United States Department of Labor
Employees' Compensation Appeals Board

S.P., Appellant	)	
and	)	**Docket No. 08-653**
	)	**Issued: August 7, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Milwaukee, WI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2007 appellant filed an appeal of an October 16, 2007 decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Board's decision and order issued July 5, 2006. Because more than one year has elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

The issue is whether the Office properly denied appellant's July 16, 2007 request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error.

FACTUAL HISTORY

This is the third appeal in this case. On the first appeal, by decision and order issued April 22, 2005, the Board affirmed the Office's September 3, 2003 decision terminating appellant's medical benefits as an accepted January 21, 2001 right shoulder strain and June 1, 2001 cervical strain had ceased without residuals.[1] On the second appeal, by decision and order issued July 5, 2006, the Board affirmed the Office's December 27, 2005 decision finding appellant did not establish entitlement to medical benefits on and after September 3, 2003.[2] The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

In an April 16, 2007 letter, appellant's attorney requested that the Office "update [his] office on the status of [appellant's] claim." The attorney submitted an April 22, 2005 cervical magnetic resonance imaging (MRI) scan report previously of record. He requested that the Office respond after reviewing the report. The Office replied by May 17, 2007 letter, stating that the claimed remained denied. The Office noted that the last decision in the case was a decision and order issued by the Board on July 17, 2006.[3]

In a letter dated and faxed on July 16, 2007, appellant requested reconsideration of the Board's July 17, 2006 decision. She submitted medical evidence.

Dr. Charluata Shirali, an attending Board-certified physiatrist, provided a March 21, 2005 report noting that appellant's job required heavy lifting. She also noted a 2001 injury. Dr. Shirali related appellant's complaints of headaches, neck pain, right shoulder pain and paresthesias in the right hand and fingers. In a May 10, 2005 report, she noted a history of an occupational right shoulder injury prior to April 2002 and diagnosed mild right rotator cuff tendinitis which she concluded was related to that injury. Dr. Shirali administered trigger point injections.

Dr. Scott D. Miller, an attending osteopathic physician Board-certified in orthopedic surgery, noted in a May 17, 2005 report that appellant sustained an unspecified occupational injury in 2001. He performed a C5-6 discectomy and fusion on June 22, 2005. A June 27, 2005 nurse's note detailed appellant's postsurgical recovery. In a January 13, 2006 letter, Dr. Miller noted an apparent temporal relationship between the C5-6 disc herniation and the January 21, 2001 injury.

[1] Docket No. 04-1989 (issued April 22, 2005). The claim for the January 21, 2001 right shoulder strain was assigned Claim No. 09-2006074. The June 1, 2001 cervical strain was assigned Claim No. 09-2010276. On September 12, 2002 the Office doubled the two claims under master Claim No. 09-2010276.

[2] Docket No. 06-611 (issued July 5, 2006).

[3] There is no July 17, 2006 decision in appellant's case. The Office's reference to a July 17, 2006 decision appears to be a clerical error.

Appellant also submitted May 24, 2002 MRI scan results, February 17, 2004 and April 22, 2005 MRI scan reports.[4]

By decision dated October 16, 2007, the Office denied appellant's July 16, 2007 request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. It found that appellant's July 16, 2007 request was untimely as it was filed more than one year after the July 5, 2006 decision. The Office noted that there was no decision in the case issued on July 17, 2006. It further found that appellant's July 16, 2007 letter and the accompanying evidence did not establish that the Office erred in denying her claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[5] does not entitle a claimant to a review of an Office decision as a matter of right.[6] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[7] The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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.[8] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[9]

In those cases where requests for reconsideration are not timely filed, 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 in accordance with section 10.607(b) of its regulation.[10] Office regulation states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must

[4] The imaging reports and Dr. Shirali's May 10, 2005 report were previously of record and considered by the Office.

[5] 5 U.S.C. § 8128(a).

[6] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[7] *Thankamma Mathews*, *supra* note 6; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[8] 20 C.F.R. §§ 10.607, 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[9] 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 6 at 769; *Jesus D. Sanchez*, *supra* note 7.

[10] *Thankamma Mathews*, *supra* note 6.

[11] 20 C.F.R. § 10.607(b).

[12] *Thankamma Mathews*, *supra* note 6.

be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16]

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.[17] The Board must make 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.[18]

ANALYSIS

In its October 16, 2007 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on December 27, 2005 which was affirmed by the Board in a merit decision on July 5, 2006. Appellant's request for reconsideration was received on July 16, 2007 which was more than one year after July 5, 2006. Accordingly, her request for reconsideration was not timely filed.

The Board notes that appellant's April 16, 2007 letter does not constitute a request for reconsideration. Appellant requested a case status update. She did not ask the Office to review any of its decisions. The Office therefore properly interpreted the letter as an informational request.

The Board finds that appellant's July 16, 2007 letter does not raise a substantial question as to whether the Office's December 27, 2005 decision was in error or *prima facie* shift the weight of the evidence in her favor. Therefore, it is insufficient to establish clear evidence of error. The medical evidence submitted in support of appellant's request for reconsideration is also insufficient to establish evidence of error by the Office. The MRI scan reports, Dr. Miller's reports and Dr. Shirali's reports do not contain medical rationale addressing the critical issue of causal relationship. They are thus irrelevant to the claim. The nurse's note is not medical

[13] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[14] *Jesus D. Sanchez, supra* note 7.

[15] *Leona N. Travis, supra* note 13.

[16] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[17] *James R. Mirra*, 56 ECAB 738 (2005).

[18] *Gregory Griffin*, *supra* note 8.

evidence and is also irrelevant to the issue of causal relationship.[19] Therefore, the evidence accompanying the July 16, 2007 letter is insufficient to raise a substantial question as to the correctness of the Office's December 27, 2005 decision.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office's decision. Consequently, the Office properly denied appellant's reconsideration request as her request does not establish clear evidence of error.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error. Therefore, the October 16, 2007 decision of the Office denying appellant's July 16, 2007 request for reconsideration was proper under the law and facts of this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 16, 2007 is affirmed.

Issued: August 7, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[19] The Board has held that treatment notes signed by a nurse are not considered medical evidence as a nurse is not a physician under the Act. *See Sedi L. Graham*, 57 ECAB 494 (2006).