United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 08-232**
	)	**Issued: August 7, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Kalamazoo, MI, Employer	)	

Appearances:
Daniel Shannon, Esq., 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 October 31, 2007 appellant filed a timely appeal of a June 6, 2007 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. The decision also appeared to vacate a February 8, 2007 Office decision. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal. Since the merit decision regarding a recurrence of disability as of September 16, 2003 was issued December 8, 2003, the Board does not have jurisdiction over the merits of this case.

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.

FACTUAL HISTORY

There are three Office case files that have been administratively combined. Appellant filed a traumatic injury claim (Form CA-1) on December 28, 2000 for a low back injury on

October 11, 2000 while loading trays of flat mail. This claim was developed under File No. 09-2005351 and was initially accepted for a lumbosacral strain. Appellant filed an occupational claim (Form CA-2) on July 22, 2002 for a sharp pain in her left hip and back. She also filed a Form CA-1 for this injury. The claim was developed under File No. 09-2023364 and was denied by decision dated September 6, 2002. Appellant also filed a traumatic injury claim for a back injury on September 16, 2003 when she reached for mail and turned, resulting in back pain. This claim was developed under OWCP File No. 09-2044422.

Appellant under went L3-4 back surgery on November 13, 2001 and returned to a light-duty job on April 19, 2002. The Office referred appellant for a second opinion examination by Dr. Ronald Rook, an osteopath, who opined in a November 20, 2002 report that she had sustained a permanent aggravation of lumbar spinal stenosis on October 11, 2000. Dr. Rook indicated that appellant was limited to light duty with no lifting over 20 pounds. On September 18, 2003 appellant filed a notice of recurrence of disability (Form CA-2a) as of September 16, 2003. The record indicated that she began working four hours per day as of September 18, 2003 and she stopped working December 1, 2003.

On November 25, 2003 the Office accepted the claim for permanent aggravation of lumbar spinal stenosis. By decision dated December 8, 2003, it denied the claim for a recurrence of disability. The Office found the medical evidence was insufficient to establish a recurrence of disability.

With respect to the claim for a traumatic injury on September 16, 2003, by decision dated December 7, 2005, the Office accepted the claim for a lumbosacral sprain. It found that the condition had resolved by November 16, 2003.

By letter dated February 12, 2006, appellant requested reconsideration of the December 7, 2005 decision. In a decision dated February 28, 2006, the Office denied merit review of the claim.

In an October 17, 2006 letter, appellant stated that there was confusion regarding the various claim numbers, but she was requesting reconsideration with respect to the October 11, 2000 employment injury.

In a decision dated February 8, 2007, issued pursuant to File No. 09-200531, the Office vacated the December 7, 2005 decision. It accepted disability from November 16, 2003 to June 29, 2004, indicating that appellant had retired from federal employment on June 30, 2004. According to the Office, its decision was based on reports from orthopedic surgeon Dr. Bruce Abrams, selected as a second opinion examiner pursuant to File No. 09-02044422, the claim accepted for a lumbosacral sprain on September 16, 2003.

By decision dated June 6, 2007, the Office determined that the October 17, 2006 request for reconsideration was untimely and failed to show clear evidence of error. It also stated that the February 8, 2007 decision was "rescinded," as "the Office erroneously reviewed and vacated a decision under case [File No.] 09[-]2005351, which was actually issued under the subsidiary case [File No.] 09[-]2044422."

LEGAL PRECEDENT

The Federal Employees' Compensation 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.[1] 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."[2]

Section 8128(a) of the Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] It, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[6] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[7] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[9] In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

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[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.605 (1999).

[3] *See supra* note 1.

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

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

[6] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, it has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[7] 20 C.F.R. § 10.607(a).

[8] *See Leon D. Faidley, Jr.*, *supra* note 4.

[9] *Leonard E. Redway*, 28 ECAB 242 (1977).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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 decision.[16] 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.[17]

ANALYSIS

There is, as noted by appellant in her application for reconsideration, some confusion in the records regarding her low back injuries. The Office has accepted a lumbosacral strain and permanent aggravation of lumbar spinal stenosis as a result of an October 11, 2000 employment incident. There is also a separate claim for injury on September 16, 2003, which was accepted for a lumbosacral sprain. As to disability resulting from the September 16, 2003 injury, the Office initially found in a December 7, 2005 decision that disability had resolved as of November 16, 2003. By decision dated February 8, 2007, it vacated the December 7, 2005 decision and found that appellant had employment-related disability from November 16, 2003 to June 29, 2004, when she retired from federal employment.

The June 6, 2007 decision stated that it was rescinding the February 8, 2007 decision. The term "rescinded" applies to the acceptance of a claim or a period of disability, not to decisions of the Office.[18] It appeared that the Office was attempting to vacate the February 8, 2007 decision on the grounds that it had improperly vacated a decision under another (subsidiary) claim. Since the December 7, 2005 decision had been vacated with regard to the

[11] *Dean D. Beets*, 43 ECAB 1153 (1992).

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

[13] *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[14] *See Leona N. Travis*, *supra* note 12.

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

[16] *Leon D. Faidley, Jr.*, *supra* note 4.

[17] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[18] *See, e.g., George A. Rodriguez*, 57 ECAB 224 (2005).

period of disability, if the February 8, 2007 decision is also vacated then the Office has no final decision on the issue of disability from the September 16, 2003 injury. The June 6, 2007 decision makes no specific findings on the disability issue other than to vacate the February 8, 2007 decision. On return of the case record, the Office should issue a merit decision with appeal rights on the pending issues regarding the September 16, 2003 employment injury.

On this appeal, therefore, the only issue is whether the June 6, 2007 Office decision properly determined that appellant's October 17, 2006 application for reconsideration was untimely and failed to show clear evidence of error regarding the October 11, 2000 injury. The last merit decision in that claim was the December 8, 2003 denial of a recurrence of disability as of September 16, 2003. The application for reconsideration is therefore untimely.

On appeal, appellant acknowledged that her claim for compensation as of September 16, 2003 was a new injury, not a recurrence of disability. A recurrence of disability means "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."[19] The evidence of record does not show a spontaneous change in the October 11, 2000 employment injury as of September 16, 2003. There is no medical evidence discussing appellant's employment-related condition and establishing a recurrence of disability on or about September 16, 2003. Dr. Stephen Dallas, an internist, indicated in a February 9, 2004 report that he treated appellant on September 18, 2003, but he indicated that she had back pain from a September 16, 2003 employment incident. Dr. Abrams, the second opinion physician, also discussed a new injury on September 16, 2003. Appellant did not establish clear evidence of error in the denial of a claim for a recurrence of disability.

The Board accordingly finds the Office properly determined that appellant's October 17, 2006 application for reconsideration was untimely and failed to show clear evidence of error. The Office properly denied merit review of the claim. On return of the case record, it should issue an appropriate decision regarding the September 16, 2003 employment injury.

CONCLUSION

The October 17, 2006 application for reconsideration was untimely and failed to show clear evidence of error.

[19] 20 C.F.R. § 10.5(x).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 6, 2007 is affirmed.

Issued: August 7, 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