

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

L.G., Appellant)

and)

GENERAL SERVICES ADMINISTRATION,)
FEDERAL ARCHIVES & RECORDS CENTER,)
Denver, CO, Employer)

Docket No. 07-1779
Issued: February 4, 2008

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 24, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' nonmerit decision dated March 30, 2007 which denied her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated October 17, 2000 to the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On April 6, 1983 appellant, then a 43-year-old archives technician, claimed that she sustained low back and neck strains while lifting boxes on March 31, 1983. She stopped work

on April 1, 1983. On December 15, 1983 appellant underwent a lumbar hemilaminectomy, which was performed by Dr. Thomas K. Craigmile, a neurosurgeon. The Office accepted her claim for low back and neck strain and herniated nucleus pulposis. Appellant received appropriate benefits.

On August 14, 1985 appellant underwent a second hemilaminectomy, also performed by Dr. Craigmile, who diagnosed herniated nucleus pulposis and perineural scar at L4-5. On October 24, 1985 Dr. Craigmile reported that appellant had recovered nicely and was free of lower extremity radicular pain. He attributed appellant's right hip symptoms to "changes in her right hip joint which will probably require hip joint replacement." On December 4, 1985 Dr. Craigmile noted that ischemic necrosis of the right femoral head would require hip joint replacement. After further medical development, the Office, on August 15, 1986, denied the claim for bilateral avascular necrosis of the femoral head base. The Office further developed the medical evidence, which indicated that she continued to have some residuals of her work injury that prevented her from returning to her regular duties and that her hip condition was not employment related.

On July 7, 2000 the Office referred appellant to Dr. Richard Talbott, a Board-certified orthopedic surgeon, for a second opinion examination. In a July 25, 2000 report, Dr. Talbott noted appellant's history and diagnosed postoperative lumbar laminectomies and probable degenerative joint disease of the hips. He stated that appellant complained of back and leg pain but also noted that she "was observed walking across the parking lot to the building for the appointment and she demonstrated no gait abnormality whatsoever." Dr. Talbott opined that she understated her activity level. He advised that appellant had some residual disability but that it was mostly subjective and that "it is questionable that the limitation of motion is objective." Dr. Talbott stated that appellant probably could not perform her date-of-injury job, but that this conclusion was based on subjective factors. He found that appellant could work with restrictions, based on her subjective, complaints for eight hours per day. The Office requested clarification regarding whether objective evidence of appellant's work injury remained. In an August 8, 2000 report, Dr. Talbott explained that his work restrictions were based on her subjective complaints. He reiterated that "from an objective standpoint, there are no disabling residuals." Dr. Talbott explained that, while appellant's surgical history constituted objective evidence, there was no objective evidence of residuals other than the surgical scar on appellant's back and the bone removed during the surgery.

On September 11, 2000 the Office proposed to terminate appellant's compensation benefits. On October 17, 2000 the Office finalized the termination effective November 4, 2000.

Appellant requested reconsideration on February 22, 2007, arguing that the Office erred in relying upon Dr. Talbott's reports to find that she had no continuing residuals when Dr. Talbott found some objective evidence of continuing disability. She submitted medical evidence. In a January 27, 1986 report, Dr. Theodore C. Hunt,¹ stated that appellant sustained a work injury while lifting boxes and that she had contributory hip problems. He rated a 12 percent "permanent partial disability measured as a working unit (the whole person)." An

¹ The Board was unable to ascertain Dr. Hunt's specialty based on the record.

April 23, 1986 note from Dr. Hunt found bilateral avascular necrosis of the femoral heads. Dr. Hunt explained: “We are still in the process of trying to relate this causally to the injury in question. At this point I cannot definitely relate the two. The hip pain, however, is perpetuating and continuing her back pain.”² In a November 25, 1985 report, Dr. Hunt noted that Dr. Craigmile had discovered bilateral avascular necrosis of the femoral heads. He explained: “This avascular necrosis is quite extensive, restricting the motion in her hips and giving her a very exaggerated gait.” In a February 17, 1989 report, Dr. Jeffrey Hrutkay, a Board-certified orthopedic surgeon, noted that appellant attributed 50 percent of her claimed pain to low back pain and 50 percent to hip pain. On examination, he found a healed midline lower back scar and tenderness in the buttock and low back region, but a normal lumbosacral spine x-ray. Dr. Hrutkay diagnosed failed back syndrome. On February 23, 1989 he noted that a magnetic resonance imaging (MRI) scan of appellant’s lower back revealed fibrosis at the L5 nerve, “which may explain her persistent pain.”

In an August 31, 2001 report, Dr. Paul S. Hsieh, a Board-certified radiologist, reported that appellant underwent a lumbar discogram. A July 5, 2001 lumbar MRI scan from Dr. Raymond Yost, a radiologist, diagnosed previous surgery at L4-5 and L5-S1, minimal bulging disc at L4-5, protrusion at L3-4 and some facet joint arthropathy contributing to bilateral exit foraminal narrowing. A September 1, 2001 computerized tomography (CT) scan report from Dr. Hsieh, diagnosed degenerative disc changes at L3-4, L4-5 and L5-S1.

By decision dated March 30, 2007, the Office denied appellant’s request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error.

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 This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵ The Office, through its regulations, 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 application for reconsideration is filed within one year of the date of that decision.⁶ 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).⁷

² The Board notes that Dr. Hunt’s January 27 and April 23, 1986 reports were previously of record and considered by the Office.

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁶ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office’s limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁷ 20 C.F.R. § 10.607(b); *Thankamma Mathews*, *supra* note 4 at 769; *Jesus D. Sanchez*, *supra* note 5 at 967.

The Office's regulations provide:

“[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.”⁸

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.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 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.¹⁴ 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.¹⁵

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration as untimely. The Act's implementing regulations provide that a request for reconsideration must be filed within one year from the date of the Office decision for which review is sought.¹⁶ The most recent merit decision was the Office's October 17, 2000 decision terminating her compensation benefits effective November 4, 2000. As appellant's February 2, 2007 reconsideration request

⁸ 20 C.F.R. § 10.607(b).

⁹ *Thankamma Mathews*, *supra* note 4 at 770.

¹⁰ *Id.*

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Jesus D. Sanchez*, *supra* note 5 at 968.

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

¹⁴ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁶ 20 C.F.R. § 10.607(a).

was made more than one year following the Office's October 17, 2000 decision, the request was untimely filed. Consequently, to have her claim reopened, appellant must establish clear evidence of error by the Office in its October 17, 2000 decision.

In support of her request for reconsideration, appellant submitted several new medical reports. However, none of the new reports established clear evidence of error on the part of the Office. Dr. Hsieh indicated that appellant underwent a successful lumbar discogram. His September 1, 2001 CT scan report diagnosed degenerative disc changes at L3-4, L4-5 and L5-S1 but did not address the issue of whether appellant had continuing employment-related residuals at the time the Office terminated her compensation benefits. The reports did not discuss the issue of appellant's disability or provide a reasoned medical opinion that she continued to have residuals of her employment injury after her benefits were terminated effective November 4, 2000. The Board finds that Dr. Hsieh's August 31 and September 1, 2001 reports do not shift the weight of evidence in appellant's favor. Dr. Yost's July 5, 2001 MRI scan report, similarly, diagnosed previous surgery at L4-5 and L5-S1, minimal bulging disc at L4-5, protrusion at L3-4 and facet joint arthropathy. He did not provide an opinion concerning appellant's employment-related disability or condition, if any, at the time of termination. The Board finds that Dr. Yost's July 5, 2001 report is insufficient to establish clear evidence of error.

Appellant also submitted several reports from Dr. Hunt. The Board notes that Dr. Hunt's January 27 and April 23, 1986 notes were previously of record and considered prior to the termination of her benefits. These reports do not establish that the Office's October 17, 2000 decision was clearly erroneous. They do not raise a substantial question as to the correctness of the Office's decision. Dr. Hunt's November 25, 1985 report predated the termination of benefits and does not address the relevant issue of appellant's employment-related condition or disability, if any, at or after the time of the termination. Therefore, Dr. Hunt's reports are insufficient to establish clear evidence of error by the Office.

Additionally, appellant provided reports from Dr. Hrutkay. On February 17, 1989 Dr. Hrutkay noted that appellant attributed 50 percent of her pain to her low back condition and 50 percent to hip pain. He noted a healed midline scar and some tenderness in the lower back and buttock region. On February 23, 1989 Dr. Hrutkay indicated that an MRI scan revealed evidence of fibrosis at the L5 nerve and explained that the finding might explain appellant's back pain. However, both of these reports predate the termination of benefits. Accordingly, the Board finds that Dr. Hrutkay's reports are not of sufficient probative value to *prima facie* shift the weight of the evidence in appellant's favor and thus establish clear error on the part of the Office.

On appeal, appellant asserted that the Office erred in relying on Dr. Talbott's June 25 and August 8, 2000 reports in terminating benefits. She noted that, although Dr. Talbott characterized his findings as "mostly subjective," he found that she had some residual disability in her low back due to her work injury and subsequent surgery and that she had some work restrictions that were not consistent with her job. However, the Board notes that in his July 25, 2000 report, he also noted that appellant walked without gait abnormality or apparent discomfort and in his August 8, 2000 clarification report found that, from an objective standpoint, there were no disabling residuals. Dr. Talbott noted that all findings and restrictions were due to subjective complaints and that there was no objective basis for any continuing employment-related

condition or disability.¹⁷ Thus, appellant's assertions do not show that the Office's decision was clearly erroneous. As noted above, evidence that merely indicates that reasonable minds might come to a contrary conclusion is not sufficient to establish clear evidence of error.¹⁸

Appellant also asserted that the Office erred in characterizing Dr. Talbott's report as the weight of the medical evidence and in not considering prior medical reports. The record reflects that the Office considered the medical evidence of record prior to the termination of benefits on November 4, 2000. It determined that the opinion of Dr. Talbott was the most probative. Appellant has not established that the Office clearly erred in relying upon the most recent medical reports when terminating her benefits.

Finally, appellant asserted that it was clear error to shift the burden of proof to her and to terminate her medical benefits. However, the record reflects that the Office did not shift the burden of proof but followed its standard procedures in termination cases. It issued a notice of proposed termination, to which appellant had the opportunity to respond. The Office finalized the termination after that time period for submitting additional evidence had elapsed.¹⁹ As noted, the Office reviewed Dr. Talbott's report and found that this report established that appellant had no objective evidence of continuing residuals of the work-related condition. Appellant's assertion that the Office shifted the burden of proof to her is without merit.

The Board finds that appellant's evidence and argument submitted in support of her reconsideration request was not of sufficient probative value to 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.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as it was untimely filed and did not present clear evidence of error.

¹⁷ Cf. *William A. Archer*, 55 ECAB 674 (2004) (a physician's opinion statements regarding an employee's ability to work without objective signs of disability are not a basis for payment of compensation).

¹⁸ See *Leona N. Travis*, *supra* note 11.

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.0812.3 (July 1993); see also *Del K. Rykert*, 40 ECAB 284, 295-96 (1988); *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2008
Washington, DC

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

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

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