

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

De'BORAH SAMPSON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Los Angeles, CA, Employer**

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**Docket No. 04-834
Issued: June 15, 2004**

Appearances:
De'Boraha Sampson, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 9, 2004 appellant filed a timely appeal of the November 5, 2003 nonmerit decision of the Office of Workers' Compensation Programs which denied her request for reconsideration. Because more than one year has elapsed between the merit decision dated January 26, 2001 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly determined that appellant's January 16, 2003 request for reconsideration was untimely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On June 24, 1999 appellant, then a 45-year-old distribution clerk, filed an occupational disease claim alleging that she developed cervical radiculitis and tendinitis of the right arm, wrist, elbow and shoulder as a result of lifting and throwing mail. Appellant became aware of her condition on May 21, 1998. The Office accepted appellant's claim for cervical muscle strain

and right arm and right shoulder strains and paid appropriate compensation. Appellant did not stop work but continued on light duty.

In a decision dated January 26, 2001, the Office terminated appellant's benefits effective that date on the grounds that the weight of the medical evidence established that she had no continuing disability resulting from her employment injury.¹

On March 14, 2001 appellant requested an oral hearing, which the Office denied as untimely in a decision dated April 24, 2001.

On January 16, 2003 appellant requested reconsideration and submitted additional medical evidence. In a report dated December 3, 2001, Dr. Eleanora S. Spokoyny, a Board-certified neurologist, noted that nerve conduction tests revealed mild sensory peripheral neuropathy of the bilateral upper extremities. In reports dated November 2, 2002 to January 16, 2004, Dr. William P. Simpson, a specialist in orthopedics, noted treating appellant for pain in her neck, both upper extremities, both knees and lower back. Dr. Simpson diagnosed bilateral knee internal derangements, superimposed chronic lumbar musculoligamentous sprain, herniated lumbar discs, bilateral carpal tunnel syndrome, bilateral shoulder impingement syndrome, chronic cervical musculoligamentous sprain and bilateral overuse syndrome of the forearms. He advised that appellant's bilateral shoulder and wrist symptoms were a direct result of repetitive lifting of mail, letter casing and tossing parcels overhead and below the waist. Dr. Simpson stated that, although nerve conduction tests revealed no abnormalities, this was not dispositive of appellant's condition, as she had physical findings of bilaterally positive Phalen's test and Tinel's signs and bilateral atrophy. He recommended surgical decompression of both wrists and the right shoulder. On October 30, 2003 Dr. Simpson diagnosed bilateral carpal tunnel syndrome, bilateral shoulder impingement and cervical and lumbar musculoligamentous sprain and recommended appellant remain off work until November 30, 2003. Appellant also submitted a witness statement describing a disagreement between two of her coworkers.

By decision dated November 5, 2003, the Office denied appellant's request for reconsideration on the grounds that it was not timely and appellant did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with

¹ The Office relied on the opinion of Dr. Frank W. Cunningham, a Board-certified orthopedist and Office referral physician. In reports dated December 20, 1999 and March 27, 2000, Dr. Cunningham concluded that appellant's work-related condition had resolved and that there was no permanent impairment for which ongoing treatment was needed.

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

discretionary authority to determine whether it will review an award for or against payment of compensation.³ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵ In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office.⁶ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁸ The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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 decision.¹²

ANALYSIS

In the November 5, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office issued its most recent merit decision on January 26, 2001 and appellant’s request for reconsideration was dated January 16, 2003, more than one year after January 26, 2001. Accordingly, appellant’s request for reconsideration was not timely filed.

The Board has reviewed the evidence submitted with appellant’s January 16, 2003 reconsideration request and finds that appellant has not established clear evidence of error.

³ 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 his own motion or on application.” 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607 (1999).

⁵ 20 C.F.R. § 10.607(a) (1999).

⁶ 20 C.F.R. § 10.607(b) (1999).

⁷ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

Appellant submitted a report from Dr. Spokoyny which indicated that nerve conduction tests revealed no abnormalities. This report failed to include a work history and the physician did not provide a rationalized opinion addressing the relevant issue of appellant's disability as of January 26, 2001, when her benefits were terminated. The reports from Dr. Simpson diagnosed various conditions as work related. The Board notes, however, that the majority of the medical conditions diagnosed by Dr. Simpson were not accepted by the Office as employment related. While Dr. Simpson indicated that these conditions were causally related to appellant's employment injuries, he did not directly address the issue of appellant's disability as of the January 26, 2001 termination. The Board, therefore, finds that the medical evidence submitted with appellant's January 16, 2003 request for reconsideration is insufficient to raise a substantial question as to the correctness of the Office's January 26, 2001 decision. Accordingly, the Office properly denied appellant's reconsideration request.

CONCLUSION

The Board finds that the Office properly determined that appellant's January 16, 2003 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member