United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 10-2135**
	)	**Issued: July 15, 2011**
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Gainesville, AL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 17, 2010 appellant filed a timely appeal of an April 23, 2010 decision of the Office of Workers' Compensation Programs which denied her request for an examination of the written record and a June 15, 2010 decision which denied her request for reconsideration on the grounds that it was not timely filed. Because more than one year elapsed from the last merit decision dated January 17, 2008 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for an examination of the written record because it was untimely filed; and (2) whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 26, 1985 appellant, then a 35-year-old laborer, filed a traumatic injury claim alleging that on that date she sustained an injury to her low back when she was knocked off a ladder in the performance of duty.[2] The Office accepted her claim for lumbar sprain and herniated nucleus pulposus.[3] Appellant underwent a lumbar laminectomy on September 17, 1985 and received compensation benefits.

On October 24, 2007 appellant was referred to Dr. Martin Pomphrey, a Board-certified orthopedic surgeon and second opinion physician. In a report dated November 7, 2007, Dr. Pomphrey reviewed her history of injury and treatment and conducted a physical examination. He determined that the work-related condition had resolved. Although Dr. Pomphrey advised that appellant had chronic back pain for over 20 years, he explained that it was secondary to underlying degenerative disc disease. He opined that she could return to regular duty and she should have returned to her "previous position over 20 years ago."

On December 13, 2007 the Office proposed to terminate appellant's compensation. By decision dated January 17, 2008, it terminated her compensation benefits on the grounds that the medical evidence established that she no longer had continuing employment-related residuals or disability entitling her to compensation.

On March 5, 2010 appellant requested a review of the written record. In a letter dated March 11, 2010, she explained that her request was not submitted within 30 days due to illness. Appellant stated that she lost her home, automobile and her credit was ruined. She was forced to move in with her daughter. Appellant also alleged that she was too confused to comprehend the documentation concerning her termination and benefits.

In a decision dated April 23, 2010, the Office found that appellant was not entitled to a review of the written record because her request was not made within 30 days of the issuance of the January 17, 2008 decision. It exercised its discretion and determined that it would not grant a hearing for the reason that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence not previously considered pertaining to her whether she had residuals from her July 26, 1985 injury.

On June 3, 2010 appellant requested reconsideration. She contended that she continued to suffer residuals for her July 26, 1985 injury.

Appellant submitted additional medical evidence from her treating physician, Dr. Arturo Ortero, a neurologist. In a December 14, 2009 report, Dr. Ortero advised that she was seen for a recheck of her failed L5 laminectomy syndrome. He had not seen appellant for the above diagnosis since October 2007. Dr. Ortero advised that she had recurrent falls and chronic daily pain. He diagnosed failed lumbosacral laminectomy syndrome. In a December 16, 2009 nerve

[2] Appellant had a separate nonwork-related condition of diabetes.

[3] The record reflects that appellant has nonwork-related degenerative disc disease of the lumbar spine, chronic pain syndrome and depression.

conduction study, Dr. Ortero found all nerves were normal. In a January 25, 2010 report, he advised that appellant had complaints of low back pain. Dr. Ortero reiterated his opinion in reports dated March 8 to June 2, 2010. He stated that appellant's low back resulted from the injury that occurred on July 26, 1985. Dr. Ortero diagnosed failed lumbosacral laminectomy syndrome and advised that she had done poorly with definite worsening of the lumbosacral pain with pain radiating to the lower extremities bilaterally. He had followed appellant for a year and diagnosed severe chronic lumbosacral pain due to failed lumbosacral laminectomy syndrome. Dr. Ortero opined that she was unable to withhold meaningful gainful employment and was totally disabled.

The Office also received a letter dated March 18, 2010 from Indian River Mental Health Center stating that appellant received treatment. It also received physical therapy records.

In a June 15, 2010 decision, the Office denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision.[4] Section 10.615 of the Office's regulations provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[5] The Office's regulations provide that the request must be sent within 30 days of the date of the decision (as determined by postmark or other carrier's date marking) for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[6] These regulations provide that a request received more than 30 days after the Office's decision is subject to the Office's discretion[7] and the Board has held that the Office must exercise this discretion when a hearing request is untimely.[8]

ANALYSIS -- ISSUE 1

Appellant requested a review of the written record on March 5, 2010. The Board notes that her request for a review of the written record was more than 30 days after the Office issued the January 17, 2008 decision. Appellant was not entitled to an examination of the written record as a matter of right as her request was untimely filed.[9]

[4] 5 U.S.C. § 8124(b)(1).

[5] 20 C.F.R. § 10.615.

[6] *Id*. at § 10.616(a).

[7] *Id*. at § 10.616(b).

[8] *Samuel R. Johnson*, 51 ECAB 612 (2000).

[9] *Claudio Vasquez*, 52 ECAB 496 (2002).

The Office also properly denied a discretionary review of the written record by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue in this case could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[10] In the present case, the evidence of record does not establish that the Office abused its discretion in its denial of appellant's request for a review of the written record.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[11] vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[12]

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[13] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[14]

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[15]

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[10] *See J.C.*, 58 ECAB 594 (2007).

[11] 5 U.S.C. §§ 8101-8193.

[12] *Id*. at § 8128(a).

[13] *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[14] 20 C.F.R. § 10.607(a).

[15] *Id*. at § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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 that 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.[16] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to 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. 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.[17]

ANALYSIS -- ISSUE 2

In its June 15, 2010 decision, the Office properly determined that appellant did not file a timely request for reconsideration. It issued the most recent merit decision on January 17, 2008. Appellant's June 3, 2010 letter requesting reconsideration was submitted more than one year after the January 17, 2008 merit decision and was therefore untimely.

In accordance with internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening her case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by her in support of his application for review, but found that it did not clearly show that the Office's most recent merit decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's most recent merit decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether she has shown clear evidence of error in the Office's January 17, 2008 decision that terminated her compensation benefits.

With her June 3, 2010 request for reconsideration, appellant alleged that she continued to have residuals of her injury. She submitted various reports from Dr. Ortero who noted appellant's findings, work status and continuing symptoms. Dr. Ortero's March 8 and June 2, 2010 referenced the work injury and advised that appellant's continued low back pain was the result of that injury. While his reports note her status and provide some support for causal relationship, this is insufficient to raise a substantial question concerning the correctness of the Office's decision. As noted, to show clear evidence of error, it is not enough merely to show that

[16] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

[17] *Id.*

the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.[18] Consequently, the reports from Dr. Ortero are insufficient to demonstrate clear evidence of error by the Office.

Appellant also submitted nonmedical evidence such a letter from a mental health center, noting that she received treatment and physical therapy records.[19] The Board notes that the underlying issue in the present case is medical in nature. Appellant has not explained how the submission of such evidence raises a substantial question concerning the correctness of the Office's decision.

The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in its January 17, 2008 decision. Therefore, the Board finds that she has not presented clear evidence of error.

On appeal, appellant submitted arguments which included that she continued to have residuals from her work injury and that she is unable to work or do simple things such as bathing. She also questioned the report of the second opinion physician, asserting that he did not perform any diagnostic testing and that the examination barely took 15 minutes. However, the Board, as noted, does not have jurisdiction over the merits of the claim. Furthermore, appellant did not submit sufficient evidence on reconsideration, in support of her allegations that show clear evidence of error by the Office in its January 17, 2008 decision. She also submitted additional evidence with her appeal to the Board. The Board cannot consider this evidence for the first time on appeal, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision.[20]

CONCLUSION

The Board finds that the Office properly denied appellant's request for a review of the written record. The Office also properly found that appellant's request for reconsideration was untimely filed and did not show clear evidence of error.

[18] *Annie L. Billingsley*, 50 ECAB 210 (1998); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

[19] The letter from a mental health center, not signed by a physician, cannot be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician under 5 U.S.C. § 8101(2). *See C.B.*, Docket No. 09-2027 (issued May 12, 2010). Furthermore, a physical therapist, is not a physician as defined under 5 U.S.C. § 8101(2) and such reports may not be considered as probative medical opinion evidence. *See R.C.*, Docket No. 09-2095 (issued August 4, 2010).

[20] 20 C.F.R. § 501.2(c); *see Steven S. Saleh*, 55 ECAB 169 (2003).

ORDER

IT IS HEREBY ORDERED THAT the June 15 and April 23, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees Compensation Appeals Board