United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 10-2120**
	)	**Issued: June 2, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 18, 2010 appellant filed a timely appeal of a February 23, 2010 merit decision of the Office of Workers' Compensation Programs, finding that appellant's request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the February 23, 2010 decision. The Board does not have jurisdiction over a decision on the merits of the claim.[2]

ISSUE

The issue is whether the Office properly determined that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The last merit decision was an Office decision dated March 8, 2006. For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

The case was previously before the Board. By decision dated September 11, 2002, the Board affirmed Office decisions dated December 12 and March 19, 2001, finding that appellant did not establish an emotional condition causally related to compensable work factors.[3] By decision dated December 2, 2008, the Board affirmed a March 25, 2007 Office decision denying further merit review of the claim.[4] The history provided in the prior Board decisions is incorporated herein by reference.

In a letter dated November 28, 2009, appellant requested reconsideration of her claim. She highlighted a sentence from the March 8, 2006 merit decision stating that she had established that the Office had erroneously applied or interpreted a point of law in its earlier decision. Appellant stated that the Office had never clarified this statement, and she assumed the error was that relevant evidence was submitted with her December 6, 2004 reconsideration request. She also noted that the Office did not issue a decision with respect to her December 6, 2004 request until March 8, 2006. In her application for reconsideration, appellant reviewed the history of her claim and quoted from a report of a Dr. Belich that is not contained in the case record.

In a decision dated February 23, 2010, the Office found appellant's application for reconsideration was untimely. It further denied the application without merit review on the grounds that it did not show clear evidence of error.

LEGAL PRECEDENT

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.[5] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[6]

Section 8128(a) of the Act[7] does not entitle a claimant to a review of an Office decision as a matter of right.[8] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[9] The Office, through regulations,

[3] Docket No. 02-342 (issued September 11, 2002). The Board found appellant had not established any compensable work factors.

[4] Docket No. 07-2187 (issued December 2, 2008).

[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.605 (1999).

[7] 5 U.S.C. § 8128(a).

[8] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at anytime on his own motion or on application."

has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Act.[10] As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application 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.[11]

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 medical 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 the case on the Director's own motion.[12] 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.[13] 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.[14]

ANALYSIS

The most recent decision of the merits of the present claim was dated March 8, 2006. Appellant's application for reconsideration was dated November 28, 2009. Since it was filed more than one year after the last merit decision, it was an untimely application for reconsideration. As noted, appellant must establish clear evidence of error by the Office to warrant further merit review.

In her November 28, 2009 letter, appellant noted that the March 8, 2006 Office decision stated that "the claimant has established that the Office erroneously applied or interpreted a point of law in its earlier decision."[15] The standard of an erroneous application or interpretation of a point of law is found at 20 C.F.R. § 10.606(b)(2), and is a standard used to determine if a timely reconsideration request is sufficient to require merit review of the claim.[16] The March 6, 2008

[10] 5 U.S.C. §§ 8101-8193.

[11] 20 C.F.R. § 10.607.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

[13] *Robert F. Stone*, 57 ECAB 292 (2005)*; D.O.*, Docket No. 08-1057 (issued June 23, 2009).

[14] *Gregory Griffin*, 41 ECAB 458 (1990).

[15] It appeared that the Office intended to state appellant had not established an erroneous application or interpretation of a point of law.

[16] The Board notes that the February 23, 2010 Office decision cited 20 C.F.R. § 10.138(b)(1), which was an earlier regulations similar to 20 C.F.R. § 10.606(b)(2). Since the Office properly found the application to be untimely, and noted the clear evidence of error standard, it is unclear why the Office referred to the standards for a timely reconsideration request.

Office decision explicitly stated that it was a review of the merits of the claim. The Office determined that the evidence did not establish a compensable work factor and denied modification of the earlier denial of the claim. The standard regarding erroneous application or interpretation of a point of law in a prior Office decision is irrelevant, since the Office actually reviewed the merits of appellant's claim in the March 8, 2006 decision. The inclusion of an irrelevant sentence does not establish clear evidence of error by the Office in denying her emotional condition claim. The March 8, 2006 Office decision reviewed the evidence of record, explained its findings with respect to the alleged compensable work factors and denied modification of the prior decisions. There is no clear evidence of error with respect to the Office's determination that appellant failed to establish any compensable employment factor.

The Board notes that appellant also noted that her application for reconsideration was dated December 6, 2004, but she did not receive a decision until March 8, 2006. Again, the March 8, 2006 decision was a merit decision considering all the evidence of record and accompanied by full appeal rights. Appellant did not explain how any delay in issuing the decision was detrimental to the pursuit of her claim. The Board finds no clear evidence of error in this regard.

Appellant also referred to a medical report which resulted from an examination in 2006. The report is not contained in the current case record.[17] Moreover, until a compensable work factor is established, a medical issue regarding causal relationship with employment is not presented.[18]

The Board finds that appellant did not establish clear evidence of error in this case. Since appellant's untimely application for reconsideration did not establish clear evidence of error, the Office properly denied her application for review.

CONCLUSION

The Board finds that appellant's application for reconsideration was untimely filed and failed to show clear evidence of error.

[17] It appears the medical report was from another claim that is not before the Board on the current appeal.

[18] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2010 is affirmed.

Issued: June 2, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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