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

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| **D.G., Appellant** | ) | |
| **and** | ) | **Docket No. 08-137** |
| | ) | **Issued: April 14, 2008** |
| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, San Francisco, CA, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*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 October 18, 2007 appellant filed a timely appeal from a July 13, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration as it was untimely and did not show clear evidence of error. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the July 13, 2007 nonmerit decision.

### ***ISSUE***

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits on the grounds that her request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

[1] *See* 5 U.S.C. § 501.2(c).

## ***FACTUAL HISTORY***

On August 2, 2005 appellant, then a 62-year-old vocational nurse, filed a traumatic injury claim alleging that she sustained a pulled back muscle on May 31, 2005 "holding [a] resistive patient on his side." The employing establishment indicated that she was on annual leave from June 1 to 13, 2005. Upon her return, appellant worked five shifts before reporting her employment injury.

On August 25, 2005 the Office requested that appellant submit additional factual and medical information. In a decision dated September 23, 2005, the Office denied her claim on the grounds that she did not establish that the incident occurred as alleged. The Office additionally noted that she had not submitted any medical evidence in support of her claim.

By letter dated December 3, 2006, appellant requested information regarding her appeal rights. She indicated that she had lost her copy of the September 23, 2005 decision when she relocated. In a December 13, 2006 response, an Office claims examiner enclosed a copy of the appeal rights accompanying the September 23, 2005 decision. The claims examiner informed her that as she had misplaced the original decision, her appeal rights would begin the date of the December 13, 2006 letter.

On March 31, 2007 appellant requested reconsideration. She related that on May 31, 2005 she held a resistant patient on his side so that a nurse could change a dressing. Appellant "overstretched" her back attempting to hold the patient. She experienced leg and back discomfort the next day and throughout her vacation the beginning of June 2005. Appellant filed an injury claim when she returned to work after vacation.

In support of her request for reconsideration, appellant submitted form reports dated June 20, 2005 through February 1, 2007. The June 20, 2005 report of Dr. P. Johnson, a Board-certified internist, noted that appellant complained of a "flare up" of a prior employment injury. Dr. Johnson diagnosed lumbar radiculopathy and low back strain. He found that she should remain off work from June 20 to 23, 2005 and could resume modified duty on June 24, 2005.

On June 20, 2005 Dr. Linda H. Morse, Board-certified in preventative medicine, discussed appellant's complaint of pain in the lower back and fatigue. She diagnosed lumbar radiculopathy and low back strain. Dr. Morse found that appellant was disabled for work from July 21 through August 22, 2005. On July 6, 2005 she listed the history of injury as appellant experiencing low back pain beginning one month ago after holding down a patient. Dr. Morse's back did not hurt at the time but bothered her during vacation. She diagnosed lumbar radiculopathy and low back strain. On August 10, 2005 Dr. Morse released her to resume modified work and on October 12, 2005 found that she could resume her usual employment. In a progress report dated January 26, 2006, she noted that appellant experienced back pain and stiffness in the mornings. Dr. Morse related, "[appellant] is a very hard-working LVN [licensed vocational nurse] whose job involves years of repeated lifting and bending, stooping, pushing and pulling and, aside from any acute back injury, I believe has an excellent case for chronic low back strain on a cumulative basis." She diagnosed lumbar radiculopathy and low back strain. Dr. Morse related that she could provide the Office with a detailed narrative report if requested.

On April 26, 2006 Dr. Morse found that appellant could return to full duty "for this injury." She again indicated that she could provide a more detailed narrative report. On October 20, 2006 appellant reported a gradual onset of increased pain in her lower back and hips. Dr. Morse found that appellant should remain off work from October 30 to November 7, 2006. On November 7, 2006 she noted that a magnetic resonance imaging (MRI) study of the lumbar spine as showing multilievel hypertrophy, degenerative changes and stenosis especially at L4-5. On February 1, 2007 Dr. Morse found that appellant could work full duty.

In a decision dated July 13, 2007, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. The Office noted that a claims examiner erroneously informed appellant that her appeal rights began the date of the December 13, 2006 letter resending her appeal rights. The Office noted that it did not have the authority to extend appeal rights.

## ***LEGAL PRECEDENT***

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[2] 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.[3] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[4] The Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[5] 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.[6]

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. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] 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

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[4] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[5] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

[6] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[7] *Leon J. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

and whether the new evidence demonstrates clear error on the part of the Office. 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.[8] 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***

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[10] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[11] As appellant's March 31, 2007 request for reconsideration was submitted more than one year after September 23, 2005, the date of the last merit decision of record, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim for a traumatic injury on May 31, 2005.[12] While an Office claims examiner informed appellant that her appeal rights would begin as of the date of its December 13, 2006 letter, neither the Board nor the Office has the power to enlarge the specific terms of the Act or to make an award of benefits under any terms other than those specified by law.[13] The applicable regulation provides a one-year time period for requesting reconsideration beginning on the date of the Office's decision.[14]

Appellant submitted form reports dated June 20, 2005 through February 1, 2007 describing her treatment for lumbar radiculopathy and low back strain and listing work restrictions. On June 20, 2005 Dr. Johnson noted that appellant complained of a "flare up" of a prior work injury. He found that she should remain off work from June 20 to 23, 2005 and resume modified duty on June 24, 2005. On July 6, 2005 Dr. Morse indicated that appellant experienced low back pain after holding down a patient one month ago and that she was currently disabled. In a progress report dated January 26, 2006, she attributed appellant's chronic low back strain to her repeated bending, lifting, pushing, stooping and pulling during the course of her employment as a nurse. On April 26, 2006 Dr. Morse found that appellant could return to full duty "for this injury."

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[8] *Id*.

[9] *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

[10] 20 C.F.R. § 10.607(a).

[11] *Robert F. Stone*, 57 ECAB ___ (Docket No. 04-1451, issued December 22, 2005).

[12] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB ___ (Docket No. 05-1637, issued October 18, 2005).

[13] *Richard T. DeVito*, 39 ECAB 668 (1988).

[14] 20 C.F.R. § 10.607(a). In *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), the Board noted that the Office, through regulation, had placed limitations on the exercise of its discretion under 5 U.S.C. § 8128.

The term "clear evidence of error" is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.[15] The evidence must *prima facie* shift the weight of the evidence in favor of appellant.[16] The June 20, 2005 through February 1, 2007 progress reports do not manifest on their face that the Office committed an error in denying appellant's occupational disease claim and thus are insufficient to establish clear evidence of error.

As the evidence submitted by appellant is insufficient to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's last merit decision, she has not established clear evidence of error.[17]

## ***CONCLUSION***

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that her request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 13, 2007 is affirmed.

Issued: April 14, 2008
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

[15] *Joseph R. Santos*, 57 ECAB ___ (Docket No. 06-452, issued May 3, 2006).

[16] *See Darletha Coleman*, *supra* note 7.

[17] *See Veletta C. Coleman*, *supra* note 4.