

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

A.M., Appellant

and

**DEPARTMENT OF AGRICULTURE,
FARMERS HOME ADMINISTRATION,
Lares, PR, Employer**

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**Docket No. 10-526
Issued: November 8, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On December 18, 2009 appellant filed a timely appeal from the November 3, 2009 nonmerit decision of the Office of Workers' Compensation Programs which denied her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year elapsed between the last Office merit decision dated August 5, 1996 and the filing of the appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

The issue is whether the Office properly determined that appellant's reconsideration request was not timely filed and failed to establish clear evidence of error.

¹ For Office decisions issued prior to November 19, 2008, a claimant has up to one year to file a Board appeal. *See* 20 C.F.R. § 501.3(d)(2). For Office decisions issued on or after November 19, 2008, a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

This case has previously been before the Board. By decision dated May 27, 1998, the Board affirmed Office decisions dated March 18 and August 5, 1996 which found appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on October 14, 1994.² The Board noted that on October 14, 1994 she slipped and fell on a flooded floor; however, she did not submit sufficient medical evidence to establish that she sustained an employment injury due to this incident. The Board noted that the record did not contain any statement or medical evidence around the time of the October 14, 1994 fall which established that appellant reported hitting her head during the fall. In a May 29, 2008 order remanding case, the Board found that the record was incomplete and remanded the case for reconstruction and proper assemblage of the record.³ The facts and the circumstances of the case as set forth in the Board's previous determinations are incorporated herein by reference.

By decision dated August 26, 2008, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

In a December 19, 2008 letter, appellant asserted that her claim should be approved. She questioned the manner in which the Office developed her claim. Appellant submitted evidence with her letter, including an April 2, 2008 prescription sheet, diagnostic reports from 2007 and 2008, 39 pages of progress notes, health records, prescription notes and medical testing from Orange Blossom Family Health Center from 2006,⁴ 21 pages of medical evidence that predated the claimed work injury of October 14, 1994, and copies of prescriptions and progress reports from Dr. Victor M. Mojica, a Board-certified neurologist, from September 1995 to 1999. On September 11, 1995 Dr. Mojica noted a history that appellant fell backwards and hit her head after slipping on a watery floor at work.

In an August 26, 2009 letter, appellant requested reconsideration. She provided a chronological history of the case, summarized various statements she had submitted and described the medical treatments she received. Appellant argued that the evidence supported that she sustained a work-related injury in October 1994 and the Office mistakenly denied her claim. She alleged other errors she believed the employing establishment and the Office made in handling her claim for compensation. Appellant submitted an August 25, 2009 witness statement attesting to her medical problems/conditions after her October 14, 1994 work injury. A 12-page June 10, 2009 statement provided much of the same information and arguments contained in her August 26, 2009 reconsideration request.

By decision dated November 3, 2009, the Office denied appellant's request for reconsideration as it was not timely filed and failed to demonstrate clear evidence of error.

² Docket No. 97-853 (issued May 27, 1998).

³ Docket No. 08-491 (issued May 29, 2009), *order denying petition for recon.* (issued December 2, 2008). Appellant appealed from September 11 and November 7, 2007 Office decisions that found that her requests for reconsideration were untimely and did not present clear evidence of error.

⁴ Certain of these treatment records were signed by Dr. Olga Molina, a critical care physician.

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.⁵ 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.⁶ 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.⁷

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.⁸ Its 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(a), if the claimant's application for review shows clear evidence of error on the part of the Office.⁹ 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.¹⁰

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 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 raise a substantial question as to the correctness of the Office's decision. 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.¹¹

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607; *see also D.K.*, 59 ECAB 141 (2007).

⁷ *Veletta C. Coleman*, 48 ECAB 367 (1997). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

⁸ *A.F.*, 59 ECAB 714 (2008).

⁹ *E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (January 2004).

¹⁰ *D.G.*, 59 ECAB 455 (2008).

¹¹ *Id.* *See James R. Mirra*, 56 ECAB 738 (2005).

ANALYSIS

The Board finds that the Office properly determined that appellant failed to 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.¹² However a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ The most recent merit decision was the Board's May 27, 1998 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Since appellant did not file her request until August 25, 2009, it was filed outside the one-year time period.

As her reconsideration request was untimely, appellant must submit evidence or argument that shows clear evidence of error in the Office's decision denying her claim. As noted, the occurrence of the employment incident on October 14, 1994, when appellant slipped and fell on a wet floor, was accepted. The claim was denied because there was insufficient medical evidence to establish that the accepted slip and fall caused left hip, back, right knee or other medical conditions. Appellant's statements and those from her coworkers or witnesses do not raise a substantial question as to the correctness of the Office decision in denying her claim as they do not address the reason that the claim was originally denied, insufficient medical evidence. Although appellant asserts that her claim was improperly developed, that records were lost and that the Office committed errors, she has not submitted sufficient supporting evidence that is so positive, precise and explicit that it manifests on its face that the Office committed an error in denying her request for merit review.

The medical evidence submitted by appellant is also insufficient to establish clear evidence of error. Medical records which predate the work injury of October 14, 1994 are not relevant to the issue which was decided by the Office. Those other medical treatment records, as from Dr. Molina, and prescription notes and reports of diagnostic testing, which do not address how the October 14, 1994 employment incident caused an injury, do not establish clear evidence of error as they are not relevant to the issue decided by the Office.¹⁴ Dr. Mojica addressed the October 14, 1994 work injury in his September 11, 1995 report, noting a history that appellant fell backwards and hit her head after slipping on a wet floor.¹⁵ This report contains information similar to that contained in the physician's December 27, 1995 report that was considered in the Board's May 27, 1998 decision. Appellant has not explained how this largely duplicative report raises a substantial question as to the correctness of the Office's decision. To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. 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

¹² See *supra* note 7. See also 20 C.F.R. § 10.607(a); *A.F.*, *supra* note 8; *Alberta Dukes*, 56 ECAB 247 (2005).

¹³ *D.G.*, 59 ECAB 734 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁴ See *F.R.*, 61 ECAB ____ (Docket No. 09-575, issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

¹⁵ The Board's May 27, 1998 decision noted that the record contemporaneous with the October 14, 1994 fall did not support that appellant hit her head when she fell.

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.¹⁶ Consequently, the medical evidence submitted by appellant is insufficient to establish clear evidence of error.

Appellant's arguments on appeal are largely repetitious of her previous statements and requests for reconsideration. She asserts that there is missing documentation from the record and numerous errors which she believed the employing establishment and the Office committed errors in handling her claim. As explained, these assertions are not relevant to the reason that the claim was denied. Clear evidence of error is intended to represent a difficult standard. Appellant has not otherwise submitted supporting evidence in support of her assertions that is of sufficient probative value to raise a substantial question as to the correctness of the Office's decision.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 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

¹⁶ *E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009).