

FACTUAL HISTORY

This is the second appeal in the present case.² In an August 12, 2009 decision, the Board affirmed Office decisions dated December 14, 2007 and September 18, 2008 denying appellant's requests for reconsideration finding that they were untimely filed and failed to establish clear evidence of error. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.³

Following the Office's September 18, 2008 decision, appellant submitted a September 23, 2008 lumbar spine computerized tomography (CT) scan report from Dr. Kathleen A. Barry, a Board-certified diagnostic radiologist, who noted findings and an impression of degenerative joint disease of the lumbar spine.

On October 14, 2009 appellant requested reconsideration. Her attorney indicated that the request was being made within one year of the August 12, 2009 decision and was based on the April 14, 2008 report of Dr. Ernest P. Chiodo, a Board-certified internist, whose report was previously of record. Dr. Chiodo opined that appellant's work injury of March 20, 1997 caused her musculoskeletal disease which resulted in her current disability. Appellant asserted that the Board's decision of August 12, 2009 should be vacated.

By decision dated October 22, 2009, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that she did not present clear evidence of error by the Office.

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."⁴

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)

² On March 19, 2000 appellant, then a 48-year-old letter carrier filed an occupational disease claim alleging that she developed bursitis from carrying mail. The Office accepted her claim for temporary aggravation of the left shoulder bursitis and costochondritis of the chest wall. In its March 29, 2005 merit decision, the Office denied modification of prior decisions that denied appellant's claim for disability beginning June 30, 2000.

³ Docket No. 09-253 (issued August 12, 2009).

⁴ 5 U.S.C. § 8128(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.⁵

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.⁶

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.⁷

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.¹¹

ANALYSIS

In its October 22, 2009 decision, the Office properly determined that appellant failed to file timely applications for review. It rendered its most recent merit decision on March 29, 2005. Appellant's request for reconsideration was dated October 14, 2009, more than one year after March 29, 2005. Although appellant's attorney asserted that the reconsideration request was made within one year of the Board's August 12, 2009 decision, the Board notes that the one year period for requesting reconsideration only accompanies merit decisions on the point at issue, including merit decisions of the Board.¹² The Board notes that its August 12, 2009 decision in Docket No. 09-253 was not a merit decision as it affirmed Office decisions finding that

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

⁶ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L. Billingsley*, *supra* note 5.

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

appellant's reconsideration request was untimely filed and did not present clear evidence of error. Thus, this reconsideration 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 asserted that the August 12, 2009 decision should be vacated. While she addressed her disagreement with the Office's decision to deny her recurrence claim, her general allegations do not establish clear evidence of error as her arguments do not raise a substantial question as to the correctness of the Office's decision. The Board notes that the underlying issue is medical in nature and that appellant submitted no new medical evidence sufficient to shift the weight of the evidence in her favor and establish that the Office erred in denying her recurrence of disability beginning June 30, 2000. Therefore the Office properly found that her statement and letter of October 14, 2009 did not establish clear evidence of error.

Appellant submitted an April 14, 2008 report from Dr. Chiodo who opined that her traumatic occupational injury on March 20, 1997 caused her musculoskeletal disease which resulted in her current disability. However, the Office had previously considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise and explicit in manifesting on its face that the Office committed an error in denying her recurrence of disability beginning June 30, 2000. Resubmission of these documents is sufficient to raise a substantial question as to the correctness of the Office's decision. Following the Office's September 18, 2008 decision, appellant also submitted a September 23, 2008 lumbar spine CT scan report from Dr. Barry. However, this report is insufficient to show clear evidence of error as Dr. Barry did not address whether the work injury caused disability.¹³ Furthermore, the Board notes that clear evidence of error is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is still not clear evidence of error.¹⁴

Appellant has not otherwise provided any argument or evidence 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.

¹³ Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error. *F.R.*, 61 ECAB ___ (Docket No. 09-575, issued January 4, 2010).

¹⁴ *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

ORDER

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

Issued: September 13, 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