

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

V.C., Appellant)

and)

**DEPARTMENT OF DEFENSE, DEFENSE
COMMISSARY AGENCY, MARINE AIR
CORPS STATION, Yuma, AZ, Employer**)

**Docket No. 08-2404
Issued: March 5, 2009**

Appearances:
David J. Holdsworth, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 13, 2008 appellant filed a timely appeal from an April 9, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error. Because more than one year has elapsed from the last merit decision dated June 10, 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 refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This is the second appeal in this case.¹ By decision dated February 5, 2004, the Board affirmed a June 10, 2003 Office decision, which denied appellant's claim for an injury on November 25, 1998. The facts of the previous Board decision are incorporated herein by reference.

By letter dated September 11, 2007, appellant, through her attorney, requested reconsideration. She submitted two disability certificates dated January 13 and 30, 1999 which did not mention the claimed November 25, 1998 fall at work. In a March 3, 2005 report, Dr. Gregory L. Peare, an attending Board-certified orthopedic surgeon, could not explain the causal relationship between appellant's left knee and left shoulder conditions but believed that the November 25, 1998 fall could have aggravated preexisting conditions. In reports dated January 20 and 23, 2006, he diagnosed subacromial impingement of the left shoulder, a rotator cuff tear and acromioclavicular (AC) joint arthritis. A January 31, 2006 operative report noted that appellant underwent left shoulder arthroscopy surgery. In an August 21, 2007 report, Dr. Leona M. Martin, an attending Board-certified internist, stated that appellant's November 25, 1998 fall resulted in a direct traumatic blow to her left knee and left shoulder and caused an aggravation of preexisting left knee and left shoulder conditions and disability for work. She was not aware of any other factors which could have caused an increase in left knee and left shoulder pain. Appellant also submitted medical evidence previously of record and arguments concerning the Office's handling of her request for reconsideration.

By decision dated April 9, 2008, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error in the last merit decision dated June 10, 2003.

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 As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence on the

¹ See Docket No. 03-2087 (issued February 5, 2004). On December 5, 1998 appellant, then a 55-year-old store worker, filed a traumatic injury claim alleging that on November 25, 1998 she injured her right elbow, left rib and left shoulder blade when she tripped and fell while in the employing establishment parking lot. By decisions dated March 17, 1999, July 22, 2000 and March 7, 2001, the Office denied her claim on the grounds that her fall was not sustained in the performance of duty. By decision dated December 12, 2001, an Office hearing representative found that the November 25, 1998 fall occurred in the performance of duty but the medical evidence did not establish that appellant sustained a medical condition causally related to the fall. By decisions dated May 31, 2002 and June 10, 2003, the Office upheld its denial of her claim.

² 5 U.S.C. §§ 8101-8193.

part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.³

The term “clear evidence of error” is intended to represent a difficult standard. The claimant must present evidence which, on its face, shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office’s denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.⁴

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.⁵ 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 To show clear evidence of error, it is not enough that the evidence be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error; it 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 merits of appellant’s case are not before the Board. Her request for reconsideration was dated September 11, 2007, more than one year after the Board’s February 5, 2004 decision, and therefore not timely. The issue to be determined is whether appellant demonstrated clear evidence of error in her untimely request for reconsideration.

The record reflects that the Office’s merit decision on June 10, 2003 denied appellant’s claim on the grounds that the medical evidence did not establish that she sustained an injury on November 25, 1998 causally related to her employment.

In support of her untimely request for reconsideration, appellant submitted two disability certificates dated January 13 and 30, 1999. These disability certificates do not mention the November 25, 1998 fall at work. Therefore, they do not raise a substantial question as to the

³ 20 C.F.R. § 10.607.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

⁵ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004).

⁶ *Darletha Coleman*, 55 ECAB 143 (2003).

⁷ *Id.*

⁸ *Pete F. Dorso*, 52 ECAB 424 (2001).

correctness of the Office's June 10, 2003 merit decision or demonstrate clear evidence of error. In reports dated March 3, 2005 and January 20 and 23, 2006, Dr. Peare diagnosed subacromial impingement of the left shoulder, a rotator cuff tear and acromioclavicular joint arthritis. He could not provide a definite causal relationship between appellant's left knee and left shoulder conditions but felt that the November 25, 1998 fall could have aggravated preexisting conditions. In an August 21, 2007 report, Dr. Martin stated that appellant's November 25, 1998 fall resulted in a direct traumatic blow to her left knee and left shoulder and caused an aggravation of preexisting left knee and left shoulder conditions and disability from work. As noted, even evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion. The reports of Dr. Peare and Dr. Martin, which are not well rationalized, do not raise a substantial question as to the correctness of the Office's June 10, 2003 merit decision or demonstrate clear evidence of error. Appellant submitted medical evidence previously of record. Because this evidence was previously considered by the Office, it does not raise a substantial question as to the correctness of the June 10, 2003 merit decision or demonstrate clear evidence of error. She presented arguments concerning the Office's handling of her request for reconsideration. These arguments do not address the issue in the June 10, 2003 merit decision of whether the medical evidence was sufficient to establish causal relationship between appellant's medical conditions and the November 25, 1998 fall. Consequently, they do not demonstrate clear evidence of error.

Because appellant's untimely request for reconsideration did not demonstrate clear evidence of error in the June 10, 2003 merit decision, the Office properly denied her request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error in the June 10, 2003 Office merit decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 9, 2008 is affirmed.

Issued: March 5, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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