United States Department of Labor
Employees' Compensation Appeals Board

LORETTA M. INTONI, Appellant	)	
and	)	**Docket No. 05-1850**
	)	**Issued: December 5, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Brewster, MA, Employer	)	

Appearances:
Loretta M. Intoni, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 7, 2005 appellant filed a timely appeal of an August 18, 2005 nonmerit decision of the Office of Workers' Compensation Programs, which denied her July 28, 2005 request for reconsideration as untimely filed and failed to establish clear evidence of error. The last merit decision of record is dated March 18, 2004.[1] Because more than one year has elapsed between the March 18, 2004 decision and the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board only has jurisdiction to review the August 18, 2005 nonmerit decision.

ISSUE

The issue is whether the Office properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

[1] According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including, *inter alia*, any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (June 2002).

FACTUAL HISTORY

On May 10, 2001 appellant, a 43-year-old rural carrier, filed a traumatic injury claim alleging that on May 7, 2001 she sustained a concussion and injuries to her neck, lower back and both legs due to an automobile accident. She stopped work on May 7, 2001 and was placed on the periodic rolls for temporary total disability effective September 9, 2001. The Office accepted the claim for cervical strain, lumbosacral strain and post-traumatic headaches and paid appropriate compensation. Appellant returned to work in a limited-duty job on December 13, 2001 and had intermittent periods of total disability. On November 4, 2002 appellant filed a claim for a recurrence of total disability beginning October 23, 2002, which the Office accepted.

On March 27, 2003 the Office determined a conflict in the medical opinion evidence existed between Dr. Andrew Judelson, a treating Board-certified physiatrist, and Dr. James S. Broome, second opinion Board-certified orthopedic surgeon, on the issue of whether appellant was capable of working eight hours a day. Appellant was referred to Dr. John S. Ritter, a Board-certified orthopedic surgeon, to resolve the conflict.

In a report dated April 30, 2003, Dr. Ritter concluded that appellant had no residuals or disability from her accepted employment injury. In support of this conclusion, he noted "[t]here are no objective findings of impairment resulting" from the accepted employment injury. A physical examination revealed normal range of motion of the head, neck and upper extremity, no limp, "no evidence of ataxia," intact abductor motor function and "no evidence of palapable paraspinal muscle spasm." A review of x-ray interpretations taken on May 7, 2001 revealed "a normal cervical spine series" and a May 11, 2001 magnetic resonance imaging (MRI) scan of the brain showed "no evidence of recent or acute infraction" and "[n]o evidence of recent intracranial hemorrhage. Dr. Ritter stated a November 29, 2002 MRI scan showed "no significant lesions in the cervical spine."

On May 14, 2003 the Office issued a notice of proposed termination of compensation and medical benefits based upon the opinion of the impartial medical examiner, Dr. Ritter, that appellant no longer had any disability or residuals due to her accepted employment injury.

By decision dated June 25, 2003, the Office finalized the termination of appellant's compensation benefits effective that date.

On July 3, 2003 appellant requested an oral hearing, which was held on December 16, 2003.

By decision dated March 18, 2004, the hearing representative affirmed the termination of appellant's benefits effective June 25, 2003 on the grounds that the medical evidence was insufficient to establish that she had any residuals or disability due to her accepted employment injury on and after June 25, 2003.

Appellant requested reconsideration by letter dated June 28, 2005. In support of her claim, she submitted a July 29, 2004 MRI scan of the lumbar spine and a March 7, 2005 bone scan by Dr. Jay E. Rosenfeld, a Board-certified physiatrist. The July 29, 2004 MRI scan revealed there was "a similar appearance is seen to the lumbosacral spine in comparison to the

previous MRI [scan] examination of November 14, 1997." Dr. Rosenfeld indicated that there was "[a]ctivity along the anterior margins of multiple left ribs likely relates to sequelae of traumatic injury." He further related the scan as showing "a rounded focus of markedly increased tracer activity in the region of the right L4-5 facet-joint."

By decision dated August 18, 2005, the Office denied further review of the claim on the grounds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[2] The Office 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.[3] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[4] The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[5] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[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 manifested on its face that the Office committed an error.[8] Evidence which 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

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[2] 5 U.S.C. §§ 8101-8193. The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB ____ (Docket No. 04-208, issued March 18, 2004).

[3] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[4] *Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[5] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

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

[7] *See Darletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

[8] *See Pasquale C. D'Arco*, 54 ECAB ___ (Docket No. 02-1913, issued May 12, 2003); *Leona N. Travis*, 43 ECAB 227 (1991).

[9] *See Leon J. Modrowski*, *supra* note 4; *Jesus D. Sanchez supra* note 4.

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 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.[13]

ANALYSIS

Appellant requested reconsideration of the Office hearing representative's March 18, 2004 decision by letter of June 28, 2005. As this request was over one year from the date of the Office hearing representative's March 18, 2004 decision, the Board finds that the request is untimely.

The issue is whether appellant's untimely request for reconsideration demonstrated clear evidence of error on the part of the Office in its March 18, 2004 merit decision. Appellant's July 28, 2005 request for reconsideration fails to demonstrate clear evidence of error on the part of the Office in its March 18, 2004 decision. The Office hearing representative affirmed the decision terminating appellant's benefits and found the evidence insufficient to establish that she had any disability or residuals on and after June 25, 2003 due to her accepted May 7, 2001 employment injury. In support of her request, appellant submitted a July 29, 2004 MRI scan of the lumbar spine and a March 7, 2005 bone scan by Dr. Rosenfeld, a Board-certified physiatrist. These reports are not relevant to the reason the Office hearing representative affirmed the June 25, 2003 termination of benefits and his finding that she had no longer had any disability or residuals. The July 29, 2004 MRI scan and the March 7, 2004 bone scan are diagnostic studies and do not provide any opinion as to whether appellant is disabled or the cause of her condition. This evidence does not raise a substantial question as to the correctness of the hearing representative's March 18, 2004 decision. Nothing in appellant's July 28, 2005 request for reconsideration establishes that the Office hearing representative's March 18, 2004 decision was erroneous in affirming the termination of her benefits and finding no continuing disability or residuals.

Because appellant's July 28, 2005 request for reconsideration does not establish, on its face, that the Office hearing representative's March 18, 2004 decision was erroneous, the Board

[10] *See Leona N. Travis, supra* note 8.

[11] *See Nelson T. Thompson, supra* note 6.

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

[13] *See George C. Vernon*, 54 ECAB ___ (Docket No. 02-1954, issued January 6, 2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

will affirm the Office's August 18, 2005 decision not to reopen her case for a review on the merits.

CONCLUSION

The Board finds that the Office properly determined that appellant's July 28, 2005 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 18, 2005 is affirmed.

Issued: December 5, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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