

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

L.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

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**Docket No. 08-2365
Issued: May 12, 2009**

Appearances:

*David R. Swimmer, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 28, 2008 appellant filed a timely appeal from an August 18, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration of a March 24, 2008 nonmerit decision. As over a year has elapsed since the most recent merit decision dated February 23, 2006 and the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On January 13, 2006 appellant, a 53-year-old clerk, filed a traumatic injury claim (Form CA-1) for a pulled muscle. She attributed her condition to an incident at work when, while moving parcels, she felt a very sharp pain in her left leg/hip area.

Appellant submitted no medical evidence in support of her claim, and by letter dated January 19, 2006 the Office notified her that the evidence of record was insufficient to support her claim.

Appellant submitted medical evidence, and her claim was developed. By decision dated February 23, 2006, the Office denied her claim because the medical evidence was insufficient to establish that she sustained an injury as defined by the Act. By separate decision, it also denied appellant's continuation of pay claim.

Appellant disagreed and, through counsel, on March 17, 2008 requested reconsideration.

By decision dated March 24, 2008, the Office denied reconsideration because her request was untimely and did not establish clear evidence of error.

Appellant, through counsel, again requested reconsideration on August 1, 2008. With her request appellant submitted a May 5, 2008 medical report signed by Frank J. Niesen, MD, who diagnosed appellant with ankylosis of the left hip with impaired flexion, impaired extension, impaired external rotation and impaired abduction. Dr. Niesen asserted that the industrial accident that occurred on November 22, 2005, while employed at the post office, was the prevailing factor in the cause of the ankylosis of the left hip.

By decision dated August 18, 2008, the Office denied appellant's claim because it was untimely and did not establish clear evidence of error.¹

LEGAL PRECEDENT

The Federal Employees' Compensation Act² provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.³

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.⁴ Where

¹ On appeal, appellant submitted additional medical evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). See *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision).

² 5 U.S.C. § 8101 *et seq.*

³ 20 C.F.R. § 10.605.

⁴ *Donna L. Shahin*, 55 ECAB 192 (2003).

the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁵

Section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. 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.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. 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.⁷

ANALYSIS

The Office's August 18, 2008 decision properly determined that appellant filed untimely requests for reconsideration. The merit decision denying appellant's claim was dated February 23, 2006. Appellant, through counsel, requested reconsideration on March 17 and August 1, 2008. Thus these reconsideration requests were untimely as they were made outside of the one-year time limit.

The Board also finds that appellant's March 17 and August 1, 2008 requests for reconsideration failed to demonstrate clear evidence of error. Appellant's claim was denied because the evidence of record was insufficient to establish she sustained an injury in the performance of duty. In support of her reconsideration request, she submitted a May 5, 2008 medical report signed by Dr. Niesen. While Dr. Niesen's opinion is related to the issue, it does not demonstrate error on the part of the Office when it decided the case on the evidence in the record at the time.

The Board notes that clear evidence of error is intended to represent a difficult standard.⁸ Evidence such as a detailed, well-rationalized medical report which, if submitted before the

⁵ 20 C.F.R. § 10.608.

⁶ See *Alberta Dukes*, 56 ECAB 247 (2005); see also *Leon J. Modrowski*, 55 ECAB 196 (2004).

⁷ *Id.*

⁸ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides that 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 that a schedule award was miscalculated). Evidence such as 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. *Id.* at Chapter 2.1602.3c.

denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.⁹

A review of the medical evidence of record does not establish that the Office erred in denying a merit review. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. Dr. Niesen's report does not raise a substantial question as to the correctness of the Office's February 23, 2008 merit decision or demonstrate clear evidence of error.

For these reasons, the Office properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds appellant's untimely request for reconsideration did not establish clear evidence of error on the part of the Office.

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 12, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

⁹ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).