

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

C.B., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
St. Louis, MO, Employer)

**Docket No. 08-624
Issued: July 24, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 28, 2007 appellant filed a timely appeal of a November 16, 2007 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for reconsideration as it was untimely and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated November 1, 2006 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).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. In a September 30, 2004 decision, the Board set aside the Office's April 29 and October 1, 2003 decisions, which denied appellant's

schedule award claim.¹ It found a conflict in the medical opinion evidence between Dr. John Gragnani, an Office referral physician, and Dr. Raymond F. Cohen, an attending physician, as to the extent of permanent impairment of appellant's right upper extremity. The Board remanded the case to the Office for referral of appellant to an impartial medical specialist to resolve the conflict. It also set aside the Office's December 24, 2003 and January 13, 2004 decisions, denying appellant's request for reconsideration as it determined that this issue was moot in light of its resolution of the schedule award issue. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.² The facts and the history relevant to the present issue are hereafter set forth.

On remand, the Office, by decision dated July 12, 2005, denied appellant's schedule award claim. It found that the May 25, 2005 medical report of Dr. Michael H. Ralph, a Board-certified orthopedic surgeon whom the Office selected as the impartial medical specialist to resolve the conflict in medical opinion, stated that appellant sustained no permanent impairment causally related to her accepted January 15, 1999 employment injury, was entitled to special weight accorded an impartial medical specialist.

In an undated letter received by the Office on July 7, 2006, appellant requested reconsideration of the July 12, 2005 decision. She submitted a September 22, 2005 report of Dr. Rafat S. Nashed, a Board-certified orthopedic surgeon, which stated that she sustained right carpal tunnel syndrome based on an electromyogram and positive Tinel's sign. Dr. Nashed also stated that appellant may have double crush syndrome. In a February 23, 2006 report, Dr. Cohen stated that appellant was disabled due to her cervical surgery. He also stated that she also had work-related right carpal tunnel syndrome due to her ongoing significant symptoms and his findings of positive Tinel's and Phalen's sign, right median and ulnar sensory loss and decreased grip strength on physical examination.

On October 4, 2006 the Office requested that an Office medical adviser review appellant's case record to determine whether she sustained any permanent impairment. On October 26, 2006 Dr. Daniel D. Zimmerman, an Office medical adviser, stated that neither Dr. Nashed's nor Dr. Cohen's report provided any medical documentation that could be utilized to calculate an impairment rating based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

By decision dated November 1, 2006, the Office denied modification of the July 12, 2005 decision. It found that the evidence submitted by appellant was insufficient to outweigh the special weight accorded to Dr. Ralph's May 25, 2005 impartial medical opinion. In an appeal request form dated and postmarked November 3, 2007, appellant requested reconsideration.

By decision dated November 16, 2007, the Office found that appellant's reconsideration request was postmarked November 3, 2007, more than one year after the Office's November 1,

¹ Docket No. 04-1175 (issued September 30, 2004).

² The Office accepted that, on January 15, 1999, appellant, then a 38-year-old letter carrier, slipped and fell during the performance of her duties and sustained cervical, lumbar and right knee strains with resultant arthroscopy, which she underwent on July 31, 2000.

2006 decision and was untimely. It further found that appellant did not submit factual or medical evidence sufficient to establish clear evidence of error in the Office's denial of her schedule award claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's 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.⁵

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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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 decision.¹² The

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Leona N. Travis*, *supra* note 8.

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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.¹³

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁴

The most recent merit decision was issued by the Office on November 1, 2006. It denied modification of its prior decision, denying appellant's schedule award claim for her right upper extremity based on Dr. Ralph's May 25, 2005 impartial medical opinion. As her November 3, 2007 request for reconsideration was made more than one year after the Office's November 1, 2006 merit decision, the Board finds that it was not timely filed.

Appellant did not submit any additional factual or medical evidence with her reconsideration request sufficient to establish that the Office committed clear evidence of error in finding that she was not entitled to a schedule award. She merely requested reconsideration of the Office's November 1, 2006 decision. Appellant's request is insufficient to *prima facie* shift the weight of the evidence in favor of her claim. For these reasons, the Board finds that she has not established clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ *Larry L. Litton*, 44 ECAB 243 (1992).

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2007 decision of Office of Workers' Compensation Programs is affirmed.

Issued: July 24, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board