United States Department of Labor
Employees' Compensation Appeals Board

H.A., Appellant	)	
and	)	**Docket No. 08-541**
	)	**Issued: July 16, 2008**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, North Highlands, CA, Employer	)	

Appearances:
James A. Birt, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 13, 2007 appellant filed a timely appeal of a November 29, 2007 decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration without conducting a merit review. Because more than one year has elapsed between the most recent merit decision dated November 25, 2005 and 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(d)(2). The only decision properly before the Board is the Office's November 29, 2007 decision denying appellant's request for reconsideration.

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 was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On May 2, 2003 appellant, then a 50-year-old internal revenue officer filed a traumatic injury claim alleging that she sustained injuries to her neck, arm, back, hip, thigh and neck when she was struck by a vehicle while in the performance of duty on April 28, 2003. She stopped work from April 28 to 30, 2003 and was advised that she could return to light duty on May 1, 2003. The Office accepted appellant's claim for upper and lower back strains. Appellant received appropriate compensation and benefits.

The Office continued to develop the claim and appellant was referred to Dr. Aubrey A. Swartz, Board-certified in orthopedic surgery, for a second opinion. In a report dated August 17, 2005, Dr. Swartz noted appellant's history of injury and treatment and conducted a physical examination. He determined that appellant did not demonstrate any objective findings but that her subjective complaints included headaches, pain in the occipital, cervical region and slight pain on occasion in the low back and pain in the right shoulder and numbness in the upper extremity. Dr. Swartz advised that appellant had chronic C5-6 degenerative disc disease, which was preexisting and not work related. He opined that appellant's diagnosed condition was no longer medically connected to factors of her federal employment. Dr. Swartz explained that total disability would have been reasonable for 10 to 14 days and part-time work would have been reasonable for a period of 6 weeks. He opined that appellant reached maximum medical improvement and that she could resume her date-of-injury position.

On October 18, 2005 the Office issued a notice of proposed termination of compensation. It found that the weight of the medical evidence established that appellant no longer had residuals of her April 28, 2003 employment injury.

By decision dated November 25, 2005, the Office terminated appellant's compensation benefits effective November 22, 2005 on the grounds that she no longer had disability or a need for medical treatment due to her April 28, 2003 employment injury.

On October 12, 2007 appellant's representative requested reconsideration. He alleged that the Office failed to request records and diagnostic testing before rendering its decision. Appellant's representative referred to the Office procedure manual and alleged that the Office failed to assist her with regard to obtaining her initial medical reports. He also alleged once the Office began to investigate the claim, it had a responsibility to continue its development. Furthermore, appellant's representative alleged that the Office did not provide her physicians with a copy of the same list of questions presented to the second opinion examiner. He alleged that the Office also provided a medical opinion by discrediting the medical evidence in its decision. Appellant's representative also provided an October 5, 2006 report from Dr. Roderick G.S. Sanden, a neurological surgeon. He alleged that Dr. Sanden's report contradicted that of the second opinion physician and carried the weight of the evidence and was sufficient to reverse the Office's November 25, 2005 decision.

In an October 5, 2006 report, Dr. Sanden noted appellant's history of injury and treatment. He opined that appellant's accepted injuries were not a permanent aggravation, but rather, a permanent precipitation of an irreversible diagnosis and medical condition. Dr. Sanden attributed various diagnoses such as cervical disc dislocation and collapse and depression and

cardiac conditions to the 2003 employment injury. He further advised that appellant's condition continued through the time of his examination.

In a decision dated November 29, 2007, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

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

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[3] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[4]

Section 10.607(b) 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.[5]

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 that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8128(a).

[3] *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[4] 20 C.F.R. § 10.607(a).

[5] 20 C.F.R. § 10.607(b).

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.[6] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.[7]

ANALYSIS

In its November 29, 2007 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on November 25, 2005. Appellant's October 12, 2007 request for reconsideration was submitted more than one year after the November 25, 2005 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with the Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening her case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether the Office on November 25, 2005 properly terminated appellant's compensation and benefits on the grounds that she no longer had a continuing employment-related disability or condition.

With his October 12, 2007 request for reconsideration, appellant's representative submitted additional evidence and argument. His arguments included that the Office failed to request records and diagnostic testing before rendering its decision, that the Office failed to assist appellant with regard to obtaining her initial medical reports and that the Office did not fully investigate her claim. However, these arguments are not relevant to whether appellant had a continuing employment-related disability or condition on or after November 22, 2005. These arguments pertain to the initial investigation of the claim, which as noted was accepted for upper and lower back strains. The Board finds that these arguments are insufficient to raise a substantial question as to the correctness of the Office's determination that appellant no longer had any disability or condition after November 22, 2005 causally related to her employment injury.

[6] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

[7] *Id.*

Appellant's representative also alleged that the Office did not provide her physicians with a copy of the same list of questions presented to the second opinion examiner. However, the Board notes that there is no requirement that appellant's physicians be provided with a list of questions presented to the second opinion physician. Thus, this argument is insufficient to establish that the Office's denial of the claim was erroneous or to raise a substantial question as to the correctness of the Office's determination that appellant no longer had any disability after November 22, 2005 causally related to her employment injury.

Appellant's argument that the claims examiner provided a medical opinion is also without merit and insufficient to establish clear evidence of error. The record reflects that the Office evaluated the medical evidence provided by the second opinion examiner, Dr. Swartz, who opined that appellant's condition had resolved in his August 17, 2005 report. Upon receipt of his report, the Office proceeded to issue a notice of proposed termination of compensation on October 18, 2005, based on Dr. Swartz' opinion that her condition had resolved. The Board finds that this argument does not raise a substantial question as to the correctness of the Office's termination decision.

Appellant's representative also provided a report from Dr. Sanden who opined that appellant sustained a permanent aggravation and continued to be disabled through the time of his October 5, 2006 examination. While he supported that appellant had several ongoing conditions caused or aggravated by April 28, 2003 work injury, he did not provide detailed rationale explaining the reasons for his conclusions on why her diagnoses were caused or aggravated by the accepted back strains.[8] The Board notes that Office procedures provide 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.[9] Thus, this report is insufficient to raise a substantial question as to the correctness of the Office's November 25, 2005 decision.

The Board finds that the evidence and arguments presented by appellant are insufficient to *prima facie* shift the weight of the evidence in favor of her claim or raise a substantial question of the correctness of the Office's November 25, 2005 decision.[10] Therefore, the Board finds that appellant has not presented clear evidence of error.

[8] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[9] *Annie L. Billingsley*, 50 ECAB 210 (1998).

[10] *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 16, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board+