

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

J.S., Appellant

and

**DEPARTMENT OF THE ARMY, NATIONAL
GUARD BUREAU, Lansing, MI, Employer**

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**Docket No. 10-385
Issued: September 15, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 25, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated August 24, 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 March 12, 2008 to the filing of this appeal on November 25, 2009, the Board lacks jurisdiction to review the merits of appellant's case 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 untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On May 20, 2003 appellant, then a 43-year-old tool and parts attendant, filed a traumatic injury claim alleging that on May 14, 2003, she sustained a lower back injury while unloading parts from the back of a truck in the performance of duty. Appellant stopped work on

May 20, 2003. The Office accepted appellant's claim for lumbar strain and herniated disc at L4-5 for which she underwent surgery on August 21, 2003. Appellant received compensation benefits.

On July 21, 2006 appellant filed a claim for a schedule award.

By decision dated March 12, 2008, the Office denied appellant's claim for a schedule award. It found that the medical evidence was insufficient to support a permanent impairment to a member or function of the body.

Appellant requested reconsideration on April 15, 2008. She disagreed with the denial of her claim for a schedule award. Appellant noted that she was medically disqualified from her "dual career." She contested the findings regarding her range of motion and indicated that she was unable to participate in activities of daily living without a great deal of pain.

Appellant provided a copy of an April 3, 2008 report to her representative. She also enclosed a copy of an ergonomic survey. Additionally, appellant provided copies of medical reports. They included an August 21, 2003 report from Dr. Kimball M. Pratt, a Board-certified neurosurgeon, who performed surgery to repair appellant's herniated nucleus pulposus with radiculopathy left L4-5 and a December 17, 2003 duty status report from Dr. Pratt, who noted that appellant had permanent lifting restrictions. She also provided a portion of a February 16, 2004 report from Dr. Henry Ottens, a Board-certified orthopedic surgeon, who was unable to fill out a work capacity evaluation. Additionally, the Office received an August 19, 2004 work capacity evaluation from Dr. Scott Krasner, Board-certified in preventive medicine, who also provided restrictions.

By decision dated May 9, 2008, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

Appellant requested reconsideration on August 10, 2009. She noted her accepted conditions and stated that, during surgery, her physician discovered shattered discs that were not revealed in previous tests. Appellant alleged that she was impaired because her physical abilities were restricted. She also advised the Office that she was being sent to a neurosurgeon for an evaluation and determination of her impairment. Appellant also indicated that she had constant back pain and her spine was degenerating with time.

The Office also received a May 28, 2009 lumbar magnetic resonance imaging (MRI) scan read by Dr. Terence Gibboney, a Board-certified diagnostic radiologist, which revealed postoperative changes consistent with left-sided L3-4 laminectomy and some epidural scarring along the left side. Dr. Gibboney also determined that there was no definite evidence of nerve root impingement. He also found disc desiccation at L2-3, L3-4 and L5-S1 and mild disc osteophyte formation.

By decision dated August 24, 2009, the Office denied reconsideration on the grounds that her request for reconsideration was not timely filed and did not establish clear evidence of error on the part of the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ Through its regulations, it has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

The Office's regulations require that an application for reconsideration must be submitted in writing⁶ and define an application for reconsideration as the request for reconsideration "along with the supporting statements and evidence."⁷ The regulations provide that the Office will consider an untimely application for reconsideration 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.⁸

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

¹ 5 U.S.C. § 8128(a).

² *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

³ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁴ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ *Id.* at § 10.607(b); *Thankamma Mathews*, *supra* note 2 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

⁶ *Id.* § 10.606.

⁷ *Id.* § 10.605.

⁸ *Id.* at § 10.607(b).

⁹ *Thankamma Mathews*, *supra* note 2 at 770.

¹⁰ *Id.*

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁴ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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.¹⁵

ANALYSIS

Appellant requested reconsideration on August 10, 2009. Since appellant filed her reconsideration request more than one year following the Office's March 12, 2008 merit decision, the Office properly determined that the request was untimely.

The underlying issue in this case is medical in nature as to whether appellant sustained a permanent impairment as a result of her accepted lumbar strain. The Office found that the medical evidence was insufficient to establish that appellant sustained a permanent impairment that would entitle her to receive a schedule award.

In the August 10, 2009 request for reconsideration, appellant noted that her claim was accepted for lumbar strain and herniated disc and that shattered discs were discovered during surgery which were not revealed in previous tests. She alleged that she did have impairment and restricted physical abilities. Additionally, appellant indicated that she had constant back pain and her spine was degenerating with time. She also noted that she was being sent to a neurosurgeon for an evaluation and determination of her impairment. The Board notes that while appellant alleges that she has impairment, she has not raised any issue of error on the part of its most recent merit decision of March 12, 2008. 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.¹⁶ Appellant has not, in accordance with 20 C.F.R. § 10.607(b), demonstrated clear evidence of error on the part of the Office in finding that she did not establish that she was entitled to a schedule award. Her request for reconsideration does not establish "on its face" that the Office's March 12, 2008 merit decision was erroneous.

The Board also finds that the May 28, 2009 lumbar MRI scan read by Dr. Gibboney is insufficient to establish clear evidence of error. It contains a diagnosis, but no opinion on impairment of a scheduled member of the body. The term "clear evidence of error" is intended

¹² *Jesus D. Sanchez*, *supra* note 3 at 968.

¹³ *Leona N. Travis*, *supra* note 11.

¹⁴ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁶ *D.O.*, 60 ECAB ____ (Docket No. 08-1057, issued June 23, 2009).

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.¹⁷

In the current appeal before the Board, appellant did not submit any medical evidence that rated impairment of a scheduled body member or raise any specific legal contention which would establish that the Office committed error in its March 12, 2008 decision denying her claim for schedule award. Therefore, the Board finds that appellant has not established clear evidence of error in the Office's finding that the evidence was insufficient to establish that appellant sustained a permanent impairment that would entitle her to receive a schedule award.

The Board notes that appellant submitted evidence with her appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision.¹⁸ She also reiterated that she has impairment for which compensation is warranted. As noted above, these arguments would be insufficient to establish clear evidence of error.¹⁹

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

¹⁷ *E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009); *D.O.*, *id.*

¹⁸ 20 C.F.R. § 501.2(c); *see Steven S. Saleh*, 55 ECAB 169 (2003).

¹⁹ The Board notes that appellant retains the right to file a claim for an increased schedule award based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).

ORDER

IT IS HEREBY ORDERED THAT the August 24, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 15, 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