United States Department of Labor
Employees' Compensation Appeals Board

T.W., Appellant	)	
and	)	**Docket No. 07-756**
	)	**Issued: June 21, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Kalamazoo, MI, Employer	)	

Appearances:
John M. Sims, Esq., for the appellant
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 January 24, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated January 8, 2007 which denied her reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated November 9, 2005 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 determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

Appellant, a 34-year-old automation clerk, filed a Form CA-2 claim for benefits on July 24, 2005, alleging that she sustained a neck condition causally related to factors of employment. By decision dated September 23, 2005, the Office denied her claim on the grounds

that she did not submit medical evidence sufficient to establish that the claimed medical condition was causally related to her federal employment.

On October 24, 2005 appellant requested reconsideration. In a May 3, 2005 report, Dr. Michael G. Hughes, a Board-certified neurosurgeon, stated that appellant related complaints of diffuse neck pain radiating into the upper thoracic, trapezius and scapular area. He noted that appellant had episodes of radicular pain down both arms, paresthesia down both arms, an occasional "electric shock sensation" affecting her neck and radiating down her arms and occasional headaches. Dr. Hughes stated that results of a cervical x-ray showed some narrowing at C4-5 and some foraminal narrowing; he advised that a magnetic resonance imaging [MRI] scan of the cervical spine demonstrated a central herniated disc and some foraminal narrowing at C4-5, with some minimal cord effacement, and a posterior central protrusion without compromise at C6-7. He diagnosed anxiety, depression and chronic pain syndrome.

In a report dated October 19, 2005, Dr. Paul A. Walk, a Board-certified family practitioner, indicated that appellant had a history of cervical symptomatology. He stated that a February 11, 2005 MRI scan showed a posterior central disc herniation with associated bony hypertrophic changes at C4-5 causing spinal stenosis.

By decision dated November 9, 2005, the Office denied modification of the September 23, 2005 decision.

On August 29, 2006 the Office received a July 31, 2006 report from Dr. Hughes, who stated:

> "I have reviewed the records of Dr. John Zeller, a copy of which is attached hereto as Exhibit 1, indicating that [appellant] sustained an injury in 1998 which was due to a lifting incident in the course of her employment. Following that incident, she developed acute onset of neck pain with some radicular symptoms in her upper extremities, as noted by Dr. Zeller's findings. Dr. Zeller's diagnosis was supported by MRI [scan]. The doctor referred to a September 1998 MRI [scan] in his report, and a December 2000, as well as a February 2005 MRI [scan] [which] have almost identical findings as those referred to by Dr. Zeller.
>
> "Following that incident the history presented by this woman is that she worked for six years with restrictions on numerous occasions, and had persistent symptomatology in the form of pain in her neck and upper extremities.
>
> "Based upon the underlying diagnosis of a herniated disc in the cervical spine, supported by MRI [scan] and the histories presented, it is reasonable to conclude that her present problem began with the lifting incident in the course of her employment in 1998. The condition that I saw in 2005 was basically a natural progression of that condition."

The Office did not receive a timely request for reconsideration in conjunction with Dr. Hughes' report. Appellant's attorney requested reconsideration by letter dated December 12, 2006, received by the Office on December 29, 2006. Counsel acknowledged that the Office did not receive a request for reconsideration within one year of the November 9, 2005 decision. He

stated, however, that he had been under the belief that his office had previously submitted a timely request for reconsideration with the medical evidence the Office received on August 29, 2006. Counsel advised that, after the Office informed him that it had not received such a request, he had concluded that an administrative/clerical error had been made which precluded the Office's receipt of said request. He therefore requested that the Office accept his current request as a timely request for reconsideration.

By decision dated January 8, 2007, the Office denied appellant's request for reconsideration without a merit review, finding appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle an employee to a review of an Office decision as a matter of right.[2] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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 --
>
> (1) end, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[3] As one such limitation, the Office has stated that it 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.[4] The Board has found that the

[1] 5 U.S.C. § 8128(a).

[2] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[3] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

[4] 20 C.F.R. § 10.607(b).

imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).[5]

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[6] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] 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.[12] 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.[13] The Board makes an independent determination of whether an appellant 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.[14]

ANALYSIS

The Board notes that appellant failed to file a timely application for review. The Office issued its most recent merit decision in this case on November 9, 2005. Appellant requested

[5] *See* cases cited *supra* note 2.

[6] *Rex L. Weaver*, 44 ECAB 535 (1993).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

[10] *See Jesus D. Sanchez, supra* note 2.

[11] *See Leona N. Travis, supra* note 9.

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

[13] *Faidley, supra* note 2.

[14] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

reconsideration on December 29, 2006; thus, the reconsideration request is untimely as it was outside the one-year time limit. Appellant's attorney contended that the Office did not receive his reconsideration request with the medical evidence it received in August 2006 due to an administrative/clerical error. On appeal to the Board, he stated that the Office has a copy of this timely request "someplace, somewhere," among the various files "created and consolidated" in this case. However, counsel has submitted no documentation to support this assertion. As appellant's attorney has failed to establish that he submitted a timely request for reconsideration with the medical evidence he submitted in August 2006, the Office properly treated his December 29, 2006 request as untimely.

The Board finds that appellant's December 29, 2006 request for reconsideration failed to show clear evidence of error. Dr. Hughes' July 2006 report is of limited probative value as it did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether appellant sustained a cervical condition causally related to employment factors. Dr. Hughes stated that appellant had a work-related injury in 1998, after which she developed neck pain with radicular symptoms in her upper extremities. He noted that results from MRI scans appellant underwent in 1998, 2000 and 2005 indicated persistent symptomatology in her neck and upper extremities. Dr. Hughes opined that, based on this history of neck pain, taken together with the diagnosis of a herniated disc in the cervical spine, it was reasonable to conclude that her present problem began with the 1998 work injury. He concluded that the condition he observed in 2005 was essentially a natural progression of that condition. However, while Dr. Hughes refers to a 1998 employment injury, the record contains no documentation pertaining to this injury, and appellant has not alleged in the instant claim that her neck condition was caused or aggravated by this injury.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.[15]

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration request dated December 29, 2006. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on January 8, 2007.

[15] The Board notes that appellant submitted additional evidence to the record following the October 26, 2004 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c). Appellant's attorney alleges that this evidence was received by the Office prior to its January 8, 2007 decision. However, this evidence is not contained in the instant record.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2007 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: June 21, 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