

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

C.D., Appellant)	
)	
and)	Docket No. 06-1849
)	Issued: June 22, 2007
DEPARTMENT OF THE NAVY, NORFOLK)	
NAVAL SHIPYARD, Norfolk, VA, Employer)	

Appearances: Oral Argument May 18, 2007
Gwendolyn S. Green, for the appellant
No appearance, for the Director

DECISION AND ORDER

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

JURISDICTION

On August 8, 2006 appellant filed a timely appeal from an April 7, 2006 decision of the Office of Workers' Compensation Programs that denied her request for reconsideration because it was untimely filed and did not establish clear evidence of error. As there is no merit decision within one year of 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 501.3.¹

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board. In an August 25, 1999 decision, the Board found that appellant did not meet her burden of proof to establish that her fibromyalgia and myofascial pain in her neck, shoulder and right arm were causally related to factors of her

¹ 20 C.F.R. § 501.2(c).

federal employment.² On May 25, 2000 the Board denied appellant's petition for reconsideration of its August 25, 1999 decision. The law and the facts of the previous Board decision and orders are incorporated herein by reference.

By decision dated October 7, 2004, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. On August 28, 2005 appellant requested reconsideration and submitted additional evidence, which consisted of test results and treatment notes. She also submitted reports dated October 17, 2002 to November 19, 2004 from Dr. Robert B. Hansen, an attending Board-certified neurologist who specializes in pain medicine. In an April 7, 2006 decision, the Office denied appellant's reconsideration request, again finding that it was untimely and that she did not demonstrate clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.³ 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.⁴ 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.⁵ The Office's implementing procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth at section 10.607,⁶ if the claimant's application for review shows "clear evidence of error." 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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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 which 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. 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

² Docket No. 97-2798 (issued August 25, 1999).

³ 5 U.S.C. §§ 8101-8193.

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

⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁶ 20 C.F.R. § 10.607.

⁷ *Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

correctness of the Office decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.⁸

ANALYSIS

The Board notes that, as more than one year had elapsed from the date of issuance of the August 25, 1999 Board decision, appellant's request for reconsideration on August 28, 2005 was untimely filed. The one-year time limitation on reconsideration requests begins to run subsequent to any merit decisions on the issues, including any such decision of the Board.⁹ Consequently, appellant must demonstrate clear evidence of error by the Office in denying her claim for compensation.¹⁰

The Board finds that appellant failed to establish clear evidence of error with her reconsideration request. In considering clear evidence of error, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

With her request for reconsideration, appellant submitted several medical reports that had previously been reviewed by the Office and the Board. These duplicative reports are insufficient to establish clear evidence of error.¹² Similarly, the reports of various medical studies do not establish error.¹³ In treatment notes, Dr. Hansen indicated that appellant had been seen at his practice since 1993 for diagnoses of widespread myofascial pain consistent with fibromyalgia syndrome with secondary depression and sleep disorder. He advised that numerous treatment modalities had not satisfactorily relieved her pain and concluded that she was permanently disabled. Dr. Hansen stated that he relied on the opinion of his practice partner, Dr. Bruce Tetalman, a Board-certified psychiatrist, that appellant's conditions were employment related.

⁸ *Nancy Marcano*, 50 ECAB 110 (1998).

⁹ *Odell Thomas*, 42 ECAB 405 (1991).

¹⁰ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB ____ (Docket No. 05-1637, issued October 18, 2005). The Board notes that Office procedures provide that when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to have review of the merits of the case by the Board, the Office should conduct a merit review. *Janice M. Hatcher*, 55 ECAB 155 (2003). In this case, however, the last merit decision was issued on August 25, 1999. As appellant did not request reconsideration until August 28, 2005, the Office did not jeopardize her right to merit review by delaying beyond 90 days until April 7, 2006 in issuing its decision.

¹¹ *Alberta Dukes*, *supra* note 7.

¹² *Id.*

¹³ Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence. *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000). Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994). Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship. *Dennis M. Mascarenas*, 49 ECAB 215 (1997). Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *Willie M. Miller*, 53 ECAB 697 (2002).

Dr. Tetalman provided reports dating from August 27, 1996 to May 21, 1997. These reports, however, were reviewed by the Board in its August 25, 1999 decision and were found to be insufficient to establish that appellant's fibromyalgia and myofascial pain were causally related to factors of her federal employment.¹⁴ Dr. Hansen's newly submitted reports are of insufficient 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.¹⁵

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the evidence and argument submitted by appellant with her August 28, 2005 reconsideration request to ascertain whether it demonstrated clear evidence of error. The Office correctly determined that it did not and thus properly denied appellant's untimely request for reconsideration of the merits of her claim.¹⁶

CONCLUSION

The Board finds that, as appellant's August 28, 2005 reconsideration request was not timely filed and she failed to establish clear evidence of error, the Office properly denied a merit review of her claim in its April 7, 2006 decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 7, 2006 be affirmed.

Issued: June 22, 2007
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

¹⁴ *Supra* note 2.

¹⁵ *Nancy Marcano, supra* note 8.

¹⁶ *Alberta Dukes, supra* note 7.