

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

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C.R., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Milwaukee, WI, Employer )

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**Docket No. 09-1492  
Issued: April 7, 2010**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 27, 2009 appellant filed a timely appeal of a May 12, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated March 5, 2008, 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**

On April 4, 2000 appellant, then a 35-year-old flat sorter machine clerk, filed an occupational disease claim for pain in the left elbow, left arm and neck and numbing in the

fingers. The Office accepted appellant's claim for left elbow tendinitis, left elbow epicondylitis, and cervical radiculopathy later accepted temporary toxic myopathy with cellulitis as a consequence of a corticosteroid injection. Appellant returned to a full-time limited-duty position on September 29, 2004 with permanent restrictions. On July 25, 2005 the Office granted her a schedule award for a seven percent permanent impairment of the left upper extremity.<sup>1</sup>

In a May 12, 2006 report, Dr. Arvind Ahuja, a Board-certified neurosurgeon, and treating physician, recommended a discogram at C3-4, C4-5 and C5-6. On August 16, 2006 the Office referred appellant to Dr. Lawrence J. Frazin, a Board-certified neurological surgeon, for a second opinion to determine whether a discogram should be authorized and to determine the extent of appellant's employment-related condition. In a report dated September 13, 2006, Dr. Frazin opined that appellant's work-related conditions continued but that she could remain working in a restricted-duty capacity. He advised against discography.

On February 15, 2007 Dr. Ahuja indicated that appellant had neck pain and recommended surgery at C3-4 and C4-5. He indicated that conservative management had been unsuccessful in the past, and that appellant desired further intervention. In a March 18, 2007 report, the Office medical adviser determined that he could not recommend a cervical fusion as the medical record was unclear.

On April 16, 2007 the Office referred to Dr. Steven Grindel, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Drs. Ahuja and Frazin regarding the need for surgery and additional conditions. In a June 6, 2007 report, Dr. Grindel determined that the cervical degenerative disc disease was not employment related. He also determined that authorization for the cervical spine surgery was unwarranted.

In a June 28, 2007 decision, the Office denied appellant's claim for degenerative disc disease and denied authorization for the cervical spine surgery. Appellant requested a hearing on July 9, 2007. The hearing was held on December 18, 2007.

In a March 5, 2008 decision, the Office hearing representative affirmed the June 28, 2007 decision.<sup>2</sup>

Appellant subsequently submitted reports dated November 1, 2007 and March 6, 2008 from Dr. Spencer Block, a Board-certified neurological surgeon and a treating physician, who noted that appellant had complaints of neck and left shoulder pain. Dr. Block reviewed her history and noted that Dr. Ahuja had recommended an anterior cervical discectomy and fusion, but he did not have a complete record and could not make a recommendation. He explained that he would try local anesthetic facet injections at the C4-5 level and if they failed to provide some benefit, it would be reasonable to include this level in the fusion. Dr. Block also recommended an MRI scan to rule out any shoulder abnormalities. In a March 20, 2008 report, he advised that

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<sup>1</sup> The Office accepted recurrence claims on January 23, 2002, September 9, 2004 and June 26, 2006.

<sup>2</sup> She found that Dr. Grindel's report was entitled to the weight of the medical evidence and established that the degenerative disc disease condition was not related to the work injury.

he would consider an anterior cervical fusion at the C4-5 and C5-6 levels because conservative treatment had failed. Dr. Block also indicated that he would defer to Dr. Ahuja who opined that it was work related.

In a letter dated October 24, 2008, appellant requested that the Office reevaluate her and send her for another impartial medical examination. She indicated that the report of Dr. Frazin lacked credibility as he was involved in several legal medical lawsuits, including one for wrongful death. Appellant also alleged that the impartial medical examiner specialized in hands and legs and that she did not feel that her claim was given proper consideration.

In a letter dated November 17, 2008, the Office advised appellant that it had received her letter dated October 24, 2008. It indicated that she should follow her appeal rights if she disagreed with the prior decision.

In a letter dated April 6, 2009, appellant requested reconsideration of March 5, 2008 decision denying her surgery. She alleged that, as of January 2009, she had a new physician, Dr. Block. Appellant further alleged that she never had a degenerative disc condition prior to her injury and requested the opportunity for surgery comprised of a spinal fusion on her cervical radiculopathy. She also alleged that there was a mix-up with the forms as she had mistakenly sent in the wrong appeal form. Appellant indicated that she sent in the appeal form for the change of physician instead of the surgery denial.

In a letter dated April 24, 2009, appellant indicated that she was attaching additional evidence which included copies of reports dated February 8 and 19, 2009 and a February 16, 2009 MRI scan.

In a February 5, 2009 report, Dr. Block noted appellant's history. He advised that he believed that appellant might benefit from an anterior cervical discectomy and fusion of the C4-5 and C5-6 levels and to alleviate her cervical radiculopathy from the C5-6 level as well as the discogenic pain at the C4-5 level. Dr. Block indicated that, before he could formally recommend surgical intervention, he would recommend updated imaging studies to rule out any significant change in her cervical spine disease before proceeding with surgery. He indicated that he would like to obtain an MRI scan of the cervical spine and dynamic x-rays of the cervical spine. Dr. Block noted that Dr. Ahuja "hope[d] that her cervical radiculopathy [was] due to a work[-] related condition, and I will support this as well as he was the initial surgeon to see her following her work injury."

A February 16, 2009 cervical MRI scan read by Dr. Bruce Cardone, a Board-certified diagnostic radiologist, revealed: a mild intervertebral disc and subtle surrounding bony degenerative changes throughout the cervical spine; a bulging disc with central osteophyte formation at the C3-4 level; a bulging disc without disc herniation or spinal stenosis C4-5 level, and subtle broad-based disc protrusion to the left of midline at the C5-6 level with no associated central canal or foraminal stenosis.

In a February 19, 2009 report, Dr. Block noted that he had reviewed appellant's most recent MRI scan and compared it to prior images. He indicated that there did not appear to be any significant change between the last two cervical MRI scan examinations, and explained that

there was a persistent mild disc bulge seen at C4-5 and C5-6. Dr. Block noted that C6-7 was completely normal. He opined that appellant would benefit from a C4-5 and C5-6 anterior cervical discectomy and fusion. Dr. Block also noted that Dr. Ahuja had recommended surgery in the past.

The Office also received several work excuse notes dated March 19, 2008 and February 5, 2009. It also received a March 13, 2008 MRI scan of the left shoulder, read by Dr. Christopher J. Skowlund, a Board-certified diagnostic radiologist, which revealed no evidence of rotator cuff tear. Additionally, the Office received a November 4, 2008 treatment note from Dr. Laura Kleczka, Board-certified in internal medicine, who noted that appellant was seen for chronic neck pain from working on the machine at work. It also received a February 13, 2006 electrodiagnostic medicine consultation from Dr. Scott Hardin, Board-certified in physical medicine and rehabilitation, which was normal.

In a May 12, 2009 decision, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provide that an application for reconsideration must be submitted within one year of the date of the Office decision for which review is sought.<sup>5</sup>

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the decision was, on its face, erroneous.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>8</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>9</sup> It is not enough merely to show that the evidence could be construed so

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> *Id.* at § 10.607(b); *see also Alberta Dukes*, 56 ECAB 247 (2005).

<sup>7</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>8</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>9</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

as to produce a contrary conclusion.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

### ANALYSIS

In its May 12, 2009 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its last merit decision with regard to the requested surgery on March 5, 2008. Appellant's April 6, 2009 letter requesting reconsideration was submitted more than one year after March 5, 2008 and was, therefore, untimely.

Appellant also alleged that there was a mix-up with the forms as she had mistakenly sent in the wrong appeal form. The Board notes that this argument is not supported by the record as it clearly contains several requests from appellant in which she identified each decision for which she sought reconsideration.<sup>13</sup> Furthermore, the only exception to the one-year time limit occurs where the claimant can establish through probative medical evidence that she was unable to communicate in any way and that her testimony was necessary in order to obtain modification of the Office's decision.<sup>14</sup> No such showing has been made in this case. Thus, the evidence does not support that the request for reconsideration was timely filed.

In accordance with internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. With her April 6, 2009 request for reconsideration, appellant alleged that she never had a degenerative disc condition prior to her injury and wanted spinal fusion surgery. However, whether she needs surgery for an employment-related condition and whether a degenerative neck condition is employment related is a medical issue.

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<sup>10</sup> *Leona N. Travis*, *supra* note 8.

<sup>11</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>12</sup> *W.G.*, 60 ECAB \_\_\_ (Docket No. 08-2340, issued June 22, 2009); *Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>13</sup> During the period in question, appellant also requested reconsideration with regard to a request for a change in treating physicians which the Office ultimately granted.

<sup>14</sup> 20 C.F.R. § 10.607(c).

Although appellant submitted medical evidence, this evidence is insufficient to establish clear evidence of error. She provided several reports from Dr. Block that give some support for her contention that she needs surgery due to her accepted conditions. They included reports dated November 1, 2007 and March 6, 2008. Appellant noted that Dr. Ahuja had recommended an anterior cervical discectomy and fusion, but he did not have a complete record and could not make a recommendation. In his March 20, 2008 report, Dr. Block indicated that he would consider an anterior cervical fusion at the C4-5 and C5-6 levels because conservative treatment had failed. He also indicated that he would defer to Dr. Ahuja who opined that it was work related. Dr. Block provided a February 5, 2009 report reiterating that Dr. Ahuja believed that appellant's condition was work related and that she needed of surgery. In his February 19, 2009 report, he reviewed the current MRI scan and opined that appellant would benefit from a C4-5 and C5-6 anterior cervical discectomy and fusion. Dr. Block also noted that Dr. Ahuja had recommended surgery in the past.

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup> 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.<sup>16</sup> The evidence presented does not rise to that level, but is simply further evidence that supports appellant's contention.

Appellant also submitted reports of diagnostic testing and other reports that do not address why the requested surgery was needed due to the accepted conditions. None of these reports raise a substantial question concerning the correctness of the Office's decision which denied her claim for degenerative disc disease and authorization for the cervical spine surgery. Appellant also submitted evidence that was previously of record. Such evidence would not be sufficient to establish clear evidence of error.

Consequently, the Board finds that appellant has not presented clear evidence of error.

On appeal appellant alleged that her appeal was untimely because her caseworker held up the process of switching her doctor from Dr. Ahuja to Dr. Block. She alleged that, as soon as she was given permission to switch, she submitted the surgery requests as soon as possible. However, as noted above, the evidence does not support that appellant was unable to file a timely request for reconsideration.

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<sup>15</sup> *Supra* note 10.

<sup>16</sup> *D.O.*, 60 ECAB \_\_\_\_ (Docket No. 08-1057, issued June 23, 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 12, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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