

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

K.Y., Appellant

and

**U.S. POSTAL SERVICE, COTTONWOOD
POST OFFICE, Salt Lake City, UT, Employer**

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**Docket No. 09-1259
Issued: January 12, 2010**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge

MICHAEL E. GROOM, Alternate Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 16, 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. There is no merit decision within one year of the filing of this appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's January 27, 2009 request for reconsideration on the grounds that it was not timely filed and did not establish clear evidence of error.

On appeal, appellant contends that the Office's decision denying her request for reconsideration is contrary to fact and law.

FACTUAL HISTORY

On February 27, 2007 appellant, then a 53-year-old city letter carrier, filed an occupational disease claim (Form CA-2) claiming that she sustained left-sided sciatica and

degenerative disc disease due to repetitive lifting, bending and twisting while processing a heavy volume of holiday mail on or before December 26, 2006.¹ In a March 9, 2007 letter, the Office advised appellant of the evidence needed to establish her claim. It requested a rationalized opinion from her attending physician explaining how her work factors caused the claimed conditions.

Appellant submitted reports dated February 20 to March 16, 2007 by Dr. Rajiv R. Shah, an attending Board-certified anesthesiologist, who diagnosed lumbar radiculopathy, paraspinal muscle spasms, postlaminectomy syndrome at L4-5 and degenerative spondylosis at C4-6. Dr. Shah did not address causal relationship in his reports. In an April 3, 2007 report, Dr. David B. Jack, an attending family practitioner, opined that repetitive twisting while processing mail and lifting 30- to 40-pound trays of mail caused the onset of back pain on December 26, 2006. He diagnosed lumbar stenosis with nerve root compression at L5 and denervation atrophy.

By decision dated May 30, 2007, the Office denied the claim, finding that causal relationship was not established. It accepted that appellant's job duties required repetitive lifting, twisting and bending. However, appellant failed to submit sufficient rationalized medical evidence explaining how the accepted work factors would cause degenerative disc disease or sciatica.

In a letter dated May 12, 2008 and postmarked June 6, 2008, appellant requested reconsideration. She submitted March 12 and April 2, 2007 duty status reports from Dr. Jack noting work restrictions. Dr. Jack also checked a box "yes" indicating his support for causal relationship. In a May 30, 2008 report, he found appellant permanently disabled due to degenerative disc disease.

By decision dated June 20, 2008, the Office denied reconsideration on the grounds that appellant's request was not timely filed and failed to present clear evidence of error. It found that, on limited review, the additional medical evidence submitted was insufficient to establish that the Office erred in issuing the May 30, 2007 decision denying appellant's claim.

In a letter dated January 21, 2009 and received by the Office on January 27, 2009, appellant requested reconsideration. She contended that the Office erred in denying her claim as it had accepted her previous back condition claims in 1995 and 2006. Appellant submitted an excerpt of a February 29, 2006 decision under File No. xxxxxx379, accepting a herniated L5-S1 disc and aggravation of cervical and lumbar degenerative disc disease. She noted that the Office accepted the claim based on a report from Dr. Jack substantially similar to his May 30, 2008 report.

In a November 12, 2008 report, Dr. Kim C. Bertin, an attending Board-certified orthopedic surgeon, opined that appellant's degenerative left hip arthritis was "most likely accelerated" by her work as a letter carrier.

¹ Under File No. xxxxxx379, the Office accepted a herniated L5-S1 disc with aggravation of cervical and lumbar degenerative disc disease, requiring lumbar discectomy and fusion in 2004. This claim is not before the Board on the present appeal.

In a December 1, 2008 report, Dr. Jack stated that he was familiar with appellant's work duties and had once worked at a post office himself. He opined that appellant's back condition was entirely attributable to spinal damage caused by bending, twisting and lifting at work.

By decision dated February 24, 2009, the Office denied appellant's January 27, 2009 request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error. It found that appellant's January 27, 2009 request was not made within one year of the May 30, 2007 decision, the last merit decision in the case. The Office found that the medical evidence submitted in support of the request did not demonstrate clear evidence of error by the Office in issuing the May 30, 2007 decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁶

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.⁷ Office regulations states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁴ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁵ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ *Id.* at § 10.607(b); *Thankamma Mathews*, *supra* note 3 *Jesus D. Sanchez*, *supra* note 4.

⁷ *Thankamma Mathews*, *supra* note 3.

⁸ 20 C.F.R. § 10.607(b).

⁹ *Thankamma Mathews*, *supra* note 3.

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³

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 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.¹⁴ The Board must make 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.¹⁵

ANALYSIS

In its February 24, 2009 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on May 30, 2007. Appellant's request for reconsideration was received by the Office on January 27, 2009, more than one year after May 30, 2007. Accordingly, her request for reconsideration was not timely filed.

The Board finds that appellant's January 27, 2009 letter does not raise a substantial question as to whether the Office's May 30, 2007 decision was in error or shift the weight of the evidence in her favor. It is insufficient to establish clear evidence of error. The decision excerpt and medical report pertaining to a prior compensation claim are not relevant to the claim on the present appeal. The November 12, 2008 report of Dr. Bertin, an attending Board-certified orthopedic surgeon, pertains to left hip arthritis, a condition not accepted in appellant's February 27, 2007 back condition claim. The Board has held that irrelevant evidence is insufficient to establish clear evidence of error.¹⁶

In a December 1, 2008 report, Dr. Jack opined that appellant's back condition was entirely attributable to spinal damage caused by the accepted work factors. This opinion is repetitive of his reports previously considered by the Office. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit

¹¹ *Jesus D. Sanchez*, *supra* note 4.

¹² *Leona N. Travis*, *supra* note 10.

¹³ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *James R. Mirra*, 56 ECAB 738 (2005).

¹⁵ *Gregory Griffin*, *supra* note 5.

¹⁶ *Thankamma Mathews*, *supra* note 3.

review.¹⁷ The report does not manifest on its face that the Office erred in denying appellant's occupational disease claim and is insufficient to establish clear evidence of error.

Appellant has not provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office's May 30, 2007. On appeal, she asserted that the Office's February 24, 2009 decision was contrary to fact and law. However, appellant did not submit evidence demonstrating any error by the Office. Consequently, the Office properly denied her reconsideration request as her request does not establish clear evidence of error.

CONCLUSION

The Board finds that appellant's January 27, 2009 request for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

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

Issued: January 12, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁷ *Denis M. Dupor*, 51 ECAB 482 (2000).