

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

---

**S.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Vero Beach, FL, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 09-1386  
Issued: February 23, 2010**

*Appearances:*  
*Capp P. Taylor, 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 May 5, 2009 appellant filed a timely appeal from a February 24, 2009 nonmerit decision of the Office of Workers' Compensation Programs 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 of August 9, 2007 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 it was untimely and failed to establish clear evidence of error.

## **FACTUAL HISTORY**

On March 7, 2003 appellant filed a notice of recurrence (CA-2a) alleging that she sustained a lower back injury on February 24, 2003 when she stepped into a hole while getting out of her mail truck.<sup>1</sup> The Office developed the claim as a traumatic injury claim.

The Office initially denied appellant's claim on September 7, 2005 on the grounds that there was no medical evidence which provided a diagnosis that could be connected to the incident. In a January 23, 2007 decision, an Office hearing representative affirmed the September 7, 2005 decision on the grounds that appellant had failed to establish the fact of injury. By decision dated August 9, 2007, the Office denied modification of its previous decision, finding that appellant had not established that a specific incident had occurred in the time, place and in the manner alleged. It found that appellant had provided inconsistent variations of the events which allegedly caused her back injury.

On December 29, 2008 appellant, through her representative, requested reconsideration. Counsel stated that appellant's claim "actually represents a continuing repetitive trauma injury as [her] day to day duties are what aggravated her condition as finally demonstrated on February 24, 2003 when she had to cut short her route." He indicated that he was submitting a report from appellant's physician, which he contended was sufficient to establish a causal relationship between her repetitive employment activities and her back condition.

Appellant submitted a December 17, 2008 statement in which she indicated that she originally injured her lower back on June 29, 1999 when she stepped out of her mail truck and into a hole. She noted that her claim was accepted for lumbago. Appellant described her carrier duties, which involved getting in and out of the mail truck approximately 80 times per day, and frequently picking up trays of mail, which weighed up to 70 pounds. Her back condition allegedly worsened over time, and on February 24, 2003 she found it impossible to complete her routes. Appellant stated that "there was no particular incident that occurred on February 24, 2003, but just a gradual progression of the condition over many days and weeks since [she] had returned after the 2001 incident."

Appellant submitted an undated report from Dr. Frank X. Conidi, a neurologist. Noting that he had been treating appellant since 2006 for low back pain, Dr. Conidi stated that previous sensory examinations had revealed decreased light touch on the dorsum of the right foot, decreased temperature on the lateral aspect of the right leg and a possible decreased ankle jerk on the right side. Musculoskeletal examinations revealed pain on palpation at the L5 spinous process, as well as in the right piraformis and lumbar paraspinal regions in the lower lumbar area on the right. Dr. Conidi indicated that his objective findings were consistent with the results of a January 25, 2006 magnetic resonance imaging (MRI) scan of the L5-S1 area. He diagnosed L5-S1 disc herniation on the right side, with right lower extremity radiculopathy, and piraformis syndrome on the right. Stating that the original injury to appellant's low back had occurred on June 29, 1999, Dr. Conidi related that in 2003, her symptoms gradually worsened, and she developed radicular pain in her right leg. He opined that appellant's condition was caused by her years of performing the duties of a letter carrier, which consisted of getting in and out of her

---

<sup>1</sup> Appellant's June 29, 1999 traumatic injury claim (File No.xxxxxx864) was accepted for lumbago.

delivery vehicle approximately 80 times a day and carrying the trays of mail. Noting that the original injury predisposed appellant to subsequent aggravation, Dr. Conidi opined that her repetitive work activities provided nearly daily exacerbation, resulting in the disc herniation with nerve root involvement.

In a decision dated February 24, 2009, 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.<sup>2</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>3</sup> 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.<sup>4</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>5</sup> The Office 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.<sup>6</sup> In this regard, it will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>7</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.<sup>8</sup> 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

---

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

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

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

<sup>5</sup> *Id.*

<sup>6</sup> *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).

<sup>7</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

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

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.<sup>9</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>10</sup>

### ANALYSIS

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 and failed to establish clear evidence of error.

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.<sup>11</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>12</sup> As appellant's December 29, 2008 request for reconsideration was submitted more than one year after August 9, 2007, the date of the last merit decision of record, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim.<sup>13</sup>

In its August 9, 2007 decision, the Office found that appellant had failed to establish that a specific incident had occurred in the time, place and in the manner alleged. It found that appellant had provided inconsistent accounts of the incident which allegedly caused her back injury. Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its decision. She did not submit the type of positive, precise and explicit evidence that manifests on its face that the Office committed an error.

In connection with the untimely reconsideration request, appellant's representative stated that appellant's claim "actually represents a continuing repetitive trauma injury as [her] day to day duties are what aggravated her condition as finally demonstrated on February 24, 2003 when she had to cut short her route." He contended that the undated report from Dr. Conidi was sufficient to establish a causal relationship between her repetitive employment activities and her back condition. Counsel's argument does not establish error on the part of the Office. Rather, it undermines appellant's traumatic injury claim, in which she alleged that she injured her back on

---

<sup>9</sup> *Id.*

<sup>10</sup> *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

<sup>11</sup> 20 C.F.R. § 10.607(a).

<sup>12</sup> *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>13</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

a specific day, February 24, 2003, when she stepped out of her mail truck. The Office did not adjudicate the claim as an occupational disease as counsel's argument now maintains.

In a December 17, 2008 statement, appellant indicated that "there was no particular incident that occurred on February 23, 2003, but just a gradual progression of the condition over many days and weeks." Her statement does not refute the Office's determination that she did not establish the occurrence of a traumatic injury on February 24, 2003 as originally claimed. Therefore, appellant's statement is insufficient to establish that the Office erred when it rendered its August 9, 2007 decision.

Appellant submitted an undated report from Dr. Conidi, who noted that he had been treating appellant since 2006 for low back pain. Dr. Conidi provided examination findings and diagnosed L5-S1 disc herniation on the right side, with right lower extremity radiculopathy and piriformis syndrome on the right. He provided a history of injury, which reflected that the original injury to appellant's low back occurred on June 29, 1999, and that in 2003, her symptoms gradually worsened, and she developed radicular pain in her right leg. Dr. Conidi opined that appellant's condition was caused by her years of performing the repetitive duties of a letter carrier.

The Board finds that Dr. Conidi's report is insufficient to establish clear evidence of error. 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.<sup>14</sup> The evidence must *prima facie* shift the weight of the evidence in favor of appellant.<sup>15</sup> Dr. Conidi's report does not address whether appellant sustained a traumatic injury on February 24, 2003, as alleged; nor does it discuss the "inconsistent variations of the events which allegedly caused her back injury." Rather, he attributes appellant's L5-S1 disc herniation to repetitive duties over an extended period of years. Dr. Conidi's report does not manifest on its face that the Office committed an error in denying appellant's traumatic injury claim.<sup>16</sup>

On appeal, counsel argues that the Office erred by misinterpreting appellant's statement regarding her history and that the claims examiner ignored newly submitted evidence. The Board finds counsel's arguments do not establish clear error in the Office's denial of appellant's claim of traumatic injury. The Office's February 24, 2009 decision reflects that it considered all newly submitted evidence under the "clear evidence of error" standard. Neither appellant's statement, nor Dr. Conidi's report, is sufficient to establish clear error at the time it issued its decision.<sup>17</sup> As noted, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Rather, 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

---

<sup>14</sup> *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>15</sup> See *Darletha Coleman*, *supra* note 8.

<sup>16</sup> 20 C.F.R. § 10.607(b).

<sup>17</sup> *Leon J. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

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.<sup>18</sup> Appellant's attempt to clarify the "issue of events" does not meet this standard.

The Board finds that appellant failed to present clear evidence that the Office's final merit decision was in error.<sup>19</sup> Therefore, the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

### **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.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 24, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 23, 2010  
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

---

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*