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

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| **D.V., Appellant** | ) | |
| **and** | ) | **Docket No. 09-1583** |
| **U.S. POSTAL SERVICE, SUNNYSLOPE POST OFFICE, Phoenix, AZ, Employer** | ) | **Issued: March 10, 2010** |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On May 29, 2009 appellant filed a timely appeal from a June 30, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration as untimely and failing to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated July 17, 2006 and the filing of this appeal on May 29, 2009, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

### *ISSUE*

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

### *FACTUAL HISTORY*

This case was before the Board in a prior appeal. By decision dated February 22, 2007, the Board affirmed an Office hearing representative's July 18, 2006 decision.[1] The Office

[1] Docket No. 06-2078 (issued February 22, 2007).

denied appellant's claim that she sustained an emotional condition in the performance of duty. The Board found that she did not establish her allegations of harassment, retaliation and discrimination, error in her transfer from modified duty or that she was required to work outside her medical restrictions. On January 9, 2008 the Board issued an order dismissing appellant's appeal in Docket No. 07-2067 and dismissing her petition for reconsideration as untimely in Docket No. 06-2078.[2] The facts of the case as contained in the prior decision are incorporated herein by reference.[3]

On June 15, 2008 appellant requested reconsideration before the Office. She submitted medical and factual information from 2005 and 2006, which had been previously considered together with an undated letter from the Equal Employment Opportunity Commission (EEOC) noting that it had directed the employing establishment to take corrective action. Appellant also submitted a September 1, 2005 grievance the union filed on her behalf; a July 14, 2005 fax from the employing establishment regarding the unavailability of her light-duty job; and her refusal of an attached job offer. In a March 21, 2007 report, Dr. A. Todd Alijani, a treating Board-certified orthopedic surgeon, diagnosed left shoulder impingement syndrome and myofascial pain in her upper back. Medical records dated January 3, 2006 from Dr. John C. Porter, a treating physician, diagnosed upper extremity myofascial pain due to repetitive motion. He advised that appellant was unable to perform her duties as a mail processing clerk. Other materials included partial medical reports, grievance records and her prior statements.

In a decision dated June 30, 2008, 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 Federal Employees' Compensation Act[4] 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.[5] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.[6] The Board has found that the imposition of the one-year limitation

[2] Docket Nos. 07-2067 and 06-2078 (issued January 9, 2008).

[3] Appellant filed a claim for stress under claim file number xxxxxx716, which the Office accepted for unspecified anxiety condition, resolved. On June 8, 2005 she filed a claim for a recurrence of disability beginning June 2, 2005. Appellant alleged that her stress returned after learning she lost the job she held as a result of a settlement agreement for her original injury. The Office developed the claim as a new injury as appellant implicated new factors of employment. This was assigned claim file number xxxxxx650.

[4] 5 U.S.C. § 8101 *et seq.*

[5] 20 C.F.R. § 10.605.

[6] *Id*. at § 10.607(a).

does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

Title 20 of the Code of Federal Regulations, 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.[8] 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 and would not require a review of the case on the Director's own motion.[9] 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.[10]

## ***ANALYSIS***

The Board finds that the Office properly determined that appellant did not file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[11] However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[12]

The last merit decision in this case was the Board's February 22, 2007 decision. The Board affirmed the denial of appellant's emotional condition claim. As appellant's June 15, 2008 letter requesting reconsideration was made more than one year after the Board's February 22, 2007 merit decision, it was not timely filed.[13]

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[7] 5 U.S.C. § 8128(a); *E.R.*, 60 ECAB ___ (Docket No. 09-599, issued June 3, 2009); *Leon D. Faidley, Jr.,* 41 ECAB 104 (1989).

[8] *D.O.*, 60 ECAB ___ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991). *See E.R.*, *supra* note 7.

[10] *See W.G.*, 60 ECAB ___ (Docket No. 08-2340, issued June 22, 2009); *S.D.*, 58 ECAB 713 (2007); *Alberta Dukes*, 56 ECAB 247 (2005).

[11] 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB ___ (Docket No. 08-977, issued September 12, 2008).

[12] *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008); *Robert F. Stone*, 57 ECAB 292 (2005).

[13] *See* Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.1602.3b (January 2004), which provides in pertinent part: "[A] right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes … any merit decision by the ECAB…."

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence to establish clear error in the Office's finding that she did not establish a compensable factor of employment. Appellant has not established clear evidence of error by the Office. She did not submit sufficient evidence or argument which manifests on its face that the Office committed an error in the denial of her claims.

Appellant resubmitted medical and factual evidence from 2005 and 2006; an undated letter from the EEOC; a July 14, 2005 letter from the employing establishment regarding the unavailability of her light-duty job; a March 21, 2007 report from Dr. Alijani; January 3, 2006 reports from Dr. Porter; a page of a March 23, 2006 report from East Valley Orthaepedics and Sports Medicine and a page of a September 7, 2005 report; and appellant's June 26, 2005 and June 15, 2008 statements. None of this evidence is probative on her allegations of harassment, retaliation or discrimination by coworkers and her supervisor; that the employing establishment erred when it transferred her from her modified position to the General Mail Facility in Phoenix, Arizona; or that she was required to work outside her medical restrictions. The factual evidence submitted by appellant does not address any of her allegations. The undated letter from the EEOC notes that the employing establishment was instructed to take certain corrective action, but does not state what the corrective action was or how it pertains to any of appellant's allegations. The step 1 and 3 union grievances merely allege that the employing establishment erred in the removal of her light-duty position. There is no finding that the employing establishment committed error. The step 3 grievance form indicated that appellant appealed the denial of her grievance. With regard to the submitted medical evidence, the Office is not required to consider medical evidence in an emotional condition case where no computable work factors have been established.[14]

The remaining evidence submitted by appellant is either irrelevant to the issue or duplicative of that previously submitted and is therefore insufficient to establish clear evidence of error. The term clear evidence of error is intended to represent a difficult standard. The submission of evidence which, if submitted before the denial was issued, would have required further development, is not clear evidence of error.[15] None of the evidence submitted manifests on its face that the Office committed an error in denying appellant's claim. Thus, the evidence is insufficient to establish clear evidence of error

## ***CONCLUSION***

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration request dated June 15, 2008. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on June 30, 2008.

[14] *See Richard Yadron*, 57 ECAB 207 (2005).

[15] *Joseph R. Santos*, 57 ECAB 554 (2006).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 30, 2008 is affirmed.

Issued: March 10, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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