United States Department of Labor
Employees' Compensation Appeals Board

H.N., Appellant	)	
and	)	**Docket No. 07-1905**
	)	**Issued: February 4, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Hayward, CA, 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 July 3, 2007 appellant filed a timely appeal from an April 10, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying 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 between the last merit decision dated February 16, 2006 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, the Board has jurisdiction to review the April 10, 2007 nonmerit decision.

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 for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On January 20, 1998 appellant filed an occupational disease claim alleging a cervical condition resulting from factors of her federal employment. The claim was originally accepted for cervical strain and was later expanded to include disc protrusion at C5-6.[1] Appellant returned to full-time modified duty on October 26, 2000.

Appellant's treating physician, Dr. Gerald Keane, a Board-certified physiatrist, reported that she continued to experience residuals from the accepted cervical condition, including spasms and restricted range of motion. On the other hand, the Office's second opinion physician, Dr. Jerrold Sherman, a Board-certified orthopedic surgeon, opined that appellant's cervical condition had resolved. In order to resolve the conflict in medical opinion, the Office referred appellant to Dr. John Batcheller, a Board-certified orthopedic surgeon, for an impartial medical examination. Based on Dr. Batcheller's opinion that appellant no longer had residuals of the accepted work conditions, the Office terminated appellant's benefits by decision dated October 4, 2002. On June 5, 2003 the October 4, 2002 decision was set aside by an Office hearing representative for further clarification of the impartial medical examiner's (IME's) report.

Concluding that Dr. Batcheller's reports were insufficient to resolve the existing conflict, the Office referred appellant to Dr. Clarence Boyd, a Board-certified orthopedic surgeon, for an impartial medical examination. In a November 14, 2003 report, Dr. Boyd opined that appellant had no residual symptoms related to either the bilateral carpal tunnel syndrome or the accepted cervical spine injury. Based on his report, the Office terminated appellant's entitlement to continued benefits on November 26, 2003, finding that the weight of the medical evidence established that she no longer had residuals of the accepted work-related conditions. By decision of an Office hearing representative dated September 12, 2004, the Office was instructed to obtain a supplemental report from Dr. Boyd to clarify his opinion. In a supplemental report dated March 4, 2005, Dr. Boyd stated that the results of a January 29, 2003 magnetic resonance imaging (MRI) scan were consistent with his normal physical examination, which revealed full, active range of motion in the cervical spine, with no evidence of neurologic abnormalities in either upper extremity, no nerve root encroachment and no herniated disc. He opined that appellant's duties as a clerk would not have caused her degenerative disc disease or joint disease in her cervical spine.

By decision dated March 8, 2005, the Office terminated appellant's benefits, finding that the weight of the medical evidence, which was encompassed in the opinion of Dr. Boyd, established that appellant no longer had residuals of her work-related conditions. Appellant requested an oral hearing and, in support thereof, submitted reports from Dr. Keane reflecting his opinion that her cervical condition was caused by years of repetitive employment activities. She submitted a November 4, 2004 MRI scan report; reports from Dr. Cecil Chang, a Board-certified neurological surgeon, for the period March 28, 2003 through November 14, 2005, which

[1] Appellant's January 11, 1993 occupational disease claim File No. 13-1005704 was accepted for right wrist strain and bilateral carpal tunnel syndrome. By decision dated January 19, 2005, the Office affirmed a November 26, 2003 decision, finding that appellant had no residuals from the accepted bilateral upper extremity injury. The case involved in this appeal File No. A13-1154348 became the master file number for both cases.

provided a diagnosis of cervical spondylosis at C5-6; and an operative report for discectomy and fusion at C5-6 performed on July 14, 2005.

By decision dated February 16, 2006, an Office hearing representative affirmed the March 8, 2005 decision. The representative found that Dr. Boyd's reports were well-reasoned and were based upon a proper factual background. He concluded that the IME's reports represented the weight of the medical evidence and established that appellant no longer had residuals of the accepted work-related conditions.

In an undated letter, received by the Office on February 21, 2007, appellant requested reconsideration of the Office's February 16, 2006 decision, contending that Dr. Boyd's reports were insufficient to establish that her accepted work-related conditions had resolved. Appellant stated that she was submitting new medical information from Dr. Chang, which consisted of unsigned notes. She submitted numerous documents which had been previously provided and considered by the Office.[2] The record contains a copy of a letter from Robert B. Rutter to Dr. Chang requesting his cooperation in answering questions related to appellant's cervical condition. The letter contains undated, unsigned notes, which are largely illegible.

By decision dated April 10, 2007, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[3] The Office 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] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[5] The Office procedures stated that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear

[2] Previously, submitted documents included: May 12, 2005 and January 24, 2004 reports from Dr. Weinstein; November 15, 2005 and August 10, 2004 reports from Dr. Keane; a July 19, 2005 report from Dr. Chang; a January 12, 1996 report from a Dr. David A. Hunt; and an October 9, 1998 report from a Dr. Jaime Lopez.

[3] 5 U.S.C. §§ 8101-8193, 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

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

evidence of error" on the part of the Office.[6] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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 which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] 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. 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.[9] 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] The Board has held that the submission of evidence or argument already in the case record[11] or the submission of evidence or argument which does not address the particular issue involved, does not constitute a basis for reopening a case.[12]

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Section 10.607(a) provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[13] In this case, the one-year time limitation began to run the day following the issuance of the February 16, 2006 decision, the last merit decision in the case.[14] The regulations further provide that the application

[6] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

[7] *See Alberta Dukes*, 56 ECAB 247 (2005); *see also Nelson T. Thompson*, 43 ECAB 919 (1992).

[8] *See Alberta Dukes*, *supra note* 7; *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

[9] *Id*.

[10] *See Alberta Dukes*, *supra* note 7. *See also Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

[11] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[12] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[13] 20 C.F.R. § 10.607(a) (1999).

[14] *See Angel M. Lebron, Jr.*, 51 ECAB 488 (2000).

will be deemed timely if postmarked within the time period allowed.[15] The Office received appellant's undated request for reconsideration on February 21, 2007. The record does not include a copy of the envelope in which appellant submitted her request for reconsideration or any other evidence of mailing or receipt that would otherwise establish a timely filing.[16] As the request was undated and the record is devoid of any additional information that would render appellant's request timely, the Office properly relied on the February 21, 2007 date of receipt, rendering the request untimely. Because the Office received appellant's request more than one year after its February 16, 2006 merit decision, she must demonstrate clear evidence of error on the part of the Office in rendering its decision.[17]

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error that would warrant reopening her case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. In her February 21, 2007 request for reconsideration, appellant contended that Dr. Boyd's reports were insufficient to establish that her accepted work-related conditions had resolved. Appellant stated that she was submitting new medical information from Dr. Chang; however, the evidence submitted consisted of unsigned, illegible notes, which are of no probative value.[18] She also submitted numerous documents which had been previously provided and considered by the Office. The Board finds that the evidence submitted is not 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. Appellant did not allege error on the part of the Office, but merely reiterated her argument that her work-related condition had not resolved and that the opinions of her treating physicians should be accorded greater weight than that of the impartial medical examiner. Documents which duplicate evidence already in the case record have no evidentiary value.[19] Similarly, illegible notes, allegedly provided by Dr. Chang, lack probative value in that they are unsigned and fail to address the issue involved. Thus, the evidence and argument submitted by appellant are insufficient to show clear evidence of error by the Office.

[15] 20 C.F.R. § 10.607(a) (1999).

[16] The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

[17] 20 C.F.R. § 10.607(b) (1999). *See Anna Marie Feeley* , Docket No. 05-1643 (issued October 17, 2005).

[18] The Board has consistently held that unsigned medical reports are of no probative value, *Merton J. Sills*, 39 ECAB 572, 575 (1988) and that any medical evidence upon which the Office relies to resolve an issue must be in writing and signed by a qualified physician. *James A. Long*, 40 ECAB 538, 541 (1989).

[19] *See Helen E. Paglinawan*, 51 ECAB 591 (2000).

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for review of its February 16, 2006 decision. The Board finds that appellant's reconsideration request was untimely and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 10, 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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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