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D.A., Appellant)	
)	
and)	Docket No. 12-1214
)	Issued: November 14, 2012
U.S. POSTAL SERVICE, CARDISS COLLINS)	
POST OFFICE, Chicago, IL, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

On April 10, 2012 appellant filed a timely appeal from a November 9, 2011 nonmerit decision of the Office of Workers' Compensation (OWCP). As there is no merit decision regarding the issue on appeal that was issued within 180 days of the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

² 5 U.S.C. §§ 8101-8193.

On appeal, appellant generally asserts that she is entitled to back pay beginning July 25, 2006.

FACTUAL HISTORY

This case has previously been before the Board. In an October 6, 2008 decision, the Board affirmed a January 3, 2008 OWCP decision which found that appellant failed to establish that she was unable to work eight hours a day beginning July 25, 2006 due to her September 25, 2005 employment injury.³ By order dated January 27, 2010, the Board dismissed her appeal for lack of jurisdiction because there was no final OWCP decision issued within one year of the appeal.⁴ In an October 7, 2011 decision, the Board found that appellant did not establish that she was entitled to a schedule award for the accepted conditions of postconcussion syndrome and panic disorder without agoraphobia and that OWCP properly refused to reopen her case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).⁵ The law and facts of the previous Board decisions and orders are incorporated herein by reference.⁶

Appellant retired effective November 1, 2009. On October 27, 2011 she requested reconsideration on the issue of whether she was entitled to be back pay beginning July 25, 2006, when she began working four hours a day. Appellant submitted a claim for compensation and a June 10, 2011 report in which Dr. Andrew Hendrix, a Board-certified psychiatrist, reported the history of injury, past medical history and her current complaints.

By decision dated November 9, 2011, OWCP denied appellant's reconsideration request on the grounds that her request was untimely filed and that she failed to present clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. 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.⁷ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.⁸ Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding

³ Docket No. 08-1217 (issued October 6, 2008).

⁴ Docket No. 09-1458 (issued January 27, 2010).

⁵ Docket No. 11-622 (issued October 7, 2011).

⁶ Appellant, a mail processor, sustained work-related postconcussion syndrome and panic disorder on September 25, 2005 when she was struck on the head by a shelf. She returned to four hours of modified duty on March 18, 2006 and to eight hours of modified duty on July 18, 2006. Appellant returned to a four-hour workday on July 25, 2006 and submitted claims for compensation for four hours a day.

⁷ 20 C.F.R. § 10.607(b) (2011); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁸ *Cresenciano Martinez*, 51 ECAB 322 (2000).

the one-year filing limitation set forth section 10.607 of OWCP regulations, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

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

OWCP's procedures note 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 OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as 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 Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹³

ANALYSIS

The only decision before the Board is the November 9, 2011 decision in which OWCP denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. Appellant requested reconsideration regarding her entitlement to wage-loss compensation beginning July 25, 2006. The Board finds that, as more than one year has elapsed between the most recent merit decision on this issue, the Board's October 6, 2008 decision and her request for reconsideration dated October 27, 2011, her request for reconsideration was untimely.¹⁴

⁹ 20 C.F.R. § 10.607 (2011).

¹⁰ See *Alberta Dukes*, 56 ECAB 247 (2005).

¹¹ *Robert G. Burns*, 57 ECAB 657 (2006).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 1.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

¹³ *Nancy Marcano*, 50 ECAB 110 (1998).

¹⁴ 20 C.F.R. § 10.607(a) (2011).

The Board also finds that appellant failed to establish clear evidence of error. On reconsideration appellant requested that OWCP reconsider whether she was entitled to back pay from July 25, 2006 to October 31, 2009, when she retired. In a merit decision dated January 3, 2008 decision, OWCP denied modification of a December 11, 2006 decision that denied her claim that she was unable to work eight hours a day beginning July 25, 2006. In an October 6, 2008 decision, the Board affirmed the January 3, 2008 decision.¹⁵ Absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, this issue is *res judicata*.¹⁶

On appeal, appellant again contends entitlement back pay from July 2006. As discussed above, this issue was addressed in OWCP's merit decision dated January 3, 2008 and affirmed by the Board on October 6, 2008, the last merit decision on this issue. Without further merit review by OWCP, the Board has no jurisdiction to review the matter.

The term "clear evidence of error" is intended to represent a difficult standard and the argument provided here is not the type of positive, precise and explicit evidence which manifested on its face that OWCP committed an error.¹⁷ As the evidence and argument submitted are of insufficient probative value to shift the weight of evidence in favor of appellant and raise a substantial question as to the correctness of the January 3, 2008 OWCP decision, she has not established that OWCP committed error by its November 9, 2011 decision.¹⁸ The Board therefore finds that, in accordance with its internal guidelines and with Board precedent, OWCP properly performed a limited review of the argument and evidence submitted by appellant with her October 27, 2011 reconsideration request to ascertain whether it demonstrated clear evidence of error in the January 3, 2008 decision and correctly determined that it did not and thus denied her untimely request for a merit reconsideration on that basis.¹⁹

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and that she failed to establish clear evidence of error. OWCP therefore properly denied a merit review of her claim.

¹⁵ *Supra* note 3.

¹⁶ See *Robert G. Burns*, *supra* note 11; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d) (2009).

¹⁷ *Robert G. Burns*, *supra* note 11.

¹⁸ *Nancy Marcano*, *supra* note 13.

¹⁹ 20 C.F.R. § 10.607(b) (2011); see *D.G.*, 59 ECAB 455 (2008).

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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