United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 07-1964**
	)	**Issued: March 13, 2008**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SAFETY ADMINISTRATION, Detroit, MI, Employer	)	

Appearances:
Gerald Keller, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 19, 2007 appellant filed a timely appeal of a November 27, 2006 decision of the Office of Workers' Compensation Programs, denying further merit review of his claim. The record also contains a May 9, 2007 decision denying merit review on the grounds that appellant's reconsideration request was untimely and failed to show clear evidence of error. Since more than one year has elapsed between the last merit decision of October 18, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2) and 501.6(c) and (d).

ISSUES

The issues are: (1) whether the Office properly denied appellant's September 19, 2006 application for reconsideration without merit review of the claim pursuant to 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's February 22, 2007 application for reconsideration was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

The Office accepted that appellant, an airport security screener, sustained a cervical and upper back strain in the performance of duty on April 9, 2004 when she twisted her back and neck while carrying luggage. Appellant stopped work on the date of injury. She returned to a light-duty position for one day on January 31, 2005 and on February 4, 2005. Pursuant to a June 10, 2005 Office hearing representative's decision, appellant was paid compensation through July 24, 2004 based on claims for compensation (Form CA-7) filed.

Appellant filed additional CA-7 forms commencing February 20, 2005. By decision dated October 18, 2005, the Office denied claims for compensation commencing February 20, 2005.[1] The Office noted that attending physiatrist, Dr. Peter Samet, had submitted a February 11, 2005 report stating that appellant should remain off work for the next month. However, the Office found the medical evidence insufficient to establish an employment-related disability for the periods claimed.

Appellant requested reconsideration of her claim by letter dated September 19, 2006. She submitted an April 3, 2006 report from Dr. Samet, who stated that appellant had been treated since February 11, 2005 following an April 9, 2004 work injury. Dr. Samet's stated electrodiagnostic testing on February 11, 2005 showed a left L5-S1 radiculopathy and possible right-sided involvement. He indicated that appellant had been seen on a regular basis and was restricted from work until September 1, 2005. Dr. Samet concluded that it appeared that the injuries she had to her neck, back and left shoulder were the result "of work that she had done." Appellant also submitted treatment reports from Dr. Samet commencing in June 2005. The record also contains "disability certificates" from Dr. Samet dated February 11, March 5 and July 11, 2005.

By decision dated November 27, 2006, the Office found the request for reconsideration insufficient to warrant further merit review of the claim.

Appellant again requested reconsideration by letter dated February 22, 2007. She submitted a January 8, 2007 report from Dr. Samet, who reviewed the medical record. Dr. Samet again stated that injuries were related to work appellant had done; he noted the type of work she was doing included lifting heavy bags and swinging them around. He opined that appellant was disabled from February 11 to August 26, 2005, when he placed work restrictions such as 10-pound lifting. Dr. Samet stated that the current diagnosis was lumbar radiculopathy, cervical strain and left shoulder bursitis, and these diagnosed conditions were directly causally related to the April 9, 2004 injury.

In a decision dated May 9, 2007, the Office found the reconsideration request insufficient to warrant merit review. The Office determined that the request for reconsideration was untimely and failed to show clear evidence of error.

[1] The record indicates that appellant filed CA-7 forms for periods after July 24, 2004 and prior to February 20, 2005, but the October 18, 2005 decision addressed only the period commencing February 20, 2005.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.[2] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[3]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent evidence not previously considered by the Office.[4]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[5]

ANALYSIS -- ISSUE 1

The application for reconsideration dated September 19, 2006 did not attempt to show that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Appellant relied on the submission of a new medical report dated April 3, 2006 from attending physician, Dr. Samet. The submission of a new medical report does not in itself require reopening the claim for merit review.[6] The evidence must address the particular issue involved in the case.[7] The medical issue in this case is whether appellant had disability as of February 20, 2005 causally related to the April 9, 2004 employment injury.

Dr. Samet had previously submitted reports which indicated that appellant was disabled for work. The April 3, 2006 report does not provide new and relevant evidence on the issue presented. Dr. Samet referred generally to injuries resulting from "work" appellant had done, without discussing how any restriction from work after February 11, 2005 was causally related to

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.605 (1999).

[4] *Id*. at § 10.606(b)(2).

[5] *Id*. at § 10.608.

[6] *See Kevin M. Fatzer,* 51 ECAB 407 (2000).

[7] *Richard L. Ballard,* 44 ECAB 146 (1992).

an April 9, 2004 employment injury. He does not address the specific medical issue involved, and therefore his report is not "relevant and pertinent evidence not previously considered by the Office." Moreover, the form reports submitted by Dr. Samet regarding continuing treatment and disability do not provide any new and relevant evidence on the causal relationship issue.

The Board accorded finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent evidence not previously considered by the Office. Accordingly, the Office properly denied the application for reconsideration without reopening the claim for merit review.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[8] does not entitle a claimant to a review of an Office decision as a matter of right.[9] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[10] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[11] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[12] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[13]

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[14] In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set

[8] 5 U.S.C. § 8128(a).

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

[10] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[11] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[12] 20 C.F.R. § 10.607(a).

[13] *See Leon D. Faidley, Jr., supra* note 9.

[14] *Leonard E. Redway*, 28 ECAB 242 (1977).

forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[15]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[16] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[17] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[18] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[19] 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.[20] 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.[21] 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.[22]

ANALYSIS -- ISSUE 2

The decision on the merits of the claim for compensation was dated October 18, 2005. While the Office issued a November 27, 2006 decision, this decision did not review the merits of the claim, as discussed above. The February 22, 2007 application for reconsideration is untimely because it was filed more than one year after the last merit decision. Accordingly, the issue is whether the February 22, 2007 application for reconsideration demonstrated "clear evidence of error" by the Office.

Appellant submitted a January 8, 2007 report from Dr. Samet. This report is more detailed than prior reports in that it reviewed the medical history. But the "clear evidence of error" standard requires that the evidence be of such value that it *prima facie* shifts the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision. The January 8, 2007 report does not meet this standard. For example, while

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[16] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[17] *See Leona N. Travis*, 43 ECAB 227 (1991).

[18] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[19] *See Leona N. Travis*, *supra* note 17.

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

[21] *Leon D. Faidley, Jr.*, *supra* note 9.

[22] *Gregory Griffin*, 41 ECAB 458 (1990).

Dr. Samet notes the April 9, 2004 employment incident, his discussion on causal relationship between a diagnosed condition or disability and employment refers to the "type of work" appellant performed over time. The issue in the claim for compensation in this case was disability commencing February 20, 2005 causally related to the April 9, 2004 injury, not to occupational duties performed over a period of time.

The Board finds that the February 22, 2007 application was untimely and failed to demonstrate clear evidence of error. The Office therefore properly declined to reopen the claim for review of the merits.

CONCLUSION

The September 19, 2006 application for reconsideration was not sufficient to warrant reopening the claim for merit review. The February 22, 2007 application for reconsideration was untimely and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 9, 2007 and November 27, 2006 are affirmed.

Issued: March 13, 2008
Washington, DC

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

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

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