of a popliteal cyst and instability in the left knee joint; noted that her knee locked up intermittently, putting her at risk for falls; and that she continued to experience neuropathic pain radiating from the left hip to the left knee, secondary to her injury. He diagnosed fibromyalgia, chronic lumbar and left knee pain, and neuropathic pain. However, appellant's condition in 2007 is not relevant to her condition at the time the Office issued its decision terminating benefits. Dr. Kumar did not provide any opinion addressing appellant's disability for work due to her accepted condition in 2005. The evidence fails to establish that the hearing representative erred or abused his discretion in finding that appellant had no disability or residuals from her accepted condition on June 11, 2005, when her benefits were terminated.

The term "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.¹⁴ 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.¹⁵

CONCLUSION

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

¹⁴ *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁵ See *Veletta C. Coleman*, *supra* note 4. As noted, the issue in this case is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits, on the grounds that her request was untimely and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 3, 2009
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