

FACTUAL HISTORY

On October 23, 2003 appellant, then a 45-year-old clinical nurse, filed a traumatic injury (Form CA-1) assigned claim number 06-2104806.¹ She alleged that on May 26, 2003 she experienced a spasm in her upper back while turning a critically ill inmate. Appellant stated that her muscle pain and spasms exacerbated her accepted January 27, 2003 employment-related injury.

By letter dated January 28, 2004, the Office addressed the medical and factual evidence appellant needed to submit to establish her claim. She was afforded 30 days to respond. Appellant did not respond within the allotted time period.

On February 3, 2004 the employing establishment controverted the claim on the grounds that it did not have actual knowledge, written or verbal notification that the alleged injury occurred. It stated that appellant requested a CA-1 form on October 21, 2003 but she did not submit it to her supervisor until December 9, 2003. The employing establishment contended that she had not submitted any medical evidence to establish her claim.

By decision dated March 3, 2004, the Office denied appellant's claim. It found the evidence of record insufficient to establish that the May 26, 2003 incident occurred at the time, place and in the manner alleged and that appellant sustained a medical condition causally related to the May 26, 2003 incident.

In a September 4, 2007 letter, the Office denied appellant's counsel's August 18, 2007 request to have all of her claims combined into one case file. It noted that the assigned claims numbers 06-2116017 and 06-2079293 were not currently in an open status and the instant assigned claim number 06-2104806 was denied on March 3, 2004.² The Office stated that it was not its policy to combine files for cases that were in denied or closed status. It further stated that if the case files were combined, any request pertaining to a claimed injury from any of the cases would still have to be considered individually. The Office noted that, when cases were doubled or linked, they were still kept separate but traveled under one claim number.

The Office received appellant's authorization for representation by her attorney and a November 1, 2006 letter from counsel requesting a complete copy of appellant's case record.

By letter dated November 19, 2007, appellant, through counsel, requested reconsideration of the March 3, 2004 decision. Counsel reiterated his request that the Office combine all of appellant's claims into one claim in accordance with its procedures. Appellant submitted a September 24, 2007 letter in which her attorney requested that Dr. Eugenia F. Zimmerman, a Board-certified physiatrist, address an accompanying list of questions regarding her back problems.

¹ The Board notes that appellant signed her CA-1 form on December 5, 2003 and it was received by the Office on January 20, 2004.

² The Office noted that, by decision dated May 11, 2007, it denied appellant's claim for a recurrence of disability in the assigned claim 06-2079293.

In a November 2, 2007 medical report, Dr. Zimmerman stated that appellant had been under her care since May 8, 2007 as a result of a referral from Dr. Patricia K. Naslund, an attending Board-certified neurologist. Her understanding of appellant's history prior to May 2007 was derived from Dr. Naslund's records and report. Dr. Zimmerman stated that appellant had myofascial pain syndrome that was characterized by hypertonicity and tenderness of the musculature of the upper trapezius and interscapular region. She also had old mild T3-4 compression deformities with no evidence of edema and left central disc herniation at C5-6 with mild effacement of the cord based on an April 8, 2005 magnetic resonance imaging (MRI) scan. Dr. Zimmerman stated that, without prior imaging, she could not state when the thoracic compression fractures occurred. She further stated that, based on appellant's own report, a work injury that was a significantly contributing factor in the development of her current back condition, indicated that she was asymptomatic prior to her fall in 2003 during federal employee training and that she experienced pain since that time. Dr. Zimmerman related that, although she could not prove, without any definitive evidence, that appellant's compression fractures were caused by the 2003 employment injury, the mechanism of injury was consistent with the cause of a compression fracture. She reviewed a history of the 2003 employment injury, which indicated that during a federal employing training session appellant was practicing hand to hand sparring with a partner when she slipped and fell on her back. There was no documentation indicating exactly how appellant landed. Dr. Zimmerman, however, stated that, if appellant landed with her spine flexed in just the right way, she could have sustained minor compression fractures to the superior endplates of T3-4 during the fall which caused her pain. She further stated that compression fractures in the thoracic spine can subtly alter the mechanics of how the vertebrae sit together dynamically during flexion, extension, rotation and side bending. This alternation in the mechanical alignment can cause persistent and troublesome myofascial pain as the muscles and tendons attempt to compensate for the alternated bony mechanics.

Dr. Zimmerman opined that because of the old compression fractures appellant was "likely" at risk for recurrent thoracic strain which she sustained in May 2003 and May 2004. She also opined that the underlying compression fractures "likely" aggravated her myofascial pain. Dr. Zimmerman indicated that, if appellant could find x-rays of the thoracic spine or chest prior to the 2003 employment injury, it might help elucidate the timing of the compression fractures. She concluded by stating that, since her pain had persisted for three and one-half years, it was likely to remain an indefinite problem.

By decision dated December 4, 2007, the Office found that appellant's letter requesting reconsideration was dated November 19, 2007, more than one year after its March 3, 2004 decision and was untimely. It further found that she did not submit evidence to establish clear evidence of error in the prior decision finding that she did not sustain an injury in the performance of duty.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵

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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Leona N. Travis*, *supra* note 8.

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.¹³

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁴

The most recent merit decision was issued by the Office on March 3, 2004. It found that the evidence of record insufficient to establish that the May 27, 2003 incident occurred as alleged and that appellant sustained a medical condition causally related to this incident. As appellant's November 19, 2007 letter requesting reconsideration was made more than one year after the Office's March 3, 2004 merit decision, the Board finds that it was not timely filed.

The issues for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was an error in the Office's finding that she neither established an employment incident nor a related medical diagnosis because she had not submitted any evidence. Appellant has not submitted evidence establishing that the Office committed clear evidence of error in its March 3, 2004 decision. She did not submit the type of positive, precise and explicit evidence or argument which manifests on its face that the Office committed an error.

In the untimely November 19, 2007 request for reconsideration, appellant's attorney requested that the Office combine all of her claims into one case file. This evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim. Counsel's request was previously addressed by the Office and it failed to address the underlying issues of whether appellant established fact of injury and causal relation. Similarly, counsel's September 24, 2007 letter which requested that Dr. Zimmerman address questions regarding appellant's back problems is insufficient to *prima facie* shift the weight of the evidence in favor of her claim. This evidence failed to address the underlying issues of whether the May 27, 2003 incident occurred as alleged and whether appellant sustained a medical condition causally related to this incident.

Dr. Zimmerman's November 2, 2007 report stated that appellant had myofascial pain syndrome that was characterized by hypertonicity and tenderness of the musculature of the upper trapezius and interscapular region. She also had old mild T3-4 compression deformities with no evidence of edema and left central disc herniation at C5-6 with mild effacement of the cord based on an April 8, 2005 MRI scan. Dr. Zimmerman related appellant's thoracic compression fractures to the 2003 employment injury based on the history of injury provided by her which indicated that she was asymptomatic prior to the injury and she had experienced pain since that

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ *Larry L. Litton*, 44 ECAB 243 (1992).

time and the mechanism of injury which was consistent with the cause of a compression fracture. Dr. Zimmerman explained that compression fractures in the thoracic spine can subtly alter the mechanics of how the vertebrae sit together dynamically during flexion, extension, rotation and side bending. She further explained that this alternation in the mechanical alignment can cause persistent and troublesome myofascial pain as the muscles and tendons attempt to compensate for the alternated bony mechanics. Dr. Zimmerman opined that because of the old compression fractures appellant was “likely” at risk for recurrent thoracic strain which she sustained in May 2003. She further opined that the underlying compression fractures “likely” aggravated her myofascial pain. Dr. Zimmerman did not provide a factual background establishing that the May 26, 2003 incident occurred as alleged. She only reviewed a history of the 2003 employment-related training incident. Moreover, Dr. Zimmerman’s opinion regarding the causal relationship between appellant’s compression fractures and recurrent thoracic strain and aggravation of myofascial pain is couched in speculative terms and, thus, is insufficient to establish clear evidence of error in the Office’s denial of her claim.¹⁵ For these reasons, the Board finds that appellant has not established clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly denied appellant’s request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

¹⁵ *Kathy A. Kelley*, 55 ECAB 206 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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