United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
	)	**Docket Nos. 06-1373**
and	)	**and 06-1723**
	)	**Issued: September 13, 2006**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Oakland, CA, Employer	)	

Appearances:
A.C., 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 31, 2006 appellant filed a timely appeal of a March 23, 2006 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for an oral hearing in Office File No. 132114850. The Board docketed the appeal as No. 06-1373. On July 3, 2006 she filed a timely appeal of the Office's nonmerit decisions dated May 17 and June 14, 2006, which denied her untimely requests for reconsideration and found that she failed to demonstrate clear evidence of error in Office File No. 132114850. The Board docketed the appeal as No. 06-1723. As the last merit decision was issued by the Office on April 5, 2005, the Board lacks jurisdiction to review the merits of her claims pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for a hearing, pursuant to 5 U.S.C. § 8124, as untimely filed; (2) whether the Office properly denied appellant's April 10 and May 31, 2006 requests for reconsideration on the grounds that they were not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On September 24, 2004 appellant, then a 39-year-old tax examining technician, filed a traumatic injury claim alleging that on December 10, 2003 she had a stroke and experienced weakness in the right leg, arm and hand as a result of pulling boxes at work. She submitted medical reports from her attending physicians, including a July 15, 2004 report of Dr. Robert D. Goldfien, a Board-certified internist, who stated that appellant was recovering from a stroke and that she recently returned to work on a trial basis. Dr. Goldfien noted, however, that she was experiencing significant stress and fatigue due to the effort required to work. Appellant was unable to continue to work at least through December 2004 and that she might be able to return to work in January 2005. In an undated narrative statement, appellant described how her stroke was caused by work-related stress.

By letter dated October 20, 2004, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It requested additional factual and medical evidence.

On March 11, 2005 Dr. Goldfien reported that the cause of appellant's stroke was multifactorial. It was plausible that undue job stress contributed significantly to her condition based on the known physiology of stress, which involved factors that could raise blood pressure and increase the risk of abnormal blood clotting. Dr. Goldfien opined that it was not possible, however, to accurately assess the degree to which job stress contributed to the onset of appellant's symptoms.

On March 18, 2005 appellant submitted an undated narrative statement which described a change in her detail assignment duties that became overwhelming for her to perform. On February 1, 2005 she provided the Office with additional information regarding these work duties.

By decision dated April 5, 2005, the Office found that appellant did not sustain an injury while in the performance of duty, as evidence of record failed to establish that her stroke was caused by factors of her federal employment.

In an August 28, 2005 letter, appellant inquired about the status of a previously submitted request for an oral hearing before an Office hearing representative. On February 23, 2006 she advised that she was waiting for a hearing date regarding the April 5, 2005 decision. A claims examiner noted that there was no hearing request of record. Appellant stated that she submitted a request after she received the Office's decision. The record reveals that she submitted a request to the Board rather than the Branch of Hearings and Review. Appellant stated that the Board's April 22, 2005 letter advised her that her request was not clear and that she should clarify her request and submit it to the Office, which she did. The claims examiner noted that the August 2005 letter was the only letter regarding a hearing request. Appellant was advised to check with the Branch of Hearings and Review to see if her request had been received. She was further advised to resubmit the request with an explanation and that it was within the hearing representative's discretion to grant a hearing since more than 30 days had elapsed since the issuance of the April 5, 2005 decision.

By letter dated March 21, 2006, appellant submitted a request for an oral hearing together with a copy of her August 28, 2005 letter and the Board's April 22, 2005 letter.[1]

In a decision issued on March 23, 2006, the Office's Branch of Hearings and Review denied appellant's August 28, 2005 request for an oral hearing as untimely. It exercised its discretion and further denied her hearing request on the basis that the issue in the case could be addressed by requesting reconsideration and submitting additional evidence establishing that she sustained a stroke causally related to factors of her federal employment.

In a September 12, 2005 report, Dr. Goldfien addressed appellant's symptoms. He stated that she was unable to type or write with her right hand and that full recovery was not anticipated. Appellant was unable to work for at least one year from the date of his report. Dr. Goldfien opined that excessive stress could exacerbate her condition and, therefore, her work capacity was very limited.

In an undated letter received by the Office on April 6, 2006, appellant requested an extension of 30 days to submit additional medical information for a hearing date. She noted that her doctor would not be able to see her until April 24, 2006.

By letter dated April 10, 2006, appellant requested reconsideration of the Office's April 5, 2005 decision. In an April 7, 2006 report, Dr. Goldfien reiterated appellant's symptoms and physical limitations and his opinion regarding her prognosis. He stated that excessive stress can contribute to increased blood pressure, headaches, fatigue and dizziness, all of which were experienced by appellant. Dr. Goldfien opined that the stress and harassment that she had while working at the employing establishment certainly "could have" contributed to her stroke. He further described the development of her stroke due to work-related stress.

Appellant filed claims for compensation for disability during the periods July 15, 2004 to January 24, 2005 and January 24 to June 13, 2005 and for a schedule award. The employing establishment submitted its responses to the claimed periods of disability.[2] In a January 11, 2005 report, Dr. Goldfien stated that appellant's stroke left her weak on the right side. Appellant had recovered substantially and was able to work within certain restrictions, beginning 20 hours a week and progressing over time to 40 hours a week.

By decision dated May 17, 2006, the Office found that appellant's April 10, 2006 letter requesting reconsideration, received on April 17, 2006, was untimely filed since it was failed more than a year after the April 5, 2005 decision. It also found that appellant did not submit any evidence establishing clear evidence of error in the prior decision rejecting her claim.

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[1] In the April 22, 2005 letter, the Board advised appellant that her April 11, 2005 correspondence was unclear as to whether she was requesting a hearing before the Office or an oral argument before the Board. The Board further advised that, if she was requesting a hearing, she should direct her request to the district Office which services her claim.

[2] The record reveals that appellant retired from the employing establishment on disability. The employing establishment stated that she was terminated on September 30, 2005 due to a reduction-in-force.

In a May 4, 2006 report, Dakari Wikkeling, a licensed clinical social worker, indicated that appellant was evaluated for depression and anxiety on April 10 and 24, 2006. Appellant presented as being traumatized by harassment at the employing establishment and overwhelmed by this experience, as well as by three strokes sustained in December 2003. She was in no condition to work or file claims. Ms. Wikkeling opined that it would greatly benefit appellant to put her work experience behind her and focus on becoming a healthy vibrant woman.

On May 31, 2006 and in a letter dated June 1, 2006, appellant requested reconsideration of the Office's May 17, 2006 decision. Dr. Goldfien's May 31, 2006 report reiterated her symptoms, restrictions and medical prognosis. He described her work duties, which included receiving and lifting heavy boxes and noted that they were previously performed by two men. Dr. Goldfien stated that the effort and energy required to perform the duties caused stress and, according to appellant, no assistance was offered to her. He reiterated that excessive stress could contribute to increased blood pressure, headaches, fatigue and dizziness. Dr. Goldfien opined that the stress and harassment appellant endured at the employing establishment certainly contributed to the health conditions that eventually led to her strokes.

In a June 14, 2006 decision, the Office found that appellant's May 31, 2006 request for reconsideration was untimely as the most recent merit decision was dated April 5, 2005. It also determined that she failed to establish clear evidence of error in the denial of her claim.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that a claimant is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on her claim before a representative of the Secretary.[3] Section 10.615 of the Office's federal regulation implementing this section of the Act, provides that a claimant can choose between an oral hearing or a review of the written record.[4] The regulation also provides that in addition to the evidence of record, the employee may submit new evidence to the hearing representative.[5]

Section 10.616(a) of the federal regulations provides that a request for a review of the written record or an oral hearing must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision, for which a hearing is sought.[6] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[7]

[3] 5 U.S.C. § 8124(b)(1).

[4] 20 C.F.R. § 10.615.

[5] *Id.*

[6] 20 C.F.R. § 10.616(a).

[7] *Daniel J. Perea*, 42 ECAB 214 (1990).

ANALYSIS -- ISSUE 1

The Board finds that appellant's hearing request was made more than 30 days after issuance of the Office April 5, 2005 decision. Therefore, she is not entitled to a hearing as a matter of right. Her August 28, 2005 request for a hearing before an Office hearing representative was submitted over four months after the decision on her claim. The Office found that she was not entitled to a hearing as a matter of right because her August 28, 2005 hearing request was not made within 30 days of the Office's April 5, 2005 decision. The Office properly exercised its discretion in denying the oral hearing request as the issue could equally well be addressed in a request for reconsideration.

LEGAL PRECEDENT -- ISSUES 2 & 3

Section 8128(a) of the Act[8] does not entitle a claimant to a review of an Office decision as a matter of right.[9] 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.[10] Pursuant to this section, if a request for reconsideration is submitted by mail, "the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as, (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date." Otherwise, the date of the letter itself should be used."[11]

Section 10.607(a) 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.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[13] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[14] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[15] It is not enough merely to show that the evidence could be

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[8] 5 U.S.C. § 8128(a).

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

[10] 20 C.F.R. § 10.607(a).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

[12] 20 C.F.R. § 10.607(b).

[13] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[14] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[15] *Richard L. Rhodes*, 50 EAB 259, 264 (1999).

construed so as to produce a contrary conclusion.[16] 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.[17]

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.[18] 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.[19]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly determined that appellant failed to file timely applications for review. In implementing the one-year time limitation, the Office's procedures provide that the 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.[20]

The last merit decision in this case was April 5, 2005, which found that appellant did not establish that her stroke was caused by factors of her federal employment. As her April 10 and May 31, 2006 requests for reconsideration were made more than one year after this merit decision, the Board finds that they were untimely filed.

The issue is whether appellant submitted evidence establishing that there was clear error in the Office's determination that she did not sustain a stroke causally related to factors of her federal employment. The Board notes that this issue is medical in nature. In support of her April 10 and May 31, 2006 requests for reconsideration, appellant submitted Dr. Goldfien's April 7 and May 31, 2006 reports. Dr. Goldfien addressed her symptoms and her inability to type or write with her right hand. He stated that full recovery was not anticipated and that she had experienced excessive stress which could increase blood pressure, headaches, fatigue and dizziness. The April 7, 2006 report opined that the stress and harassment of work at the employing establishment certainly "could have" contributed to her stroke. In the May 31, 2006 report, Dr. Goldfien opined that work-related stress and harassment contributed to the conditions that led to her stroke. This evidence does not identify specific incidents of employment-related stress and harassment by the employing establishment as the cause of appellant's stroke. Dr. Goldfien's opinion that work-related stress and harassment "could have" contributed to her

[16] *Leona N. Travis, supra* note 14.

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

[18] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

[19] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[20] *Larry L. Litton*, 44 ECAB 243 (1992).

stroke is speculative and equivocal in nature and does not shift the weight of the medical evidence in favor of the claim.[21] His statement that work-related stress and harassment certainly caused appellant's stroke does not adequately address how her stroke was work related in light of his prior March 11, 2005 opinion that the cause of her stroke was multifactorial. Dr. Goldfien noted that it was not possible to accurately assess the degree to which undue job stress contributed to the onset of her symptoms. His opinion regarding causal relation is cumulative of his prior reports that were considered by the Office. The new evidence does not otherwise contain sufficient rationale that raises a substantial question as to the correctness of the Office's denial of her claim.

On January 11, 2005 Dr. Goldfien's found that appellant's stroke left her weak on the right side, but she had recovered substantially to return to work with restriction. This evidence does not address whether appellant's stroke was caused by factors of her employment. The Board finds that this report does not raise a substantial question as to the correctness of the Office's decision.

Appellant's narrative statement, which described the development of her stroke as work related, does not raise a substantial question as to the correctness of the Office's decision.[22] Her opinion regarding causal relation is not relevant as the underlying issue is medical in nature and to be resolved by the submission of probative medical evidence. The Board has held that lay persons are not competent to render medical opinion.[23] Her claims for compensation and a schedule award are not relevant as they do not raise a substantial question as to the correctness of the Office's decision.

The May 4, 2006 report of a licensed clinical social worker is not sufficient to shift the weight of the evidence in favor of appellant's claim as a social worker is not considered to be a "physician" under the Act.[24]

The Board finds that the evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's determination that she did not sustain a stroke caused by factors of her employment.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing pursuant to 5 U.S.C. § 8124. The Board further finds that the Office properly found that appellant's requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.

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[21] *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

[22] *Id.*

[23] *James A. Long,* 40 ECAB 538 (1989).

[24] 5 U.S.C. § 8101(2); *see Ernest St. Pierre*, 51 ECAB 623 (2000).

ORDER

IT IS HEREBY ORDERED THAT the June 14, May 17 and March 23, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 13, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board