

**United States Department of Labor
Employees' Compensation Appeals Board**

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| J.M., Appellant |) | |
| |) | |
| and |) | Docket No. 09-960 |
| |) | Issued: December 8, 2009 |
| DEPARTMENT OF THE ARMY, GREEN |) | |
| RIVER LAKE, Campbellsville, KY, |) | |
| Employer |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 3, 2009 appellant filed a timely appeal of a December 5, 2008 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 Office's most recent merit decision dated August 17, 2005 and 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(d)(2).

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

This is the fourth appeal in this case. In the first appeal, the Board affirmed decisions of the Office, which terminated appellant's compensation benefits effective July 19, 1998.¹ The Board considered her argument that the opinion of Dr. M.I. Malik, a Board-certified orthopedic surgeon selected as the impartial medical examiner, was not entitled to special weight as a referee physician due to complaints filed against him with a state licensing board as well as judgments against him for malpractice. The Board found that Dr. Malik was properly selected as an impartial medical specialist and that his opinion constituted the weight of the medical evidence. On February 2, 2004 the Board affirmed Office decisions finding that appellant had no disability causally related to her accepted employment injuries after July 19, 1998.² On June 26, 2006 the Board considered appellant's argument that Dr. Malik's opinion should not be given special weight as he had to surrender his license on July 17, 2005. The Board found that the Office properly refused to reopen appellant's cases for further review of the merits of her claim under 5 U.S.C. § 8128(a).³ The facts and the history contained in the prior appeals are incorporated by reference.

On September 4, 2008 appellant's representative requested reconsideration contending that the Office's prior decisions should be set aside and her wage compensation and medical benefits reinstated. He discussed the quality of Dr. Malik's March 19, 1998 report and argued that it should be excluded from the record or considered of diminished probative value. Appellant's representative reiterated that Dr. Malik was on probation when he examined appellant and ultimately, his medical license was surrendered.

In a May 9, 2008 report, Dr. Michael Cassaro, a Board-certified anesthesiologist, critiqued Dr. Malik's report and alleged that the physician's work was sloppy and indicated poor judgment. He noted that Dr. Malik's license was taken away and that there were glaring omissions in his report together with errors related to documentation and judgment.

In a letter dated September 15, 2008, appellant's representative submitted additional medical evidence. In a September 24, 2007 report, Dr. Cassaro explained that appellant's spinal cord was damaged at the C6-7 level and noted that a magnetic resonance imaging scan performed on November 16, 2005 showed flattening of the cervical cord and effacement by a broad-based disc bulge. He indicated that appellant's injury was permanent and included restrictions of sitting, bending or stooping for short periods only, no repetitive movements, no rotational movements, no lifting, no pushing, no left hand activities and no raising her arms above shoulder level. Dr. Cassaro opined that appellant's condition was "a direct result of the 1989 work-related injury. There is no indication of any extension of the work-related injury by intervening events." In an August 30, 2007 report, Dr. Cassaro diagnosed cervical/thoracic myelopathy, left suprascapular neuritis, neuritis of the dorsal branch of the C5 nerve root,

¹ Docket No. 01-1763 (issued April 24, 2002). On January 25, 1989 appellant sustained injury when she moved a 30-pound box. Her claim was accepted for lumber and thoracic strains and for pneumothorax caused by her therapy.

² Docket No. 03-2252 (issued February 2, 2004).

³ Docket No. 07-135 (issued June 21, 2007).

neuritis of the periosteal nerve to the fiber osseus junction of the interspinous ligament at T3, left T7 intercostal neuritis, adrenal fatigue and carbohydrate abuse.

In a November 12, 2007 report, Dr. Bobby Brooks, a Board-certified family practitioner, commented on the examination performed by Dr. Malik and questioned its validity. He reiterated that he found appellant disabled as a direct result of her January 1989 injury.

In a report dated December 11, 2007, Dr. Zack Stearns, a Board-certified orthopedic surgeon, opined that appellant had a permanent injury directly related to her original work injury, with no reasonable expectation of recovery. Appellant was permanently disabled. The Office also received correspondence from appellant to her congressional representative related to her claim and his inquiry to the Office as to the status of her claim.

In a December 5, 2008 decision, the Office denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ 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 --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."⁵

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).⁶ 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 provide that an application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.⁷

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

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 *Id.* at § 8128(a).

⁶ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ 20 C.F.R. § 10.607(a).

merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁸

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 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.⁹ 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 the Office abused its discretion in denying merit review in the face of such evidence.¹⁰

ANALYSIS

In its December 5, 2008 decision, the Office properly determined that appellant failed to file a timely application for review. The most recent merit decision in the claim is the Office's August 17, 2005 decision. Appellant's September 4, 2008 letter requesting reconsideration was submitted more than one year after the August 17, 2005 merit decision and was, therefore, untimely.

The Office properly performed a limited review of the evidence 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. It reviewed the evidence submitted by appellant but found that it did not clearly show that the Office's prior decisions were 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 terminating her compensation in 1998 and is insufficient to demonstrate clear evidence of error. The underlying issue is whether the Office properly terminated appellant's compensation benefits effective July 19, 1998 on the grounds that she no longer had continuing residuals of her accepted conditions.

⁸ *Id.* at § 10.607(b).

⁹ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

¹⁰ *Id.*

Appellant's representative contended that the Office's prior decisions were in error and should be set aside. He argued that the Office should not have relied upon Dr. Malik's 1998 report because the physician's license was suspended and ultimately surrendered in 2005. Further, he argued that the report should be excluded or considered of diminished probative value because Dr. Malik was on probation when he examined appellant. However, the Board notes that this argument does not establish clear evidence of error. The term "clear evidence of error" is intended to represent a difficult standard.¹¹ The Board has previously addressed this argument in its prior decisions and found that at the time of his examination, the report of Dr. Malik was entitled to special weight as that of an impartial medical specialist. The Board also notes that at the time of Dr. Malik's examination of appellant, he was not under probation or other restriction. The Board finds that this argument does not establish clear evidence of error.

In a May 9, 2008 report, Dr. Cassaro contended that Dr. Malik's report was "sloppy and indicates poor judgment," and that there were glaring omissions in his documentation and judgment. In a November 12, 2007 report, Dr. Brooks also questioned the validity of Dr. Malik's report and opined that appellant was disabled as a result of her injury in January 1989. The Board finds that these reports are insufficient to establish clear evidence of error. As noted, the Board has previously addressed the probative value of Dr. Malik's medical opinion. Dr. Brooks essentially repeated his prior reports of 2004 and 2006. Dr. Cassaro based his critique of Dr. Malik's findings in 1998 on the loss of his license in 2005. Dr. Malik's report did not adequately address the basis for relating appellant's disability in 2007 or 2008 to the back strains accepted in 1989. Appellant's disability in 2007 and 2008 is not relevant to the issue of termination in 1998. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹²

The September 24, 2007 report of Dr. Cassaro indicated that appellant's injury was permanent and advised that her numerous restrictions were "a direct result of the 1989 work-related injury. In an August 30, 2007 report, he made several diagnoses. However, these reports do not establish clear evidence of error as Dr. Cassaro reiterated his conclusion without probative medical rationale. Moreover, he attributed appellant's disability to spinal conditions which have not been accepted by the Office as employment related. Additionally, appellant submitted a December 11, 2007 report from Dr. Stearns, who opined that she was permanently disabled with no expectation of recovery and advised that her injury was directly related to her original work injury. The Board notes that Dr. Stearns reiterated his opinion from reports dated June 10, 1998 and in 2006. The Board finds that these reports are insufficient to show that the Office's termination of appellant's compensation benefits effective July 19, 1998 was erroneous or raise a substantial question as to the correctness of the Office's decision.

As noted, 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).¹³ The

¹¹ *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008).

¹² *Id.*

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in terminating appellant's compensation benefits. Therefore, the Board finds that appellant has not presented clear evidence of error.¹⁴

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 decision of the Office of Workers' Compensation Programs dated December 5, 2008 is affirmed.

Issued: December 8, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ The Board notes that, subsequent to the Office's December 5, 2008 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).