

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

J.W., Appellant and U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, Employer)))))))))))	Docket No. 10-1795 Issued: March 16, 2011
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 RICHARD J. DASCHBACH, Chief Judge
 COLLEEN DUFFY KIKO, Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 24, 2010 appellant filed a timely appeal from a June 15, 2010 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. The last merit decision in this case was the Office's June 15, 2001 decision denying her occupational disease claim. The Board lacks jurisdiction to review the merits of the claim.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that the request was untimely and failed to establish clear evidence of error.

¹ 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

On July 20, 2000 appellant filed an occupational disease claim alleging that she was “reinjured” on June 22, 1996 when her supervisor ordered her to lift parcels weighing more than 70 pounds, which exceeded her 5-pound restriction. As a result of increased pain associated with this incident, she allegedly experienced stress and depression, which resulted in hospitalization.²

The Office initially denied appellant’s claim on September 20, 2000 on the grounds that she had failed to establish a compensable factor of employment. In a decision dated June 15, 2001, the Office affirmed its denial of her claim. However, it modified the grounds for denial to reflect that the claim was time-barred, as it was filed more than three years after the claimed June 22, 1996 incident and there was no evidence establishing that appellant’s immediate supervisor had actual knowledge within 30 days of the alleged injury.

On January 12, 2009 appellant requested reconsideration of the June 15, 2001 decision. In a decision dated March 2, 2009, the Office denied her request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. In a decision dated December 16, 2009, the Board affirmed the Office’s March 2, 2009 decision.³

On February 27, 2010 appellant again requested reconsideration, contending that her claim had been filed in a timely fashion. She stated that the notice of recurrence filed on December 17, 1996 in another case constituted evidence that her claim was timely. Appellant also stated that her physical impairment was prompted by a December 4, 1993 injury.⁴

Appellant submitted a copy of the first page of a March 19, 1997 Office decision in File No. xxxxxx417 denying her claim for a recurrence of her wrist and shoulder conditions related to a December 4, 1993 injury. She also submitted a duplicate of an October 29, 1997 report from Dr. William M. Craven, a Board-certified orthopedic surgeon.⁵

In a decision dated June 15, 2010, the Office denied appellant’s reconsideration request as untimely and failing to establish clear evidence of error.

² Appellant’s December 14, 2006 traumatic injury claim (File No. xxxxxx847) was denied by the Office as time-barred. The Board affirmed the Office’s denial by decision dated April 23, 2008. Docket No. 08-28 (issued April 23, 2008). Appellant’s November 4, 2008 emotional condition claim (File No. xxxxxx362) was denied by the Office as untimely. The Board affirmed the January 5, 2009 denial by decision dated November 17, 2009. Docket No. 09-1085. Appellant’s claim for a December 4, 1993 injury (File No. xxxxxx417) was accepted for left fracture of the metacarpal bones and bilateral carpal tunnel syndrome.

³ Docket No. 09-1086 (issued December 16, 2009).

⁴ The Board notes that appellant addressed her reconsideration request to Chief Judge Alec Koromilas at the Office of Workers’ Compensation Programs. In a letter dated April 22, 2010, the Office asked appellant to clarify whether she intended to appeal her case to the Board or to seek reconsideration with the Office. In an undated letter, appellant stated that her reference to the Board was in error and she intended to seek reconsideration with the Office based on new evidence establishing that her claim was timely filed.

⁵ The Board notes that Dr. Craven’s October 29, 1997 letter was received and considered by the Office prior to its original September 20, 2000 decision denying appellant’s claim.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁶ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 8128(a). To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁷ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁸

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁹ Office regulations and procedure provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ The Board makes an independent determination of whether a claimant has submitted clear evidence of error

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607(a).

⁸ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁹ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004).

¹¹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹² *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁴ *See M.L.*, Docket No. 09-956 (issued April 15, 2010). *See Leona N. Travis*, *supra* note 12.

¹⁵ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁶

ANALYSIS

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

The Office correctly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁷ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁸ As appellant's February 27, 2010 request for reconsideration was submitted more than one year after the date of the last merit decision of record on June 15, 2001, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim.¹⁹

In her request for reconsideration, appellant reiterated her contention that she timely filed her compensation claim. She stated that she was submitting additional evidence, namely a notice of recurrence filed on December 17, 1996 in another case, which would establish the timely filing. Appellant also stated that her physical impairment was prompted by a December 4, 1993 injury. She did not allege or establish error on the part of the Office. Appellant merely repeated arguments made previously. Therefore, her request is insufficient to raise a substantial question concerning the correctness of the Office's decision.

Evidence submitted by appellant in support of her request for reconsideration is also insufficient to establish that the Office committed an error, or to raise a substantial question as to the correctness of the Office's decision. The March 19, 1997 decision in File No. xxxxxx417 denying her claim for a recurrence of her wrist and shoulder conditions related to a December 4, 1993 injury, is not relevant to the issue decided by the Office, namely whether appellant timely filed her claim in File No. xxxxxx597, which alleged a new injury resulting in an emotional condition. Therefore, the document cannot establish clear evidence of error.²⁰

Dr. Craven's October 29, 1997 report was received and considered by the Office prior to its initial denial of appellant's claim. The term "clear evidence of error" is intended to represent a difficult standard. The Office is required to consider how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence

¹⁶ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁷ 20 C.F.R. § 10.607(a).

¹⁸ *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁹ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

²⁰ See *supra* note 12 and accompanying text.

demonstrates clear error on the part of the Office.²¹ Dr. Craven's report was duplicative and, therefore, insufficient to establish clear evidence of error.

The Board finds that the evidence submitted by appellant in support of her untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that the Office committed an error. Therefore, she failed to meet her burden of proof to show clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that the request was untimely and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).