United States Department of Labor
Employees' Compensation Appeals Board

B.P., Appellant	)	
and	)	**Docket No. 07-420**
	)	**Issued: May 31, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Los Angeles, CA, 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 December 6, 2006 appellant filed a timely appeal from an October 4, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration as untimely and insufficient to show 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 this case.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the October 4, 2006 nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely and insufficient to show clear evidence of error.

[1] 20 C.F.R. § 501.3(d)(2).

FACTUAL HISTORY

On January 7, 2005 appellant, then a 52-year-old mail handler, filed an occupational disease claim alleging that she sustained a right foot condition causally related to factors of her federal employment. She attributed her condition to standing on concrete floors at work.

By decision dated February 17, 2005, the Office denied appellant's claim on the basis that the medical evidence was insufficient to establish that her medical condition was causally related to the accepted work factors. The Office noted that Dr. Mark Goldstein, an osteopath, opined in a report dated January 19, 2005 that appellant's bunion and right plantar metatarsal condition were unrelated to her employment.

On May 15, 2005 appellant requested reconsideration. She resubmitted Dr. Goldstein's January 19, 2005 report. In a decision dated June 7, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant reopening her case for merit review under 5 U.S.C. § 8128.

On April 28, 2006 appellant again requested reconsideration. She submitted disability certificates from Dr. A.B. Pena dated July 7, 2005 to February 1, 2006.[2] Dr. Pena described appellant's work restrictions. Appellant further submitted reports dated August 2005 from a physical therapist and an April 2006 report from an acupuncturist. In a report dated March 13, 2006, Dr. Michael P. Acord, a Board-certified physiatrist, noted that he had discussed appellant's condition with Dr. Brian Sturz, a podiatrist.[3] He found that appellant had "an untreatable neuropathy within the feet, which is most likely related to extended walking or standing on concrete floors." Dr. Acord agreed with Dr. Sturz's recommendation that she perform sedentary employment. On December 30, 2005 he noted that appellant had not improved following acupuncture. In a progress report dated February 8, 2006, Dr. Acord interpreted that nerve conduction studies as showing an "entrapment somewhere in the region of the calf or below on the right."

By decision dated October 4, 2006, the Office denied appellant's request for reconsideration as it was untimely and insufficient to establish clear evidence of error.[4] The Office found that the newly submitted evidence was insufficient to show error in the prior decision.

[2] Dr. Pena's medical specialty is not apparent.

[3] Appellant indicated that she was submitting medical evidence from Dr. Sturz. The record, however, does not contain a report from Dr. Sturz.

[4] The Office noted that she had not specifically described the factors of employment to which she attributed her condition or submitted copies of medical records regarding her right foot surgery in 2002.

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.[5] 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.[6] 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.[7] 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.[8] 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.[9]

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.[10] 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 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.[11]

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[12] A right to reconsideration

[5] 5 U.S.C. §§ 8101-8193.

[6] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[7] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[8] *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 decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

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

[10] *Dorletha Coleman*, 55 ECAB 143 (2003); *Leon J. Modrowski*, 55 ECAB 196 (2004).

[11] *Id*.

[12] 20 C.F.R. § 10.607(a).

within one year also accompanies any subsequent merit decision on the issues.[13] The Office issued its last merit decision in this case on February 17, 2005. As appellant's April 28, 2006 request for reconsideration was submitted more than one year after the February 17, 2005 decision, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim for compensation.[14]

Appellant submitted disability certificates dated 2005 and 2006 from Dr. Pena, who described her work limitations. Dr. Pena, however, did not address the cause of the work restrictions and thus his disability certificates fail to show clear evidence of error.[15]

Appellant further submitted reports from a physical therapist and an acupuncturist. Section 8101(2) of the Act provides that the term "physician" includes surgeons, podiatrist, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.[16] Lay individuals such as physical therapist and acupuncturists are not "physicians" as defined under the Act and thus their reports do not constitute competent medical evidence.[17]

In a report dated March 13, 2006, Dr. Acord opined that appellant had neuropathy of the feet "most likely related to extended walking or standing on concrete floors." His finding that appellant's bilateral foot neuropathy was "most likely" due to walking and standing on concrete floors is speculative in nature and thus of little probative value.[18] In a progress report dated December 30, 2005, Dr. Acord noted that appellant had not improved after a few acupuncture treatments. On February 8, 2006 he found that nerve conduction studies showed an entrapment from the calf or below on the right side. Dr. Acord did not, however, address causation in his December 30, 2005 and February 8, 2006 progress reports and thus his opinion is of little probative value.[19]

The evidence submitted in support of appellant's untimely reconsideration request is insufficient to establish clear evidence of error. In order to establish clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the

[13] *Robert F. Stone*, 57 ECAB ___ (Docket No. 04-1451, issued December 22, 2005).

[14] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB ___ (Docket No. 05-1637, issued October 18, 2005).

[15] The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship. *Conrad Hightower*, 54 ECAB 796 (2003).

[16] 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB ___ (Docket No. 05-1928, issued November 23, 2005).

[17] *See David P. Sawchuk*, 57 ECAB ___ (Docket No. 05-1635, issued January 13, 2006).

[18] *D.D.*, 57 ECAB ___ (Docket No. 06-1315, issued September 14, 2006).

[19] *JaJa K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

Office's decision.[20] The evidence appellant submitted on reconsideration fails to meet this standard.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as it was untimely and insufficient to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 4, 2006 is affirmed.

Issued: May 31, 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

[20] *See Pasquale C. D'Arco*, 54 ECAB 560 (2003).