United States Department of Labor
Employees' Compensation Appeals Board

V.H., Appellant	)	
and	)	**Docket No. 07-736**
	)	**Issued: July 3, 2007**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Los Angeles, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 16, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated November 20, 2006 which denied her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated March 12, 1996 to 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.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128, on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 29, 1989 appellant, then a 49-year-old mail handler, filed a traumatic injury claim, alleging that she injured her back, elbows and left side when she fell in the performance of

duty. The Office accepted appellant's claim for cervical and lumbar strains and post-traumatic headaches on October 28, 1989. Appellant filed claims for recurrence of disability on October 25, 1989 and September 4, 1990. The Office authorized compensation benefits and entered appellant on the periodic rolls on September 1, 1990.

The employing establishment referred appellant for a fitness-for-duty examination with Dr. Geoffrey M. Miller, a Board-certified orthopedic surgeon, who submitted a report dated September 15, 1990 finding that appellant could return to full duty. Appellant's attending physician's Dr. Cranford L. Scott, a Board-certified internist, and Dr. A. Newton Woodard[1] continued to support appellant's total disability for work. The Office found that there was a conflict of medical opinion evidence regarding the extent of appellant's disability and referred her for an impartial medical examination with Dr. John H. Buckner, a Board-certified orthopedic surgeon.[2] In his July 22, 1991 report, Dr. Buckner found that appellant could return to full duty with a lifting restriction due to her underlying obesity.

In a letter dated January 30, 1992, the Office proposed to terminate appellant's compensation benefits referring to Dr. Buckner as the impartial medical examiner. The Office found that the weight of the medical opinion evidence rested with Drs. Buckner and Miller. By decision dated March 9, 1992, the Office terminated appellant's compensation and medical benefits effective April 5, 1992. Appellant requested reconsideration and the Office denied modification of its prior decisions on July 8, 1992 finding that Dr. Buckner had resolved the conflict between Drs. Woodard and Miller. She again requested reconsideration on September 11, 1992 and the Office denied modification of its prior decision on November 16, 1992. The Office found that Dr. Buckner was an impartial medical examiner and his opinion was entitled to special weight. Appellant requested reconsideration on December 28, 1992 and submitted additional medical evidence. The Office denied modification of the March 9, 1992 decision finding that the additional evidence submitted by appellant was not sufficient to create a conflict with that of the impartial medical examiner, Dr. Buckner.[3]

By decision dated August 21, 1995, the Office denied appellant's claim for a schedule award. Appellant requested reconsideration of this decision on January 22, 1996 and by decision dated March 12, 1996, the Office denied modification of its August 21, 1995 decision.

In a letter dated May 8, 1996, appellant's attorney alleged error on the part of the Office in using Dr. Miller as a second opinion physician and Dr. Buckner as an impartial medical examiner. He requested reconsideration on May 21, 1996. By decision dated July 22, 1996, the Office found that the arguments were not sufficient to require it to reopen appellant's claim for consideration of the merits under section 8128(a) of the Federal Employees' Compensation Act.

[1] The Board is unable to ascertain any Board-certification or area of expertise for Dr. Woodard.

[2] The Office did not specify the physicians involved in the conflict and did not provide appellant with a letter explaining that a conflict had arisen. Instead it indicated to appellant that "expert medical opinion" was needed.

[3] In a letter dated April 7, 1993, appellant inquired whether Dr. Buckner was a second opinion physician or an impartial medical examiner.

Appellant requested reconsideration on April 22, 1997 and submitted additional evidence and argument in support of her claim. By decision dated September 23, 1997, the Office found that appellant had not established clear evidence of error. Appellant appealed this decision to the Board. In its December 15, 1999 decision,[4] the Board found that appellant's allegations that the memorandum accompanying the 1992 termination decision was "erroneous and speculative;" that all the medical evidence was not considered; that the Office did not address all of her employment-related conditions; that the Office did not make adequate factual findings, that the district medical adviser did not review her claim and did not establish clear evidence of error on the part of the Office. The facts and circumstance of the claim as set fourth in the Board's prior decision are adopted herein by reference.

Following the Board's December 15, 1999 decision, appellant requested a schedule award on March 6, 2003. She objected to Dr. Buckner's examination and findings on May 28, 2003. In response to the Office's inquiry regarding which appeal right she wished to pursue, appellant indicated that she wanted an oral hearing on August 26, 2003. By decision dated July 8, 2004, the Branch of Hearings and Review denied appellant's request for an oral hearing as untimely as she had previously requested reconsideration of the issues in her claims.[5]

On September 20, 2004 appellant stated that she was appealing the decisions dated July 8, 2004 and from September 4, 1990 to the present. She alleged that both Dr. Miller and Dr. Buckner were employing establishment physicians.[6] Appellant requested a schedule award on May 2, 2005. On January 19, 2006 the Office informed her via telephone that no schedule award was payable. In a letter dated January 27, 2006, the Office informed appellant that she had received the maximum compensation payable from September 1, 1990 through April 4, 1992. The Office listed the initial merit decisions regarding disability and schedule award and stated that appellant's appeal rights had expired.

In a telephone memorandum dated March 20, 2006, appellant again requested a schedule award and insisted that the referee examination was invalid because Dr. Buckner had previously seen her for an employing establishment fitness-for-duty examination. The claims examiner noted that appellant would submit a written request for reconsideration with a statement of how the Office made clear error.

Appellant requested reconsideration on August 9, 2006 and stated that she was requesting reconsideration of a letter she received in May 2006. She discussed the amounts that she was paid, addressed the examinations by Drs. Miller and Buckner and described her employment injury. Appellant stated that her current conditions were fibromyalgia, chronic pain disorder, carpal tunnel syndrome, osteoarthritis and chronic depression. The Office responded on October 5, 2006 and informed appellant that the letter she received was not a final decision and had no appeal rights.

[4] Docket No. 98-751 (issued December 15, 1999).

[5] As this decision dated July 8, 2004 was issued more than one year prior to the date of appellant's appeal to the Board on January 16, 2007 the Board will not address this issue on appeal. 20 C.F.R. § 501.3(d)(2).

[6] The Office did not respond to this letter.

Appellant telephoned the Office on October 20, 2006 and stated that the physician that the Office used as an impartial medical specialist had previously performed a fitness-for-duty examination. She indicated that the Office issued an incorrect decision in March 1992. By decision dated November 20, 2006, the Office referenced the August 24, 2006 letter from appellant and noted that the January 27, 2006 letter was not a formal decision and did not have appeal rights.[7] The Office stated that during a telephone conversation on October 20, 2006 appellant raised a separate issue of whether Dr. Buckner had previously examined her for the employing establishment. The Office found that Dr. Miller had performed a fitness-for-duty examination for the employing establishment and that the Office had selected Dr. Buckner to resolve a conflict of medical evidence. The Office stated, "It was appropriate to send you to an impartial medical examination based on Dr. Miller's report, but not to create a conflict in medical opinion evidence." The Office noted that it was error to refer to Dr. Buckner as an impartial medical examiner, but found that the weight of the medical evidence rested with Dr. Buckner's report as he was an appropriate Board-certified specialist. The Office found that appellant had not established clear evidence of error and denied her request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of the Act[8] does not entitle a claimant to a review of an Office decision as a matter of right.[9] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[10] The Office, through 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 review is filed within one year of the date of that decision.[11] 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).[12]

The Office's regulations require that an application for reconsideration must be submitted in writing[13] and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."[14] The regulations provide:

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[7] The Office did not address any of the statements or arguments raised by appellant in her August 9, 2006 request for reconsideration, limiting itself to the issues raised by her October 20, 2006 telephone call. As the Office did not address these issues, the Board may not consider them for the first time on appeal. 20 C.F.R. § 501.2(c).

[8] 5 U.S.C. § 8128(a).

[9] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

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

[11] 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).

[12] 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 9 at 769; *Jesus D. Sanchez*, *supra* note 10 at 967.

[13] 20 C.F.R. § 10.606.

[14] 20 C.F.R. § 10.605.

> "[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 decision. The application must establish, on its face that such decision was erroneous."[15]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[16]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[17] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[18] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[19] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[20] 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.[21] 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.[22] The Board must make 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.[23]

ANALYSIS

Appellant requested reconsideration in August 2006. This request occurred more than one year following the March 12, 1996 merit decision denying her claim for a schedule award and more than one year following the February 4, 1993 decision denying her claim for

[15] 20 C.F.R. § 10.607(b).

[16] *Thankamma Mathews, supra* note 9 at 770.

[17] *Id*.

[18] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[19] *Jesus D. Sanchez, supra* note 10 at 968.

[20] *Leona N. Travis, supra* note 18.

[21] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[22] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[23] *Gregory Griffin, supra* note 11 at 458, 466.

continuing disability. The Office properly determined that appellant's request for reconsideration was untimely.

Appellant alleged that Dr. Buckner was not properly designated as an impartial medical examiner at the time of the Office's March 9, 1992 decision terminating her compensation and medical benefits and that this failure constituted clear evidence of error. The Office stated in its November 20, 2006 decision, that there was not a conflict of medical opinion evidence in the record at the time of Dr. Buckner's July 22, 1991 report.[24] The Office noted that Dr. Buckner's report was not, therefore, entitled to the special weight accorded a duly designated impartial medical examiner. The Office concluded, however, that his report represented the weight of the medical evidence and was sufficient to terminate appellant's compensation and medical benefits as he was a Board-certified orthopedic surgeon. The Office noted that appellant's physician Dr. Scott, was a Board-certified internist and Dr. Woodard was not Board-certified.

As noted above, to establish clear evidence of error, the evidence submitted must not only be of sufficient probative value to 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. While appellant has established a clear procedural error, the Office's designation of Dr. Buckner as an impartial medical specialist, she has not demonstrated such substantive defects in Dr. Buckner's report so that this report should not have been relied upon by the Office and was insufficient to meet the Office's burden of proof to terminate her compensation benefits and deny her claims for additional compensation and medical benefits on and after April 5, 1992. As appellant has failed to establish clear evidence of error, the Office properly declined to reopen her claim for consideration of the merits.

CONCLUSION

The Board finds that appellant has failed to submit sufficient evidence to establish clear evidence of error and that the Office properly denied her request for merit review.

[24] The Office's procedure manual provided as of December 1993 that a physician employed by or under contract to the employing establishment may not be considered a second opinion specialist for the purposes of creating a conflict in medical evidence. However, such a report must receive due consideration and if its findings differ materially from those of the treating physician, a second opinion referral is appropriate. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9.b, (December 1993). The current provision provides that a physician performing fitness-for-duty examinations for the employing establishment should not be considered a second opinion physician for the purposes of creating a conflict in medical evidence. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9.b. (June 2002).

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 3, 2007
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