

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

J.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kearny, NJ, Employer**

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**Docket No. 09-2367
Issued: September 9, 2010**

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated August 21, 2009, 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 has elapsed from the last merit decision dated January 22, 2008 and the filing of this appeal on September 23, 2009, 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 refused to reopen appellant's claim for reconsideration of the merits of her claim on the grounds that it was untimely filed and failed to show clear evidence of error.

¹ For Office decisions issued beginning November 19, 2008, an appeal must be filed within 180 days of that decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On August 24, 2007 appellant, then a 37-year-old mail handler, filed an occupational disease claim alleging that she developed bilateral carpal tunnel syndrome as a result of her duties as a mail handler. She indicated that she first realized her condition and its relation to her employment on May 11, 2007. In a separate statement, appellant listed her duties in various positions she held which included: repetitive bending, stooping, lifting, pushing and pulling activities requiring the use of both hands and using cutters to cut straps. She previously stopped work on April 23, 2007 due to a back injury.² No medical evidence was submitted in support of appellant's claim.

On September 10, 2007 the Office advised appellant of the type of evidence needed to establish her claim. No additional evidence was submitted.

In an October 18, 2007 decision, the Office denied appellant's claim. It found that, while she experienced the work factors alleged, there was no medical evidence of record which provided a diagnosis which could be connected to the established work factors.

On October 22, 2007 appellant requested reconsideration that included an October 22, 2007 statement. She submitted a September 27, 2007 medical report from Dr. Mark A. Filippone, a Board-certified physiatrist, in which he diagnosed bilateral carpal tunnel syndrome which he opined was the result of the injuries appellant sustained while at work for the employing establishment. In his reports of October 24, November 21 and 29, 2007, Dr. Filippone noted bilaterally positive Phalen's and positive Tinel's signs over the median nerve at the wrist. He also provided a June 20, 2007 electromyogram (EMG) report regarding the cervical paraspinals and upper extremities.

Also submitted to the record was a December 4, 2007 report from Dr. Andrew Carollo, a Board-certified orthopedic surgeon and second opinion physician in appellant's back claim. Dr. Carollo opined that appellant's accepted back conditions had resolved without residuals and she was able to return to full-time work. He indicated negative findings on examination of the cervical spine and upper extremities.

By decision dated January 22, 2008, the Office denied modification of its earlier decision. It found that the medical evidence was insufficient to establish that the claimed condition was causally related to factors of appellant's federal employment.

On February 27 and October 15, 2008 appellant filed an appeal before the Board, which was docketed as No. 09-166. On March 17, 2009 she requested reconsideration before the Office. In a May 27, 2009 letter, the Office informed appellant that, since she had requested an appeal before the Board, the Board had jurisdiction over the issue being appealed and her

² The record indicates that appellant has filed other claims including one for a back injury which was adjudicated in a separately docketed appeal. *J.L.*, Docket No. 09-735 (issued December 22, 2009). These other claims are not before the Board on the present appeal.

reconsideration request could not be reviewed. In an April 22, 2009 order dismissing appeal, the Board granted her request that her appeal be dismissed.³

Dr. Filippone continued submitting progress reports noting appellant's status, including reports of diagnostic testing. Appellant also submitted a February 12, 2009 report from Dr. Teofilo A. Dauhajre, a Board-certified orthopedic surgeon, who provided an impression of chronic lower neck pain and right cervical radiculitis by history. Dr. Dauhajre noted that EMG and nerve conduction studies of the upper extremities of June 20, 2007 and March 5, 2008 showed evidence of a left C5-6 cervical radiculopathy. He also provided an impression of bilateral carpal tunnel syndrome, supported by the June 20, 2007 and March 5, 2008 testing and double crush syndrome of the left upper extremity, also supported by the diagnostic testing. Dr. Dauhajre recommended that appellant undergo bilateral carpal tunnel surgery.

In a May 22, 2009 letter, appellant's attorney requested reconsideration of the Office's January 22, 2008 decision. He indicated that Dr. Filippone's enclosed May 8, 2009 report supported causal relationship. Counsel also enclosed a May 6, 2009 magnetic resonance imaging (MRI) scan of the cervical spine.

In his May 8, 2009 supplemental report, Dr. Filippone indicated that he reviewed appellant's nine-page letter of August 24, 2007 wherein she described the various repetitive tasks that she performed for the employing establishment. He indicated that since September 2006 appellant repetitively lifted, moved and carried trays weighing up to 65 pounds or more, loaded a conveyor belt with mail, opened sacks of mail, dumped it onto the belt and pushed wire containers weighing up to 400 pounds. Dr. Filippone noted that appellant performed this type of work eight hours a day, five days a week. He opined that the repetitive nature of the duties appellant performed caused the bilateral carpal tunnel syndrome and cervical radiculopathy. Dr. Filippone explained the human body was not designed to perform the strenuous and repetitive duties appellant had performed since 2002. He also noted that the injuries she experienced were frequently seen in employees who had performed the same job tasks she performed.

In a June 2, 2009 letter, appellant's attorney again requested reconsideration. He requested that the Office consider her reconsideration request as timely. Counsel stated that appellant timely appealed to the Board in October 2008, but the appeal was dismissed because she had another case pending with the Board and was advised that she could not have two cases with the Board at the same time. Evidence received into the record included May 28 and July 9, 2009 progress reports from Dr. Filippone.

By decision dated August 21, 2009, the Office denied appellant's request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to

³ Docket No. 09-166 (issued April 22, 2009).

demonstrate clear evidence of error.⁴ The findings of Dr. Carollo contained in his December 4, 2007 report were noted.

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 anytime 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.⁵

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.⁶

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 manifested on its face that the Office committed an error.⁷

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 *prima facie* 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.⁸

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to

⁴ The Board notes the record contains additional evidence following the Office's August 21, 2009 decision. However, the Board may not review this evidence as its review is limited to the evidence that was before the Office at the time of its decision. See 20 C.F.R. § 501.2(c).

⁵ 5 U.S.C. § 8128(a).

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

⁷ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁸ *Annie L. Billingsley*, *supra* note 6.

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.¹²

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The most recent merit decision of record is a January 22, 2008 decision. Appellant had one year from January 22, 2008 to file her application for review. Counsel's requests for reconsideration dated May 22 and June 2, 2009 were more than one year after the Office's January 22, 2008 decision. While appellant requested reconsideration on March 17, 2009, the Office properly noted in its May 27, 2009 letter that her reconsideration request could not be reviewed as the case was pending before the Board. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case.¹³ Additionally, the March 17, 2009 request was also more than one year after January 22, 2008. While counsel argued that appellant timely filed an appeal to the Board in October 2008, the filing of an appeal would have no bearing on the timeliness of appellant's request for reconsideration. Furthermore, there is no merit to the attorney's assertion that appellant withdrew her request for an appellate review of her claim because "she was advised she could not have two cases with the ECAB at the same time." The Board's April 22, 2009 order dismissing appeal merely notes that the appeal request was withdrawn at appellant's request. As appellant's requests for reconsideration were outside the one-year time limit for requesting reconsideration, they are untimely. She must therefore demonstrate clear evidence of error on the part of the Office in issuing the January 22, 2008 decision, which denied her claim on the basis causal relationship was not established.

The Board finds that the evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the most recent merit decision and are of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

Appellant submitted numerous progress reports from Dr. Filippone along with copies of EMG and nerve conduction velocity studies. Although Dr. Filippone opined in his May 8, 2009 supplemental report that the repetitive nature of appellant's job duties caused the bilateral carpal tunnel syndrome and cervical radiculopathy, which is supportive of causal relationship, this report is still not of sufficient probative value to shift the weight of evidence in favor of appellant to establish clear evidence of error.¹⁴ The term "clear evidence of error" is intended to represent

¹⁰ *Id.*

¹¹ *Id.*

¹² *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹³ *See Douglas E. Billings*, 41 ECAB 880, 895 (1990).

¹⁴ *E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009).

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, even if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is still not enough to establish clear evidence of error. The remaining progress reports from Dr. Filippone as well as the EMG and nerve conduction velocity studies and Dr. Dauhajre's February 2, 2009 report fail to establish clear evidence of error.

On appeal, appellant's attorney argues that the Office's August 21, 2009 decision relied on the report of Dr. Carollo, a referee doctor in appellant's other case, and should not have been considered by the Office. This report was submitted to the record in appellant's carpal tunnel syndrome claim and was addressed by the Office, which noted that it had reviewed this medical report, but the decision did not rely on that evidence when it denied the claim. Rather, the Office found appellant's arguments and the additional medical evidence from Dr. Filippone did not establish clear evidence of error.

Appellant's attorney also asserted that the evidence was sufficient to create a medical conflict. Even if the evidence on reconsideration, if submitted prior to the January 22, 2008 decision, were deemed sufficient to create a medical conflict, this would not rise to the level of clear evidence of error.¹⁵

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's January 22, 2008 decision and the Board finds the request for reconsideration was properly denied.

CONCLUSION

The Board finds that the Office properly denied appellant's untimely request for reconsideration as it did not establish clear evidence of error.

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 21, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board