

This is the second appeal before the Board. On September 8, 1998 appellant, a 57-year-old distribution clerk, filed a claim alleging that on August 24, 1998 she sustained pain in her head, the left side of her neck, her left arm, chest (“heart pain”) and stomach. She attributed

these symptoms to the limited duties she performed on that date. In addition, appellant alleged that two supervisors stood and glared down at her and that they initially refused to send her to the hospital after she complained of neck and head pain. She further alleged that a supervisor threatened to terminate her job if she did not perform her duties, that a supervisor embarrassed her by coming into the break room and ordering her to go back to work stating that she had not earned a break because she had performed no work, that a supervisor accused her of being insubordinate and that the supervisor initially refused her a union representative during counseling. Appellant also claimed that on the date of injury she was forced to perform duties outside her work limitations for another work injury. She stopped working on August 24, 1998 and did not return.

By decision dated November 6, 1998, the Office rejected appellant's injury claim, finding that she failed to establish fact of injury. It noted no compensable work-related factors were established. By decisions dated February 4, 2000 and February 15 and April 10, 2001, the Office denied appellant's requests for modification. In a May 6, 2002 decision,¹ the Board affirmed the Office's decisions denying compensation. The Board found that appellant failed to establish that she sustained a physical or emotional injury on August 24, 1998 in the performance of duty, causally related to factors of her federal employment. The complete facts of this case are set forth in the Board's December 10, 2007 decision and are herein incorporated by reference.

Following the Board's decision, the Office denied appellant's claims by merit decisions dated August 21, 2003 and November 3, 2004.

By letter dated December 1, 2004, appellant requested an oral hearing.

In an August 11, 2005 decision, the Office denied appellant's request for an oral hearing. The Office hearing representative stated:

"An examination of this compensation case record reveals that a reconsideration has previously been requested under [s]ection 8128 and the [d]istrict Office has issued its reconsideration decision dated November 3, 2004.

"Since you have already previously requested reconsideration, you are not, as a matter of right, entitled to a hearing ... on the same issue."

The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

By letter dated August 7, 2006, appellant requested reconsideration.

In support of her request, appellant submitted an August 23, 2006 Form CA-20 report from Dr. Robert G. Edwards, a Board-certified family practitioner and her treating physician, who diagnosed cervical radiculopathy, bilateral impingement syndrome and imposed restrictions

¹ Docket No. 01-1868 (issued May 6, 2002).

of no pushing, lifting, pulling. Dr. Edwards indicated with a checkmark that appellant's diagnosed conditions were caused or aggravated by repetitive employment activities.

In a report dated September 8, 2006, Dr. Noah Bass, Board-certified in internal medicine, stated findings on examination, noted complaints of low, mid and upper back pain and diagnosed paresthesia, fibromyalgia, degenerative disc disease and degenerative joint disease of the cervical spine and osteopenia of the lumbar spine.

In a report dated December 22, 2006, Dr. Cheryl Bernstein, a psychologist, noted the results of a psychological evaluation she performed on appellant. She diagnosed pain disorder associated with both psychological factors and a general medical condition; anxiety disorder and depressive disorder.

In a report dated June 4, 2007, Dr. Edwards related that he was seeing appellant for anxiety and depression. He noted that appellant had been out of work since August 24, 1998 secondary to rotator cuff disease bilaterally as well as anxiety, depression and panic episodes secondary to being removed from her work duty. Dr. Edwards released appellant to return to light duties at the employing establishment for three days a week for four hours per day.

In a report dated July 20, 2006, Dr. Alan H. Klein, a specialist in orthopedic surgery, stated:

"[Appellant] has been under my care for bilateral shoulder impingement with rotator cuff tears since approximately 1999. I have operated on both shoulders in the past. [Appellant] has had a less than optimal recovery and I have never been able to get her back to full[-]duty activities. I have released her to work three days a week, four hours a day with limitations, but have not been able to get her back to doing that. Back in 2003, I rejected an offer to allow her to work eight hours a day, feeling that she could not handle it.

"I believe within a reasonable degree of medical certainty that the treatment I provided to this patient is due to her work-related injuries. I believe it is medical[ly] necessary for her to have permanent partial disability regarding both of her shoulders. [Appellant] should not do any overhead activities. She should not work more than four hours a day or three days a week."

By letter dated August 6, 2007, appellant again requested reconsideration.

In a September 25, 2006 report, Dr. Edwards stated:

"In March 1998, [appellant] had returned to work in January 1998 to a job description of shrink duties (rewrap) and that was against my medical advice. She reinjured her cervical spine as well as her shoulder and stopped work from that job duty on August 26, 1998, because of reinjury to her preexisting work[-]related cervical and shoulder injury while an employee of the [employing establishment]. [Appellant] had duties which required her to stack mail, weigh mail and reach, bend, push, twist and pull and this was again according to my noted dated March 13, 1998, contraindicated. Let it be known that her 1998 reinjury was

causally related to her job duties as the shrink duty rewrap clerk within the employing establishment.”

Appellant also submitted results of a July 12, 2005 magnetic resonance imaging (MRI) scan of the lumbar spine, which showed degenerative changes at the lower lumbar spine with severe spinal stenosis at L4-5 and an April 14, 2006 MRI scan of the cervical spine, which indicated a right paracentral disc protrusion at the C3 level.

By decision dated October 17, 2007, the Office denied appellant’s request for reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees’ Compensation Act² does not entitle an employee to a review of an Office decision as a matter of right.³ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ As one such limitation, it has stated that it 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.⁵ The Board has found that the imposition of

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

⁴ 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 point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.607(b).

this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).⁶

In those cases, where a request for reconsideration is not timely filed, the Board had held however that 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.⁷ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if her application for review shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴ The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.¹⁵

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. It issued its last merit decision in this case on November 3, 2004.

⁶ See cases cited *supra* note 2.

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, *supra* note 3.

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

Appellant requested reconsideration on August 7, 2007; thus, her reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's request for reconsideration failed to show clear evidence of error. The evidence appellant submitted is not pertinent to the issue on appeal. She submitted reports from Dr. Edwards dated June 4, August 23 and September 25, 2006; a July 20, 2006 report from Dr. Klein; a September 8, 2006 report from Dr. Bass; and a December 22, 2006 report from Dr. Bernstein. These reports are of limited probative value as they did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether appellant sustained a physical or emotional injury on August 24, 1998 in the performance of duty, causally related to factors of her federal employment. Dr. Edwards' September 25, 2006 report reviewed appellant's account of the incidents which, she alleged, had resulted in a work-related injury in 1998. He also reiterated appellant's allegation that the employing establishment forced her to work beyond her physical restrictions. However, this report -- as with Dr. Edwards' other reports, the reports from other physicians and appellant's request letter -- is cumulative and repetitive of reports and arguments previously considered and rejected by the Board and the Office.¹⁶ None of the reports appellant submitted with her request are 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. Therefore, appellant has failed to demonstrate clear evidence of error on the part of the Office.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of her. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration requests dated August 7, 2006 and August 6, 2007. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on October 17, 2007.

¹⁶ The Board notes that Dr. Edwards' August 23, 2006 form report which supported causal relationship with a checkmark is insufficient to establish the claim, as the Board has held that without further explanation or rationale, a checked box is not sufficient to establish causation. *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 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