United States Department of Labor
Employees' Compensation Appeals Board

S.L., Appellant	)	
and	)	**Docket No. 08-229**
	)	**Issued: July 14, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Sioux City, IA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 30, 2007 appellant filed a timely appeal from an August 17, 2007 decision of the Office of Workers' Compensation Programs that denied her request for reconsideration because it was untimely filed and did not establish clear evidence of error. As the most recent merit decision was not within one year of 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).

ISSUE

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

FACTUAL HISTORY

On February 10, 2002 appellant, then a 45-year-old transfer postal clerk, sustained employment-related injuries when she slipped and fell on an icy ramp at work. She stopped work that day. Appellant's claim was accepted for sprains of the right shoulder, upper arm and neck, contusion of the right elbow and forearm, closed dislocation, unspecified cervical vertebra,

myalgia and myositis not otherwise specified, and bilateral brachial plexus lesions. She returned to limited duty on March 5, 2002 and to full duty on May 8, 2002. In an April 26, 2002 report, Dr. Thomas J. Clark, a Board-certified neurologist, noted the history of injury and examination findings. He advised that appellant had done quite well and no further workup was indicated. On April 1, 2002 Dr. Clark reported that her postconcussive syndrome had essentially resolved.

On June 17, 2002 appellant requested that a head injury be included in her accepted conditions.[1] She subsequently submitted an April 29, 2004 report from Dr. Terry H. Mitchell, an attending physician, Board-certified in family medicine, who noted the history of injury and his treatment of appellant beginning on June 28, 2002.

By decision dated May 20, 2004, the Office found that appellant did not establish that she sustained injuries to her head, legs, feet and low back on February 10, 2002 on the grounds that the medical evidence was insufficient to establish causal relationship. It found Dr. Mitchell's report of diminished probative value as it provided no objective findings, medical diagnosis or opinion to support that these conditions were causally related to the February 10, 2002 employment injury.[2]

On July 4, 2004 appellant was involved in a motor vehicle accident, and was diagnosed with a cervical sprain, secondary to the accident.[3]

Appellant came under the care of Dr. N. Ake Nystrom, an orthopedic surgeon,[4] who performed authorized operative resection and decompression of myofascial trigger points of the right trapezius, brachial plexus, right median nerve, and right abdomen on February 14, August 4 and November 28, 2005 and March 8, 2006 respectively. She returned to limited duty after each procedure.[5]

On April 9, 2007 appellant requested that her claim be expanded to include benign paroxysmal positional vertigo (BPPV) and that the Office authorize vestibular physical therapy and possible electronystagmography. By letter dated April 10, 2007, the Office advised appellant that any dizziness condition was denied by the May 20, 2004 decision, and that she should follow her appeal rights.

On July 31, 2007 appellant requested reconsideration and submitted additional medical evidence. In notes dated December 8, 2006 to June 6, 2007, Dr. Sarah Pertzborn Powell, a Board-certified otolarnygologist, indicated that appellant had a significant history of dizziness after an injury in 2002 and intermittent problems since that time with imbalance. Dr. Powell

[1] On August 29, 2002 the Office accepted that appellant sustained a no-time-lost recurrence on June 24, 2002.

[2] On June 18, 2004 appellant requested a hearing, but withdrew her request on October 26, 2005.

[3] The Office was not informed of this accident until 2006. After conducting an investigation, the case was referred to the employing establishment's Office of the Inspector General for a fraud determination.

[4] Dr. Nystrom is certified in plastic and hand surgery by the Swedish National Board of Health and Welfare.

[5] Appellant was granted leave buyback for the period February 14 to March 29, 2005, and received wage-loss compensation for the other periods of disability.

diagnosed BPPV, opining that this is very common in patients following a fall injury or any type of contusion. She noted that appellant had two Semont procedures and advised that once a patient has BPPV, it was common for it to return and that appellant could need additional procedures in the future. Dr. Powell opined that the condition was causally related to the employment injury, noting that before the accident appellant did not have vertigo. She recommended home exercise and vestibular physical therapy and noted that appellant could require further testing in the future. On June 6, 2007 Dr. Powell reported that appellant was doing better but that her condition was permanent and would fluctuate in severity with activity and time.

In an April 25, 2007 report, Dr. Pat Luse, a chiropractor, stated that appellant received a blow to the head in 2002 which resulted in a middle ear injury that caused BPPV. By report dated July 12, 2007, Dr. Mitchell advised that he had cared for appellant for many years and noted the history of the February 10, 2002 injury. In October 2002, appellant reported that her dizziness worsened when she was being prepared for studies and medications and that in January 2003 she was still having headaches. Dr. Mitchell concluded that he had no reason to assume that appellant's headaches and dizziness were not related to the February 2002 employment injury. On June 22, 2007 Dr. Pariwat Thaisetthawatkul, Board-certified in neurology and neurophysiology, advised that appellant suffered recurrent attacks of vertigo that came on after a February 2002 head injury, opining that BPPV "has been known to happen following a head injury." He concluded that the diagnosis of BPPV should be included as a condition caused by this employment injury. In a July 18, 2007 report, Dr. Nystrom advised that appellant had been under his care for a chronic pain syndrome which had resolved following surgery. Appellant had residual disability caused by the February 10, 2002 employment injury due to BPPV with no documented symptoms of vertigo prior to this injury. Dr. Nystrom advised it was common for patients with chronic neck pain and headaches after trauma to develop trauma-related vertigo. He concluded that appellant's BPPV was a result of the February 10, 2002 employment injury.

By decision dated August 17, 2007, the Office denied appellant's reconsideration request, finding that it was untimely and that she did not demonstrate clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[6] 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.[7] 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.[8] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing

[6] 5 U.S.C. §§ 8101-8193.

[7] 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

[8] *Cresenciano Martinez*, 51 ECAB 322 (2000).

limitation set forth in section 10.607 of Office regulations,[9] if the claimant's application for review shows "clear evidence of error" on the part of the Office. 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.[10]

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 which 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. To show clear evidence of error, the evidence submitted 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 decision.

Office procedures note 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 that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.[11] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.[12]

ANALYSIS

The Board finds that more than one year had elapsed from the date of issuance of the most recent merit decision of May 20, 2004 to appellant's July 31, 2007 request for reconsideration. Therefore, it was untimely filed.[13] Consequently, appellant must demonstrate clear evidence of error by the Office in denying her claim for compensation.[14]

The Board finds that appellant failed to establish clear evidence that the May 20, 2004 decision was clearly in error. In this case, there is no evidence the Office erred in rendering its May 20, 2004 decision. The evidence submitted with appellant's July 31, 2007 reconsideration request, including the reports of Drs. Powell and Thaisetthawatkul, is relevant to her diagnosed

[9] 20 C.F.R. § 10.607.

[10] *Alberta Dukes*, 56 ECAB 247 (2005).

[11] *James R. Mirra*, 56 ECAB 738 (2005).

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

[13] *Supra* note 8.

[14] 20 C.F.R. § 10.607(b).

BPPV condition that developed in 2006, more than two years after the decision in question.[15] While this newly submitted evidence could be relevant as to whether appellant's BPPV condition is a consequence of the February 10, 2002 employment injury, it is of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of the May 20, 2004 Office decision and does not establish that the Office committed error by its May 20, 2004 decision.[16]

The Board finds that the Office properly performed a limited review of the evidence and argument submitted by appellant with her July 31, 2007 reconsideration request to ascertain whether it demonstrated clear evidence of error in the May 20, 2004 decision and correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.[17]

CONCLUSION

The Board finds that, as appellant's July 31, 2007 reconsideration request was not timely filed and she failed to establish clear evidence of error, the Office properly denied a merit review of her claim in its August 17, 2007 decision.

[15] Appellant also submitted an April 25, 2007 report from Dr. Luse, a chiropractor, who advised that appellant's BPPV condition was caused by a 2002 blow to the head. Section 8101(2) provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2); *see Isabelle Mitchell*, 55 ECAB 623 (2004). As Dr. Luse did not diagnose a subluxation as demonstrated by x-ray, he is not a physician under the Act, and his report is of no probative medical value. *Id*.

[16] *Nancy Marcano, supra* note 13.

[17] 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB ____ (Docket No. 08-137, issued April 14, 2008). The Board notes that appellant submitted additional evidence with her appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 17, 2007 be affirmed.
Issued: July 14, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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