

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

B.U., Appellant

and

**DEPARTMENT OF DEFENSE, FALLON
COMMISSARY, Fallon, NV, Employer**

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**Docket No. 10-721
Issued: October 25, 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 January 25, 2010 appellant filed a timely appeal from the December 16, 2009 decision of the Office of Workers' Compensation Programs which denied her reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year elapsed since the most recent merit decision of the Office dated September 16, 2008 to the filing of this 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.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as it was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On July 15, 2007 appellant, then a 50-year-old store worker, filed an occupational disease claim alleging that she developed neck pain and shoulder and arm numbness as a result of performing her work duties. She became aware of her condition on February 4, 1999 and

realized it was causally related to her work duties on April 1, 2006. Appellant retired on April 1, 2006.¹

Appellant submitted a May 3, 2007, magnetic resonance imaging (MRI) scan of the cervical spine which revealed a left paracentral disc osteophyte at C5-6, left facet degeneration with left neural foraminal narrowing, moderate disc desiccation and disc osteophyte at C6-7 and facet arthropathy at mid cervical levels. She came under the care of Dr. Viviane Ugalde, a Board-certified physiatrist, who treated her for chronic neck pain after a work-related cervical strain injury in 1999. Appellant diagnosed chronic cervical pain, residual myofascial pain and distal symmetric numbness related to her myofascial pain.

By letter dated September 12, 2007, the Office advised appellant of the factual and medical evidence needed to establish her claim and requested that she submit additional evidence, within 30 days. It asked that she submit a physician's reasoned opinion addressing the relationship of her claimed condition and specific employment factors.

In a June 7, 2005 report, Dr. Scott Playford, a Board-certified neurosurgeon, treated appellant for neck pain which began in 1999 after a bag of rice fell on her head while at work. He noted appellant underwent physical therapy with improvement only to have recurrent neck pain after two years. On July 3, 2007 appellant was treated by Dr. James Lynch, a Board-certified neurosurgeon, for neck and bilateral upper extremity radicular pain, weakness and parenthesis. She reported a history of a work-related trauma in 1999 involving a bag of rice. Dr. Lynch diagnosed neck pain refractory to conservative therapy, C5-6 and C6-7 multilevel cervical degeneration, C5-6 and C6-7 foraminal stenosis bilaterally, C5-6 and C6-7 cervical osteophytic disease, failed conservative therapy and work-related injury aggravating probable degenerative age-related disc disease.

In a decision dated November 1, 2007, the Office denied appellant's claim, findings that the medical evidence was not sufficient to establish that her cervical condition was caused by the accepted work duties.

On April 5, 2008 appellant requested reconsideration. She submitted physical therapy reports dated March 12, 1999 and March 25, 2002. Appellant was treated by Dr. Playford on June 24, 2004 and May 23, 2005. He diagnosed anxiety disorder and allergic rhinitis. On March 22, 2006 Dr. Charles Quagliari, a Board-certified neurologist, diagnosed cervical pain syndrome secondary to blunt trauma in 1999 and migraine headaches, most likely secondary to the trauma appellant received in 1999. On April 12, 2007 appellant sought treatment from Dr. Ugalde for chronic neck pain which began after a work-related cervical strain injury in 1999. Dr. Ugalde diagnosed chronic cervical pain after cervical strain in 1999 and in 2005, residual myofascial pain in the left cervical paraspinal and distal symmetrical numbness of unknown etiology. On January 7, 2008 appellant was treated by Dr. Walker for recurrent neck and arm pain with numbness which began after a trauma at work in 1999. Dr. Walker diagnosed neck pain with left arm symptoms most likely coming from the C5-6 disc or the C6-7 disc, possible bilateral carpal tunnel syndrome and low back pain. A January 28, 2008 electromyogram (EMG)

¹ Appellant filed the other claims relating to neck and arm conditions. These other claims are not before the Board on the present appeal.

revealed no abnormalities. A January 29, 2008 x-ray of the cervical spine revealed mild degenerative changes of the lower cervical spine, no fracture, subluxation or other abnormality.

On September 16, 2008 the Office denied modification of the November 1, 2007 decision.

In an undated letter postmarked October 17, 2009 appellant requested reconsideration. She noted that she was in constant pain and experienced depression due to her condition, reviewing the prior history of injury in 1999. Appellant requested to be sent to an Office referral physician, but her request was denied. She was granted social security disability. In a May 8, 2009 report, Dr. Lynch noted appellant had evidence of bilateral C6 and C7 radiculopathies, multilevel degenerative disc disease and foraminal stenosis. He recommended a two level anterior cervical discectomy in 2007; however, appellant was not interested in pursuing surgery. Dr. Lynch advised that he would not continue to be her physician because she had a negative attitude and poor interaction with his office staff. Appellant submitted an October 15, 2009 decision from the Social Security Administration which granted her disability benefits.

In a December 16, 2009 decision, the Office denied appellant's reconsideration request finding that the request was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority 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.”²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.³ However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁴

² 5 U.S.C. 8128(a).

³ 20 C.F.R. § 10.607(a); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁴ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁵ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁸ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.⁹

ANALYSIS

The Board finds that appellant failed to file a timely application for review. The Office issued its most recent merit decision on September 16, 2008. Appellant's undated request for reconsideration was postmarked October 17, 2009 more than one year after September 16, 2008. Her request was not timely filed.

The Board also finds that appellant has not established clear evidence of error on the part of the Office. Appellant's October 17, 2009 request noted that she had persistent pain and experienced depression due her 1999 injury. She stated that she had requested to be sent to an Office referral physician, but her request was denied. Appellant also noted that she was granted social security disability benefits. While she addressed her disagreement with the Office's decision to deny her claim for an occupational disease, her general allegations do not establish clear evidence of error or raise a substantial question as to the correctness of the Office's decision. The Office properly found that appellant's October 17, 2009 request did not establish clear evidence of error.

The May 8, 2009 report from Dr. Lynch, noted appellant had evidence of bilateral C6 and C7 radiculopathies, multilevel degenerative disc disease and foraminal stenosis. He recommending a discectomy in 2007; however, appellant was not interested in pursuing surgery. Dr. Lynch advised that he would not continue as her attending physician. This evidence is insufficient to raise a substantial question as to the correctness of the Office's decision. The report addresses appellant's general medical condition but is not responsive to the basis of the Office's denial of the claim. As noted, the underlying deficiency in the claim is appellant's failure to submit a rationalized medical evidence which establishes a causal relationship between her claimed cervical, shoulder and arm numbness and her work duties as claimed on

⁵ *Annie L. Billingsley*, *supra* note 3.

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

⁸ *Id.*

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

July 15, 2007. Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.¹⁰ The Board notes that clear evidence of error is intended to represent a difficult standard.¹¹ This evidence is insufficient to establish clear evidence of error.

The October 15, 2009 decision from the Social Security Administration on her claim for disability benefits is not relevant to the underlying issue of whether appellant established her occupational disease claim. The Board has held that entitlement to benefits under another act does not establish entitlement to benefits under the Act.¹² Appellant has not provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor or raise a substantial question as to the correctness of the Office's decision.

On appeal, appellant asserts that she filed an untimely reconsideration request because she was waiting for a decision from the Social Security Administration prior to requesting reconsideration. She included diagnostic testing pertaining to her back problem. Appellant asserted that she was released to work which caused additional damage to her neck and had to quit her job as a result of her neck, arm and shoulder conditions. As note, a decision of the Social Security Administration is not binding upon the Board as the Federal Employees' Compensation Act and the Social Security Act have different standards of medical proof on the question of disability. With regard to appellant's allegation that she submitted sufficient evidence in support of her claim, the Board notes that this is insufficient to show clear evidence of error in an Office decision denying appellant's claim for an occupational disease. As noted, clear evidence of error is intended to be a difficult standard and appellant has not provided evidence or argument 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 decision.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁰ *F.R.*, 61 ECAB ___ (Docket No. 09-575, issued January 4, 2010).

¹¹ *D.G.*, 59 ECAB 455 (2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

¹² *Freddie Mosley*, 54 ECAB 255 (2002) (noting that the Act and the Social Security Act have different standards of medical proof on the question of disability).

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 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