United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 06-2128**
	)	**Issued: February 6, 2007**
DEPARTMENT OF HEALTH & HUMAN SERVICES, Falls Church, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 21, 2006 appellant filed a timely appeal of a June 20, 2006 decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated January 11, 1996 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 June 20, 2006 decision denying appellant's request for reconsideration.

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 June 21, 1995 appellant, then a 41-year-old analyst, filed a traumatic injury claim alleging that her neck "popped" on June 15, 1995 when she was reaching for a telephone at work. She alleged that she was unable to move her neck without turning her entire body in her swivel chair to the left. Appellant experienced pain in her left shoulder, neck, arm, wrist and headaches with blurry vision in her left eye. She stopped work on June 27, 1995.[1]

After the Office advised appellant of the evidence needed to establish her claim, she submitted an October 19, 2005 response alleging that she notified her immediate supervisor and that the employing establishment did not properly assist her with her claim. Appellant referred to a September 5, 1990 traumatic injury, alleging that she never stopped receiving treatment for this injury. Appellant stated that repetitive use of the computer and the constant positioning of her body at work exacerbated her previous injury and caused new problems. She enclosed another copy of a Form CA-1, alleging injury on June 15, 1995. The Office also received the receipt portion of a Form CA-2 indicating that Margaret Meyer, a supervisory attorney, received notice of appellant's condition on June 21, 1995.[2] In an October 10, 1995 statement, Carolyn Goodwin, a supervisor, advised that since January 1992 appellant had experienced difficulty walking, bending, stooping and lifting claim files. Ms. Goodwin indicated that appellant's complaints continued until she left for a detail in October 1994.

In a November 16, 1995 decision, the Office denied appellant's claim for compensation, finding that the medical evidence did not establish that the June 15, 1995 employment incident caused an injury.

By letter dated November 20, 1995, appellant requested reconsideration. She contended that the Office did not consider the report of her treating physician, Dr. William Truly, a Board-certified family practitioner. Appellant enclosed a copy of an October 27, 1995 report in which Dr. Truly noted that appellant was seen on June 29, 1995. She related complaints of "pain in her left eye, shoulder, arm, elbow, hand, wrist and neck with an acute exacerbation on June 15, 1995." Appellant described having symptoms of headaches and pain in her neck as early as March 1995 and having "chronic pain in her left lower back and hip with pain radiating into her left lower extremity since an on[-]the[-]job injury in 1990." Dr. Truly conducted an examination and diagnosed chronic cervical strain with radicular pain in the left upper extremity, chronic lumbosacral pain with radiculopathy into the left lower extremity, fibromyositis for low back, scar tissue, left cervical and scapula with trigger zone in the left rib cage at lower border of the trapezius, L5 sacralization on the left side, facet disease at L5-S1, lumbar spondylosis, degenerative changes of the right foot, both knees, wrist and greater trochanter bursitis at T7 and thoracolumbar. Dr. Truly opined that repetitive motion activities prolonged standing, walking or sitting or any activity that would involve constant positioning of the neck "such as using

[1] The record reflects that appellant has an accepted claim for a fall at work on September 5, 1990. The Office accepted the claim for a left arm strain, left hip contusion, left leg strain and chronic lumbosacral strain.

[2] No other portions of a CA-2 form were submitted to the record by appellant. Ms. Meyer advised appellant on June 21, 1995 that she should file an occupational disease claim if she alleged progressive symptoms.

computers or excessive writing" would aggravate any preexisting injuries sustained in the fall of 1990.

By decision dated December 15, 1995, the Office found that the evidence was insufficient to warrant modification of the November 16, 1995 decision. The Office found that the medical reports submitted on reconsideration were insufficient as they did not address the employment factor of June 15, 1995, which appellant described as reaching for a telephone or provide an opinion as to how her conditions were caused or aggravated by the June 15, 1995 incident.

By letter dated January 4, 1996, appellant requested reconsideration.

In a January 4, 1996 report, Dr. Truly opined that computer operators "suffer all types of physical problems to include eye strain with headaches and dizziness, neck, shoulder, hand, wrist (computeritis) and back problems produced by improper posture, a result of having to maintain the same position and work where the ergonomic considerations have not been worked out." He stated that answering the telephone on June 15, 1995 involved reaching and twisting. Dr. Truly noted that appellant repeated this activity up to 30 times a day and that this aggravated her condition. He stated that, "when ergonomic problems have not been addressed, as in this case, a strain is placed on the muscles, tendons and joints which can be attributed to a poorly designed workplace. When one has to also lift heavy claims folders and reference text's weighing up to 15 to 20 pounds; the problem is aggravated further." Dr. Truly opined that appellant's preexisting workplace injury was worsened by having to perform job duties.

By decision dated January 11, 1996, the Office denied modification of the June 15, 1995 decision. It found that the medical evidence was insufficient to establish the fact that the employee sustained a traumatic injury on June 15, 1995.[3]

On March 29, 2006 appellant's attorney requested reconsideration. He contended that she was actually filing a claim for an occupational disease. Counsel referenced the reports of Dr. Truly, stating that they suggested a new occupational injury or an aggravation of her September 15, 1990 injury due to the repetitive activities of her position. He argued that the Office's development of the claim should have included development for an occupational disease. Counsel noted that Dr. Truly's January 4, 1996 report addressed the June 15, 1995 incident and, when read in conjunction with the October 27, 1995 report, supported a history of a traumatic injury on June 15, 1995. He argued that the Office should have developed the claim through a second opinion examination as appellant made a *prima facie* case for an occupational disease claim. The Office also received physical therapy notes, a copy of Dr. Truly's October 27, 1995 report and another copy of Ms. Goodwin's October 10, 1995 statement.

In a decision dated June 20, 2006, the Office denied appellant's request for reconsideration finding that it was not timely filed and failed to establish clear evidence of error.

[3] The Office also noted that appellant was previously advised that if she wished to file an occupational disease claim, she should file a separate claim. However, the Office noted that appellant did not file an occupational disease but rather, she continued to indicate that her injury occurred on June 15, 1995.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[4] 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 --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[5]

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).[6] 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). 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.[7]

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.[8]

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.[9] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

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[4] 5 U.S.C. §§ 8101-93.

[5] 5 U.S.C. § 8128(a).

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

[7] 20 C.F.R. § 10.607(a).

[8] 20 C.F.R. § 10.607(b).

[9] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

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.[10]

ANALYSIS

In its June 10, 2006 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on January 11, 1996. Appellant's March 29, 2006 request for reconsideration was submitted more than one year after the January 11, 1996 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 untimeliness of his application. The Office reviewed the evidence submitted by appellant in support of his 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. In its merit decision of January 11, 1996, the Office found that appellant did not establish that she sustained a traumatic injury on June 15, 1995. It accepted the incident at work that day but found deficiencies in the medical evidence.

On March 29, 2006 appellant's representative requested reconsideration. He contended that her claim should have been developed as an occupational disease claim. The Board finds that this argument does not establish clear evidence of error in the January 11, 1996 decision rejecting her traumatic injury claim. The Office indicated that appellant could file a separate claim for an occupational disease claim. The Office did not make any findings regarding whether appellant sustained an occupational disease but instead adjudicated the claim as one for a traumatic injury. Counsel also argued that the Office erred in failing to further develop the claim through a second opinion examination as appellant made a *prima facie* case for an occupational disease claim. However, the record indicates that the Office acted reasonably in its development of the claim and appellant was aware that she could pursue an occupational disease claim if she wished.[11] These allegations do not establish clear evidence of error.

[10] *Id.*

[11] Even where a *prima facie* claim is established, there is no requirement that the Office make a medical referral. Instead, the Office has the responsibility to take the next step, either of notifying the claimant of what additional evidence is needed to establish the claim fully or of developing the evidence in order to reach a decision. *See Robert P. Bourgeois*, 45 ECAB 745 (1994). In the present case, the Office acted reasonably in notifying appellant of the deficiencies in her claim after the claim was initially filed and also in each decision in which it denied her claim.

Counsel referenced the previously received reports of Dr. Truly dated October 27, 1995 and January 4, 1996, noting that they suggested a new occupational injury or an aggravation of her September 15, 1990 injury due to the repetitive activities of her position. Appellant's representative also alleged that Dr. Truly's January 4, 1996 report, when read in conjunction with the October 27, 1995 report, supported a history of a traumatic injury on June 15, 1995. However, appellant has not shown how the Office's prior consideration of these reports was clearly erroneous. There is no evidence that these reports were not properly considered by the Office in reaching its denial of her claim. The assertions regarding Dr. Truly's reports do not raise a substantial question concerning the correctness of prior Office decisions. 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 (for example, proof of a miscalculation in a schedule award). 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.[12]

The Office also received physical therapy notes. However, a physical therapist is not a physician as defined under the Act. Thus, their reports do not constitute probative medical opinion and have no weight or probative value.[13] The Office also received a copy of the October 10, 1995 statement from Ms. Goodwin. However, the underlying issue is medical in nature and there is otherwise no evidence or argument addressing how such a statement from a layperson raises a substantial question regarding the correctness of the Office's January 11, 1996 decision.

Appellant has not met her burden to establish clear evidence of error on the part of the Office such that the Office erred in denying merit review. The Board finds that the Office properly performed a limited review of appellant's arguments to ascertain whether clear evidence of error was established. It properly denied appellant's untimely request for reconsideration.[14]

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.

[12] *Annie L. Billingsley*, 50 ECAB 210 (1998).

[13] *Jan A. White*, 34 ECAB 515, 518 (1983).

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

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issues: February 6, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board