

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

B.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Jose, CA, Employer**

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**Docket No. 10-768
Issued: November 19, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 27, 2010 appellant filed a timely appeal of a December 22, 2009 decision of the Office of Workers' Compensation Programs, finding that her request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the December 22, 2009 decision. The Board does not have jurisdiction over a decision on the merits of the claim.¹

ISSUE

The issue is whether the Office properly determined appellant's request for reconsideration was untimely and failed to establish clear evidence of error.

¹ The last merit decision was a Board decision dated June 21, 1988. The Board has jurisdiction over final decisions of the Office. See 20 C.F.R. § 501.2(c). For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated June 21, 1988, the Board affirmed an Office decision dated June 24, 1987 that terminated appellant's compensation effective November 23, 1985.² The Office found a conflict between Attending Orthopedic Surgeon Dr. James Schneider and a second opinion referral physician, Dr. Charles Owen, an orthopedic surgeon. In the June 24, 1987 decision, the hearing representative found the weight of the evidence was represented by Referee Physicians Dr. Lawrence Petrakis, Dr. David Chittenden and Dr. Don Wilson.

On April 20, 2009 the Office received evidence previously of record and an October 14, 1987 report from Dr. Schneider. In an October 14, 1987 report, Dr. Schneider provided results on examination and diagnosed chronic lumbosacral sprain and medial meniscus tear of the left knee. He indicated his findings and opinions as reported in his February 12, 1987 report which remained essentially unchanged.

By letter dated April 24, 2009, the Office advised appellant that she could file a request for reconsideration. In an undated letter received by the Office on October 1, 2009, appellant requested reconsideration of her claim. She stated that the Office had lost, misplaced or hidden her appeals and had misquoted or ignored Dr. Schneider's reports.

By decision dated December 22, 2009, the Office found appellant's request for reconsideration was untimely filed. It further found that she was not entitled to merit review as her reconsideration request did not establish clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act 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.³ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁴

Section 8128(a) of the Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁷ The Office, through regulations,

² Docket No. 88-256 (issued June 21, 1988). The Board adopted the findings and conclusions of the Office hearing representative.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.605 (1999).

⁵ 5 U.S.C. § 8128(a).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Act.⁸ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁹

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.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.¹¹ 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.¹²

ANALYSIS

Appellant submitted an undated application for reconsideration received by the Office on October 1, 2009. The last decision on the merits of the claim was the Board's June 21, 1988 decision. To file a timely application for reconsideration, appellant had one year from the Board's decision. Although appellant referred generally to lost or misplaced "appeals," there was no evidence presented that she timely filed an application for reconsideration. The Board finds the Office properly determined the application for reconsideration received on October 1, 2009 was untimely filed.

Since the application was untimely, appellant is not entitled to a merit review unless the application demonstrates clear evidence of error. According to her, the Office had misquoted or ignored Dr. Schneider's reports without providing specific examples of how the reports were misquoted. Appellant stated that the Office ignored Dr. Schneider's "last reports" and she had new medical evidence. It is not clear to what specific new evidence she was referring in her reconsideration request. The Office reviewed Dr. Schneider's October 14, 1987 report, which had been previously submitted but was not before the hearing representative at the time of the June 24, 1987 decision and therefore not reviewed by the Board in its June 21, 1988 decision. To the extent appellant is arguing the October 14, 1987 report showed clear evidence of error,

⁸ 5 U.S.C. §§ 8101-8193.

⁹ 20 C.F.R. § 10.607.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

¹¹ *D.O.*, 60 ECAB ___ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹² *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

the Board finds no evidence to support this claim. The Board notes that Dr. Schneider was on one side of conflict that was resolved by a panel of referee physicians. Additional reports from a physician on one side of the conflict that is properly resolved by a referee physician are generally insufficient to overcome the weight accorded the referee's report or create a new conflict.¹³ Even evidence sufficient to create a conflict would not, as noted above, establish clear evidence of error. Moreover, Dr. Schneider referred to the findings in his February 12, 1987 report, which was reviewed by the hearing representative and the Board in its prior decision.

The Board accordingly finds that appellant has not established clear evidence of error in this case. The Office properly denied the application for reconsideration without merit review of the claim.

On appeal, appellant stated that she had requested reconsideration on August 10, 1988 and the Office had ignored her request. The letter dated August 10, 1988 was addressed to the Board "again appealing your decision." There is no evidence that appellant submitted a reconsideration request to the Office within one year of the June 21, 1988 Board decision. The appeal rights to the June 24, 1987 Office decision clearly explained the procedure with respect to requesting reconsideration.¹⁴ Appellant argues that there was error with respect to her claim, but the Board finds the application for reconsideration was untimely and appellant did not establish clear evidence of error in the termination of compensation effective November 23, 1985.

CONCLUSION

The Board finds the Office properly determined appellant's application for reconsideration was untimely and failed to show clear evidence of error.

¹³ See *Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹⁴ The Board also noted in its June 21, 1988 decision that appellant could submit additional evidence to the Office and request reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 22, 2009 is affirmed.

Issued: November 19, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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