

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

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**M.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Suitland, MD, Employer**

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**Docket No. 10-419  
Issued: December 2, 2010**

*Appearances:*  
*Appellant, pro se*  
*No appearance, for the Director*

Oral Argument October 12, 2010

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 30, 2009 appellant filed a timely appeal from a May 7, 2009 decision of the Office of Workers' Compensation Programs that denied her request for reconsideration, as it was untimely filed and did not establish clear evidence of error. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup> Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the May 7, 2009 decision.

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>1</sup> 20 C.F.R. § 501.2(c).

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> In a decision dated April 20, 1998, the Board set aside a September 11, 1995 Office decision with respect to appellant's pay rate for compensation purposes.<sup>3</sup> By decision dated May 6, 1998, the Board determined that overpayment in compensation was not in posture for decision until the issue of her pay rate had been resolved.<sup>4</sup> In a decision dated February 20, 2001, the Board found that the Office properly determined that appellant's pay rate for compensation purposes was as of the date of injury, March 20, 1985. The Board further found that she was not entitled to waiver of an overpayment in compensation in the amount of \$1,206.22 and that the Office properly denied her request for merit review. On July 31, 2001 the Board denied appellant's request for reconsideration.<sup>5</sup> By decision dated May 15, 2006, the Board noted that the Office properly refused to reopen her case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) and that the Office properly computed her retroactive compensation.<sup>6</sup> The law and the facts of the previous Board decisions and orders are incorporated herein by reference.

Appellant remained on the compensation rolls.<sup>7</sup> On November 13, 2007 she requested a hearing of Office decisions regarding the pay rate issue.

By decision dated January 16, 2008, the Office denied the request on the grounds that it was untimely.

On February 23, 2009 appellant again requested reconsideration regarding retroactive pay.

In a May 7, 2009 decision, the Office denied appellant's reconsideration request on the grounds that she did not establish clear evidence of error.

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<sup>2</sup> Appellant was employed as a distribution clerk. She sustained a right shoulder injury on March 20, 1985 while throwing mail and the claim was accepted for right shoulder strain, chronic tendinitis, acromioclavicular arthrosis, arthritis, traumatic arthropathy and right upper extremity mononeuritis. Appellant had shoulder surgery in December 1985 and worked intermittently until May 15, 1989. She has not worked since. On August 8, 1992 the Office accepted that appellant sustained employment-related right carpal tunnel syndrome. Appellant had a right carpal tunnel release on September 25, 2001.

<sup>3</sup> Docket No. 96-460 (issued April 20, 1998).

<sup>4</sup> Docket No. 97-776 (issued May 6, 1998).

<sup>5</sup> Docket No. 99-2221 (issued February 20, 2001). The record also contains schedule award decisions dated September 28, 1988 and May 14, 1996, that awarded appellant a total 20 percent impairment of her right upper extremity. By decision dated June 18, 2003, Docket No. 02-2350, the Board found that appellant did not have more than a 20 percent permanent impairment of her right upper extremity.

<sup>6</sup> Docket No. 05-832 (issued May 15, 2006).

<sup>7</sup> The Board notes that while the instant case was on appeal with the Board, appellant filed an appeal from a January 14, 2010 Office decision that reduced her monetary compensation because she failed to cooperate with vocational rehabilitation efforts. The appeal was docketed as number 10-1526 and will be adjudicated separately.

## 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.<sup>8</sup> 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.<sup>9</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>10</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of Office regulations,<sup>11</sup> if the claimant's application for review shows "clear evidence of error" on the part of the Office. 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.<sup>12</sup>

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. 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 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 decision.<sup>13</sup>

Office procedures note 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.<sup>14</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.<sup>15</sup>

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<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

<sup>10</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>11</sup> 20 C.F.R. § 10.607.

<sup>12</sup> *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>13</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>14</sup> *James R. Mirra*, 56 ECAB 738 (2005).

<sup>15</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

### ANALYSIS

The Board finds that more than one year elapsed from the date of issuance of the last merit decision on the pay rate issue, the Board's May 15, 2006 decision. Appellant's request for reconsideration was dated February 23, 2009. Therefore, it was untimely filed. Consequently, appellant must establish clear evidence of error.<sup>16</sup>

The Board finds that appellant failed to establish clear evidence that the October 1, 2008 decision of the Office was in error. The issue raised by appellant and asserted at oral argument is whether the Office properly determined her retroactive compensation for the period January 16, 1988 through February 19, 1989. In the May 15, 2006 decision, the Board found that the Office properly computed her retroactive compensation. With her February 23, 2009 request appellant submitted evidence previously of record that had been reviewed by both the Office and the Board. She raised arguments also previously considered. Appellant did not submit any new evidence or argument pertaining to whether the computation of her retroactive compensation was in error. Therefore, the issue adjudicated in the Board's May 15, 2006 decision is *res judicata* and not subject to further consideration by the Board absent any new evidence or argument.<sup>17</sup>

### CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>16</sup> 20 C.F.R. § 10.607(b).

<sup>17</sup> See *Robert Ringo*, 53 ECAB 258 (2001); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 7, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 2, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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