United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 07-648**
	)	**Issued: June 11, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Highlands Ranch, CO, Employer	)	

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 8, 2007 appellant filed a timely appeal of a November 13, 2006 decision of the Office of Workers' Compensation Programs, denying her request for reconsideration of a January 24, 2003 merit decision. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those decisions issued within one year prior to the filing of the appeal.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the November 13, 2006 nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

[1] 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

FACTUAL HISTORY

On October 15, 2002 appellant, then a 29-year-old mail processing clerk, filed a traumatic injury claim alleging that on September 28, 2002 she experienced pain in her upper back, neck and upper extremities while throwing parcels.

In reports dated September 30, 2002 to January 14, 2003, Dr. Catherine McGuire, appellant's attending chiropractor, provided findings on physical examination which included restricted range of motion, tingling and pain in the back and upper extremities. She diagnosed cervical and thoracic subluxations with upper extremity radiculitis as a result of the September 28, 2002 employment incident.[2] Dr. McGuire did not indicate that x-rays were taken.

By decision dated January 24, 2003, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that she sustained a medical condition as a result of the September 28, 2002 work incident. The Office stated that the evidence from Dr. McGuire was not probative on the issue of causal relationship because she did not meet the definition of a physician under the Federal Employees' Compensation Act.[3]

On March 30, 2003 Dr. McGuire asked the Office to reconsider its denial of appellant's claim. She stated that x-rays were taken of appellant's cervical and thoracic spine and she submitted a copy of an October 14, 2002 report indicating that cervical and thoracic x-rays revealed subluxations at C1-2, C5-6 and C7-T1. On May 14, 2003 the Office advised appellant that she needed to follow the appeal rights attached to the January 24, 2003 decision.

On October 10, 2006 appellant requested reconsideration and submitted additional medical evidence. A September 30, 2004 report of a cervical magnetic resonance imaging (MRI) scan from Dr. Richard B. Karsh, a radiologist, indicated that appellant had a disc protrusion at C5-6.

By decision dated November 13, 2006, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine

[2] The Office's implementing regulation defines subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on any x-ray film to an individual trained in the reading of x-rays. 20 C.F.R. § 10.5(bb) (2006).

[3] In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under 5 U.S.C. § 8101(2). A chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist. *See Mary A. Ceglia*, 55 ECAB 626 (2004).

[4] 5 U.S.C. § 8128(a).

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

whether it will review an award for or against compensation.[6] The Office, through its regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.[7] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

Section 10.607(b) of the Act 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.[9] To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15]

ANALYSIS

The merits of appellant's case are not before the Board. Her request for reconsideration was dated October 10, 2006. As this request was filed more than one year after the Office's January 24, 2003 merit decision, it is not timely.[16] The remaining issue is whether appellant

[6] *Id.* at 768.

[7] 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005).

[8] *Thankamma Mathews, supra* note 5 at 769.

[9] 20 C.F.R. § 10.607(b); s*ee also Donna M. Campbell*, 55 ECAB 241 (2004).

[10] *Dean D. Beets*, 43 ECAB 1153 (1992).

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

[12] *Darletha Coleman*, 55 ECAB 143 (2003).

[13] *Leona N. Travis, supra* note 11.

[14] *Darletha Coleman, supra* note 12.

[15] *Pete F. Dorso*, 52 ECAB 424 (2001).

[16] *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

demonstrated clear evidence of error in the January 24, 2003 Office decision which denied her claim for an injury to her cervical and thoracic spine due to the lack of probative medical evidence establishing causal relationship.

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's January 24, 2003 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of her request for reconsideration, appellant submitted a September 30, 2004 MRI scan report indicating that she had a disc protrusion at C5-6. However, the MRI scan report did not address the issue of causal relationship. Therefore, it did not raise a substantial question as to the correctness of the January 24, 2003 decision in denying appellant's claim due to lack of probative medical evidence on the issue of causal relationship.

Appellant submitted a March 30, 2003 report in which Dr. McGuire stated that x-rays were taken of appellant's cervical and thoracic spine. An October 14, 2002 report indicated that cervical and thoracic x-rays revealed subluxations at C1-2, C5-6 and C7-T1. This evidence does establish that the Office committed an error in its January 24, 2003 decision. In her reports submitted prior to the January 24, 2003 decision, Dr. McGuire diagnosed cervical and subluxations but did not indicate that x-rays had been taken. Therefore, Dr. McGuire did not meet the definition of a physician under the Act and her reports were of no probative value on the issue of causal relationship. Because Dr. McGuire did not meet the definition of a physician under the Act, based on the evidence submitted at the time of the Office's January 24, 2003 decision, the Office denied appellant's claim. The evidence submitted with appellant's untimely reconsideration claim does not raise a substantial question concerning the correctness of the Office's January 24, 2003 decision and is insufficient to establish clear evidence of error.

CONCLUSION

The Board finds that appellant failed to demonstrate clear evidence of error in the Office's January 24, 2003 merit decision. Accordingly, the Office properly denied her request for further merit review in its November 13, 2006 decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 13, 2006 is affirmed.

Issued: June 11, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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