

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

JOHNETTA C. ANDERSON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Shreveport, LA, Employer**

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**Docket No. 04-38
Issued: April 7, 2004**

Appearances:
Johnetta C. Anderson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 1, 2003 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated July 1, 2003, which denied merit review. Because more than one year has elapsed between the last merit decision of the Office dated July 20, 1995 and the filing of this appeal of October 1, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's requests for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board on appeal. In its August 12, 1998 decision, the Board found that the Office properly declined to reopen appellant's claim for

consideration of the merits on December 26, 1995.¹ The facts and the circumstances of the case as set out in the Board prior decision are adopted herein by reference.

Following the Board's August 12, 1998 nonmerit decision, appellant requested reconsideration on May 14, 2003 and submitted additional medical evidence. By decision dated July 1, 2003, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that her reconsideration request 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 Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations 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 review is filed within one year of the date of that decision.⁵ 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).⁶

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.⁷ The Office regulation state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise

¹ Docket No. 96-2595 (issued August 12, 1998).

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁴ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁵ 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).

⁶ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

⁷ *Thankamma Mathews*, *supra* note 3 at 770.

⁸ 20 C.F.R. § 10.607(b).

⁹ *Thankamma Mathews*, *supra* note 3 at 770.

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ The Board must make 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.¹⁵

ANALYSIS

Appellant requested reconsideration on May 14, 2003. Since appellant filed her reconsideration request more than one year from the Office's July 20, 1995 merit decision, the Board finds that the Office properly determined that said request was untimely.

The issue in this case is whether appellant has any continuing condition or disability causally related to her accepted November 21, 1992 employment injury, which the Office previously accepted for right wrist strain and right knee strain. An employee seeking benefits under the Act¹⁶ has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that an injury was sustained in the performance of duty as alleged and that any disability or specific condition, for which compensation is claimed is causally related to the employment injury.¹⁷ The requires rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment activity. Such an opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment activity identified by the claimant.¹⁸

¹¹ *Jesus D. Sanchez*, *supra* note 4 at 968.

¹² *Leona N. Travis*, *supra* note 10.

¹³ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁵ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹⁶ 5 U.S.C. §§ 8101-1893.

¹⁷ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

¹⁸ *Leslie C. Moore*, 52 ECAB 132, 134 (2000).

In support of her request for reconsideration, appellant submitted a report dated May 18, 2003, from Dr. Christopher D. Burda, a rheumatologist, who diagnosed medial compartment collapse and chondromalacia of appellant's right knee. He stated: "It is my opinion this problem is also related to the slip and fall she experienced while at work on February 12, 1993 resulting in the precipitation and aggravation of her osteoarthritis and chondromalacia of the right knee. This is definitely work related."

The report submitted by Dr. Burda included a diagnosis and an opinion on the causal relationship between appellant's work injury and her current condition, but he did not provide any medical rationale to explain how the accepted employment injury, a fall resulting in a knee strain, caused, aggravated or precipitated the condition of chondromalacia. This report is not enough to shift the weight of the medical evidence in favor of appellant. 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. As the only evidence submitted in support of appellant's request for reconsideration, the May 18, 2003 report of Dr. Burda, lacks the necessary medical rationale to meet appellant's burden of proof, it does not raise a substantial question as to the correctness of the Office's latest merit decision and is not sufficient to establish clear evidence of error.

CONCLUSION

The Office properly found that appellant's request for reconsideration was not timely and did not establish clear evidence of error on the part of the Office.

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member