

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

DEBORAH D. NEHEMIAH, Appellant

and

**TENNESSEE VALLEY AUTHORITY,
Chattanooga, TN, Employer**

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**Docket No. 04-2303
Issued: March 10, 2005**

Appearances:
Deborah D. Nehemiah, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 22, 2004 appellant filed a timely appeal of a July 28, 2004 decision of the Office of Workers' Compensation Programs which denied appellant's request for reconsideration without conducting a merit review. Because more than one year has elapsed between the most recent merit decision dated November 25, 2002, 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(d)(2). The only decision properly before the Board is the Office's July 28, 2004 decision denying appellant's request for reconsideration of the merits of her claim.

ISSUE

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

FACTUAL HISTORY

On October 7, 2002 appellant, then a 46-year-old camera operator, filed a traumatic injury claim alleging that she slipped on ice in the parking lot and injured her lower left hip and upper back on March 27, 2002 while in travel status in the performance of duty. Appellant did not stop work.

Appellant also submitted unsigned discharge instructions from West Central Community Hospital which contained a final diagnosis of pelvis and upper back pain, but did not contain any signature. She also submitted an employing establishment investigative report.

In an attending physician's report dated October 8, 2002, Dr. Fred K. Lamb, Board-certified in physical medicine and rehabilitation, checked a box "yes" in response to whether he believed appellant's condition was found to be caused or aggravated by an employment activity. He related that he treated appellant for a lower back and left-sided hip injury and advised that appellant was partially disabled from October 8 to 11, 2002 and could resume light duty on October 8, 2002.

By letter dated October 21, 2002, the Office requested additional factual and medical evidence from appellant.

In a November 9, 2002 report, Dr. Lamb advised that appellant had a bruised left hip and injury to her upper back and diagnosed myofascial pain syndrome. He checked a box "yes" in response to whether he believed appellant's condition was found to be caused or aggravated by the employment activity described and stated that appellant's condition was worsened by prolonged sitting and manifested by pain without permanent damage.

By decision dated November 25, 2002, the Office denied appellant's claim, finding that the evidence supported that appellant actually experienced the claimed incident; however, the medical evidence did not establish that a condition had been diagnosed in connection with the incident.

In a November 18, 2002 report, received by the Office on November 29, 2002, Dr. Lamb advised that appellant was treated on November 15, 2002 for complaints of cervical, thoracic and right hip pain, that appellant related that it began on March 26, 2002 when she slipped and fell on her way to work. He noted that appellant related that she began to experience gradually increasing discomfort in the cervical and mid back which she related caused her to seek emergency room treatment seven months later. Dr. Lamb conducted a physical examination which included a normal examination of the cervical area, hips, knees, shoulders, elbows, forearms, wrists and hands, lower legs, ankles and feet. He explained that appellant's pain was attributable to myofascial pain syndrome, gluteus medius, bilaterally, myofascial pain syndrome and interscapular muscles. Dr. Lamb opined that these diagnoses were directly attributable to the fall of March 26, 2002. In a separate report dated November 15, 2002, he advised that appellant was in need of physical therapy twice a week for two to four weeks.

By letter dated July 19, 2004, received by the Office on July 23, 2004, appellant requested reconsideration. In support of her request, appellant alleged that she did not receive the decision until February 15, 2003.² She also described the circumstances surrounding her injury, and advised that a diagnosis of the condition resulting from the injury would be provided by Dr. Lamb.

In a July 28, 2004 decision, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁴

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).⁵ This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁷

² The record reflects that the Office's November 25, 2002 decision was mailed to appellant's address of record.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8128(a).

⁵ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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. Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.⁸ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. 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.⁹

ANALYSIS

In its July 28, 2004 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on November 25, 2002. Appellant's July 19, 2004 letter requesting reconsideration was submitted more than one year after the November 25, 2002 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the unseemliness of her application. The Office reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

The issue for purposes of establishing clear evidence of error in this case is whether appellant submitted evidence establishing that there was an error in the Office's determination that she did not sustain an injury in the performance of duty. She submitted Dr. Lamb's November 18, 2002 medical report addressing her cervical, thoracic and right hip complaints of pain, which appellant related began on March 26, 2002 and gradually increased such that she went to the emergency room approximately seven months later to seek treatment. Although Dr. Lamb related that appellant indicated that her pain gradually increased over a seven-month period, his examination findings were essentially normal, with no objective findings. The evidence submitted does not establish that the Office's denial of the claim was erroneous. While

⁸ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

⁹ *Id.*

the evidence from Dr. Lamb may allow a construction of the evidence so as to produce a contrary result, this is not sufficient to *prima facie* shift the weight of the medical evidence in favor of the claim. Therefore, the Board finds that his report does not raise a substantial question as to the correctness of the Office's determination that appellant did not sustain an injury in the performance of duty.

Appellant also submitted a November 19, 2002 report from Dr. Lamb requesting authorization for physical therapy. However, this report did not address causal relationship and is insufficient to show that the Office's denial of the claim was erroneous or raise a substantial question as to the correctness of the Office's determination.

Office procedures provide that 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. Evidence such as a detailed, well-rationalized 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 a case.¹⁰

The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in denying her claim.¹¹ Therefore, the Board finds that appellant has not presented clear evidence of error.

CONCLUSION

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 filed and failed to show clear evidence of error.

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹¹ *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member