

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

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**K.M., Appellant**

**and**

**U.S. POSTAL SERVICE, PROCESSING &  
DISTRIBUTION CENTER, Mobile, AL,  
Employer**

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**Docket No. 10-496  
Issued: September 23, 2010**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
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 December 16, 2009 appellant filed a timely appeal of a November 12, 2009 decision of the Office of Workers' Compensation Programs, finding that her request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the November 12, 2009 decision. The Board does not have jurisdiction over the merits of the claim.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly found that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

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<sup>1</sup> The last merit decision was a Board decision dated June 20, 2008. The Board has jurisdiction over final decisions of the Office. See 20 C.F.R. § 501.2(c). The last Office decision on the merits was dated September 20, 2007. For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

## **FACTUAL HISTORY**

This case was before the Board on a prior appeal.<sup>2</sup> By decision dated June 20, 2008, the Board affirmed a September 20, 2007 Office decision, finding that appellant had not established a back injury causally related to the accepted employment factors. The history of the case as provided in the Board's prior decision is incorporated herein by reference.

By letter dated October 20, 2009, appellant's representative requested reconsideration of her claim. He indicated a medical report was enclosed.

In a decision dated November 12, 2009, the Office determined appellant's application for reconsideration was untimely. The Office denied merit review of the claim on the grounds that appellant did not establish clear evidence of error. Although appellant indicated that she was submitting additional material, no evidence was received.

## **LEGAL PRECEDENT**

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.<sup>3</sup> The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."<sup>4</sup>

Section 8128(a) of the Act<sup>5</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>6</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>7</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Act.<sup>8</sup> 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.<sup>9</sup>

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<sup>2</sup> Docket No. 08-560 (issued June 20, 2008).

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.605 (1999).

<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application."

<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> 20 C.F.R. § 10.607.

The term clear evidence of error is intended 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 and would not require a review of the case on the Director's own motion.<sup>10</sup> 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.<sup>11</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>12</sup>

### ANALYSIS

The Board notes that the most recent decision on the merits of the claim was the Board's June 20, 2008 decision. Appellant had one year to file a timely application for reconsideration; however, her request for reconsideration was dated October 20, 2009, which is more than one year after the merit decision. Therefore, the application for reconsideration was properly found to be untimely filed.

Since the application was untimely, appellant can obtain a merit review only if the evidence shows clear evidence of error by the Office. The clear evidence of error standard is intended as a difficult standard to meet. Appellant did not offer any specific argument regarding error by the Office. She stated that a medical report was enclosed, but the record does not establish that any new evidence was submitted. The underlying issue on which her claim was denied is medical in nature. The Board finds that appellant's application for reconsideration did not establish clear evidence of error by the Office. In the absence of clear evidence of error, the Office properly denied merit review of the claim.

### CONCLUSION

The Board finds that the October 20, 2009 application for reconsideration was untimely filed and failed to show clear evidence of error.

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

<sup>11</sup> *D.O.*, 60 ECAB \_\_\_ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>12</sup> *Gregory Griffin*, 41 ECAB 458 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 12, 2009 is affirmed.

Issued: September 23, 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