United States Department of Labor
Employees' Compensation Appeals Board

A.G., Appellant	)	
and	)	**Docket No. 08-1376**
	)	**Issued: November 12, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 2, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated March 26, 2008, which denied her reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated April 22, 2004 and the filing of this appeal on April 2, 2008, 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 determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On June 25, 2002 appellant, a 48-year-old bulk mail technician, injured her neck when a coworker fell on her. She filed a claim for benefits, which the Office accepted for cervical strain. The Office paid appropriate compensation for periods of temporary total and partial disability.

On January 17, 2003 appellant accepted a job as a modified mail technician with the employing establishment and returned to full-time work on January 31, 2003. She continued to receive disability compensation for intermittent dates.

In a report dated March 13, 2003, Dr. Alvin M. Stinson, Board-certified in physical medicine and rehabilitation, released appellant to light work and stated that she had a three percent impairment rating of the whole body.

On March 24, 2003 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of her left upper extremity.

In a May 1, 2003 report, Dr. Stinson stated that appellant had reached maximum medical improvement on February 20, 2003. He asserted that appellant had a three percent impairment rating of the total body due to myofascial pain and neck pain. Dr. Stinson noted that appellant's complaints of pain consistently pertained to her neck and did not include complaints of pain down the upper extremity or hands.

By decision dated July 21, 2003, the Office denied appellant's claim for a schedule award. It found that the medical evidence did not establish any permanent impairment stemming from her accepted cervical strain condition pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) fifth edition.

By decision dated July 21, 2003, the Office found that the position of modified mail technician, based on actual weekly wages of $843.52, represented appellant's wage-earning capacity. It noted that the position fairly and reasonably represented her wage-earning capacity and that she had worked in this position for at least 60 days.

On July 31, 2003 appellant requested an oral hearing, which was held on February 25, 2004.

In a report dated July 22, 2003, Dr. Stinson noted evidence of numerous tender points to the left and right cervical and trapezius regions on examination. He stated that appellant had normal sensation, normal strength and normal muscle tone in her arms. Dr. Stinson advised that appellant had no significant loss of range of motion of the neck. He stated:

> "I gave appellant an impairment rating of three percent on March 13, 2003, primarily for the complaints of neck pain which has limited her ability to fully participate with her job. There are no impairments due to abnormalities to the extremities. Therefore, if the total body impairment should be based strictly on abnormalities within the extremities, there would be a zero percent impairment rating. However, I do not feel that basing the impairment rating only on extremities is very applicable in a patient with primarily complaints of neck and/or lower back pain."

In a report dated February 3, 2004, Dr. Stinson essentially reiterated his previous findings and conclusions. He noted that appellant had myofascial pain syndrome and cervical symptomatology and reported continued pain in the left arm and left shoulder region.

By decision dated April 22, 2004, an Office hearing representative affirmed the July 21, 2003 decisions.

In a report dated April 23, 2004, Dr. Timothy Jackson, Board-certified in orthopedic surgery, stated findings on examination, reviewed the medical history and concluded that appellant had myofascial pain syndrome in addition to cervical degenerative disc disease. He indicated that she had sustained a permanent aggravation of cervical degenerative disc disease, which could account for her persistent pain.

On January 2, 2008 appellant requested a schedule award based on a partial loss of use of her left upper extremity.

By letter received March 10, 2008, appellant requested reconsideration of the July 21, 2003 schedule award decision. She stated that due to her accepted cervical injury she could no longer lift more than 15 pounds. Appellant also asserted that the Office improperly denied authorization for Dr. Stinson's requests for her to undergo a magnetic resonance imaging (MRI) scan.

Appellant submitted a January 18, 2008 report from Dr. Stinson, who stated that she had been treated for myofascial pain, degenerative cervical spine and cervical strain. Dr. Stinson noted that she occasionally had spasms in her neck, causing her neck to lock up in a forward position however she did not know of any triggering mechanism which caused this to occur. He stated that appellant had normal reflexes, normal muscle strength and normal sensation in the upper extremities. In a report dated February 19, 2008, Dr. Stinson reiterated that appellant was experiencing myofascial pain. He stated that his examination showed increased tightness in the left middle trapezius region compared to the right. Dr. Stinson advised that her neurological examination was normal in the upper extremities, with normal muscle strength, normal muscle tone and normal reflexes. He noted that x-rays of the cervical spine showed some minimal degenerative changes in the lower cervical spine. Dr. Stinson stated that there was no fracture or dislocation in the cervical spine.

By decision dated March 26, 2008, the Office denied appellant's request for reconsideration without a merit review, finding that she had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error.[1]

[1] In light of the fact that the Office received Dr. Jackson's April 23, 2004 report following the issuance of the April 22, 2004 Office decision, it stated that it was considering his report as new evidence pursuant to appellant's request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle an employee to a review of an Office decision as a matter of right.[3] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, or increase the compensation awarded;
>
> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] As one such limitation, it has stated that it 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.[5] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).[6]

In those cases where a request for reconsideration is not timely filed, the Board had held however that 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.[7] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the appellant's application for review shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and

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[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

[4] 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, the Office 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 point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

[5] 20 C.F.R. § 10.607(b).

[6] *See* cases cited *supra* note 2.

[7] *Rex L. Weaver*, 44 ECAB 535 (1993).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

must be manifested on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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.[14] The Board makes an independent determination of whether an appellant 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.[15]

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. It issued its last merit decision in this case on April 22, 2004. Appellant requested reconsideration on March 10, 2008; thus, her reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's March 10, 2008 request for reconsideration failed to show clear evidence of error. The evidence appellant submitted is not pertinent to the issue on appeal. The only new medical reports appellant submitted in support of her untimely request for reconsideration were Dr. Jackson's April 23, 2004 report and the January 18 and February 19, 2008 reports from Dr. Stinson. These reports are of limited probative value as they did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether appellant was entitled to a schedule award stemming from her accepted June 25, 2002 cervical injury.[16] The reports from Drs. Jackson and Stinson provide findings on examination, relate appellant's complaints of cervical pain and indicate various diagnoses pertaining to her neck and left shoulder.

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

[11] *See Jesus D. Sanchez, supra* note 3.

[12] *See Leona N. Travis, supra* note 10.

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

[14] *Faidley, supra* note 3.

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

[16] The Board notes that a claimant may seek an increased schedule award if the evidence establishes that she sustained increased impairment at a later date causally related to the accepted employment injury. A proper claim for an increase in permanent impairment is not subject to time limitations or to the clear evidence of error standard. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.8087b (August 2002). *See Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994). However, in the instant case appellant's claim for a schedule award was denied; as she has not submitted evidence of increased employment-related impairment with her request for reconsideration, this principle is not applicable.

Dr. Jackson diagnosed myofascial pain syndrome and cervical degenerative disc disease. He stated that appellant had sustained a permanent aggravation of cervical degenerative disc disease which could account for her persistent pain. Dr. Stinson advised that appellant had myofascial pain, degenerative cervical spine, degenerative cervical changes and cervical strain, with occasional neck spasms. He found that appellant had a normal neurological examination. The reports appellant submitted do not present any impairment ratings or address whether she sustained any permanent impairment from her accepted June 25, 2002 cervical injury. No other evidence was received by the Office.[17] Therefore, appellant has failed to demonstrate clear evidence of error on the part of the Office.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration request dated March 10, 2008. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on March 26, 2008.

[17] The Board rejects appellant's argument that the Office arbitrarily denied authorization for Dr. Stinson to administer an MRI scan. Appellant has submitted no documentation indicating that she or Dr. Stinson ever requested authorization for an MRI scan or that the Office ever denied such as request.

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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