

FACTUAL HISTORY

On prior appeal,¹ the Board noted that appellant began a modified casual assignment on February 12, 2000 that required her to sort letters manually. Appellant stated that sorting letters into boxes required her to reach above her head and to reach out and in front of her body on a repetitive basis. Reaching also involved twisting, she stated. Appellant performed this activity for three hours in her four-hour shift. As there was no strong or persuasive evidence refuting her account of her physical activities, the Board found that she had established these work activities at the time, place and in the manner alleged. The Board affirmed the denial of compensation benefits, however, on the grounds that appellant failed to submit a well-reasoned medical opinion explaining how the specific duties she performed in April 2000 and early May 2000 caused or contributed to her neck or shoulder condition.

On a subsequent appeal,² the Board found that the opinion of Dr. L. Edward Weeks, appellant's orthopedic surgeon, did not focus his opinion on causal relationship to the work assignments in question or show a familiarity with the dates she performed. Dr. Weeks did not explain how the frequent use of appellant's arms caused or contributed to rotator cuff calcific tendinitis or what evidence formed the basis of his opinion.

Appellant requested reconsideration on June 10, 2008 but submitted no evidence on the issue of medical causation. Her representative explained that such evidence would be forthcoming and that he was filing the request to preserve his client's appeal rights.³

In a July 31, 2008 decision, the Office denied reconsideration, noting that it had received no such evidence. Appellant appealed to the Board but at the April 9, 2009 oral argument confirmed that she had not submitted any new evidence to support her request for reconsideration. Counsel asked the Board to dismiss the appeal and it granted his request.⁴

On September 18, 2009 appellant, through counsel, again requested reconsideration by the Office. She submitted the June 18, 2009 report of Dr. Weeks, who offered a chronology of her federal employment. Dr. Weeks described appellant's work assignments from

¹ Docket No. 05-1648 (issued December 9, 2005). The facts of this case as set forth in the Board's prior decisions are hereby incorporated by reference.

² Docket No. 07-295 (issued June 15, 2007).

³ All requests for reconsideration should be accompanied by argument or evidence meeting the applicable standard of review. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (January 2010); see *Gary A. Montfort*, Docket No. 94-146 (issued May 19, 1995) (a claimant may not extend the one-year time limitation for filing a request for reconsideration by making such a request and, after the time limitation has expired, submitting the required argument or new evidence).

⁴ Docket No. 09-197 (issued May 26, 2009).

February 12 to April 6, 2000 and the physical demands.⁵ He reviewed his treatment of appellant, and addressed the issue of causal relationship, as follows:

“[Appellant] states that she had no pain prior to performing her work which involved frequent and extended use of the arms overhead and that her pain began during that work, necessitating her stopping that work and continued since that time. This strongly indicates that her work was the cause of her problem, although there was a delay of five years between the inciting work episodes and her first visit to me.

“To reiterate, the timing of her pain occurring during her work and persisting afterwards indicates that the work was the cause of the onset of her shoulder problems. The location of the pain in her shoulders and the diagnosis are consistent with repeated overhead use of the arms in her work situation.

“I am unaware of any activities outside of her work which would have caused the problem.

“All of these factors including the diagnosis and history, indicate that there is a direct cause and effect relationship between her repetitive use of her arms overhead in her manual sorting and the overuse pain she began to experience at that time in her shoulders.

“Therefore, I do feel to the degree of reasonable medical probability, that her shoulder problems were caused by her employment as described to me and summarized above.”

In a decision dated November 4, 2009, the Office denied appellant’s September 18, 2009 request for reconsideration. It found the request untimely and did not establish clear evidence of error in its most recent merit decision.

On appeal, counsel argues that appellant should not be punished for withdrawing her prior appeal to the Board by having to meet the clear evidence of error standard. He states that appellant believed the prior appeal would generate a new merit decision. Counsel contends that the Office should have considered appellant’s action in requesting reconsideration and then Board review and then requesting withdrawal of the appeal to the Board “which would have generated a merit decision” as good cause to allow consideration of Dr. Weeks’ latest report under the standard of review for a timely reconsideration request.

⁵ Appellant began her assignment on February 12, 2000 and first became aware of her condition on April 6, 2000.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretion to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”⁶

The Office, through regulations, has imposed limitations on the exercise of this discretion. 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.⁷

The term “clear evidence of error” is intended to represent a difficult standard.⁸ If clear evidence of error has not been presented, the Office should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁹

ANALYSIS

The Board's June 15, 2007 decision affirmed the denial of appellant's claim. It is the most recent decision on the merits of her case. Appellant had one year from the date of that decision, or until June 16, 2008,¹⁰ to make a timely request for reconsideration to the Office.¹¹ Her September 18, 2009 request for reconsideration is therefore untimely.

The question becomes whether appellant's untimely request establishes clear evidence of error. To support her request she submitted the June 18, 2009 report of her orthopedic surgeon.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

⁹ *Id.* at Chapter 2.1602.3.d(1).

¹⁰ June 15, 2008 was a Sunday.

¹¹ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by ECAB, but does not include preresoupment hearing decisions. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1).

Dr. Weeks attempted to remedy the deficiencies explained by the Board in its June 15, 2007 decision. He demonstrated his understanding of the physical demands imposed by the work assignments in question and he generally supported a direct cause-and-effect relationship between the repetitive use of appellant's arms overhead and the pain she began to experience in her shoulders.

Appellant alleges an injury developing over time, from February to April or May 2000. This was some five years before she first saw Dr. Weeks. The nature of her diagnosed conditions -- calcific tendinitis and acromioclavicular arthrosis -- was not well explained. Dr. Weeks noted that he based his opinion on appellant's history of symptoms that "strongly indicated" that her work was the cause of her problem. In this regard, he noted the five-year delay between the episodes identified by appellant and her first visit for treatment.

It is not enough that Dr. Weeks addressed the deficiencies noted by the Board in its June 15, 2007 merit decision. While said evidence could be considered relevant and pertinent new evidence not previously considered by the Office warranting a reopening of her case for further merit review by the Office, it did not accompany a timely request for reconsideration. The clear evidence of error standard requires more than relevant and pertinent new evidence. It requires the claimant to establish the element in question so clearly that it must be accepted as fact.

The Board finds that an opinion by Dr. Weeks on causal relationship, although given to a stated degree of medical probability, fails to show clear evidence of error in the Office's most recent merit decision. This evidence does not entitle appellant to a merit review of her case because it represents the physician's opinion but does not, on its face, establish medical causation as a matter of fact. The Board will therefore affirm the Office's November 4, 2009 decision denying appellant's September 18, 2009 request for reconsideration.

Appellant's representative argues that the prior appeal to the Board effectively stayed the prior request for reconsideration, which was timely, and because appellant believed that the Board would have issued a merit decision had he not asked the Board to dismiss the prior appeal, he argues that the September 18, 2009 request should also be regarded as timely.

Appellant's representative cites no authority to support this argument and the Board is unaware of any authority that would. The time limitation for requesting reconsideration is well established. It expired on June 16, 2008. Neither the Office's July 31, 2008 decision denying appellant's June 10, 2008 request nor appellant's October 27, 2008 appeal to the Board nor the representative's request to dismiss that appeal "stayed" or tolled the one-year period for making a timely request for reconsideration. Appellant's September 18, 2009 request was untimely by 15 months.

Appellant's representative relies on the assumption that the Board would have issued a merit decision on the prior appeal. The only issue before the Board on the prior appeal was whether the Office properly denied appellant's prior request for reconsideration. The Board could have decided whether the Office properly applied the appropriate standard of review, but it would not constitute a decision addressing the merits of appellant's claim for compensation or extending the one-year time period for requesting a merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's September 18, 2009 request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 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