United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 12-1094**
	)	**Issued: November 19, 2012**
DEPARTMENT OF THE ARMY, GREEN RIVER LAKE, Campbellsville, KY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 23, 2012 appellant, through her attorney, filed a timely appeal of a November 15, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than one year has elapsed between the most recent merit decision dated August 17, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim.[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

[1] For final adverse decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This matter has previously been before the Board. In an April 24, 2002 decision, the Board affirmed decisions of OWCP that terminated appellant's compensation benefits effective July 19, 1998.[3] The Board found that, an impartial medical specialist, Dr. M.I. Malik, was properly selected and that his opinion constituted the weight of the medical evidence. On February 2, 2004 the Board affirmed OWCP decisions finding that appellant had no disability causally related to her accepted work injuries after July 19, 1998.[4] In a June 26, 2006 decision, the Board found that OWCP properly refused to reopen her cases for further review of the merits of her claim under 5 U.S.C. § 8128(a).[5] In a December 8, 2009 decision, the Board affirmed an OWCP decision finding that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error. The Board considered her argument regarding Dr. Malik's report and reviewed the reports from Dr. Michael Cassaro, a Board-certified anesthesiologist, but found that the submitted evidence and argument was insufficient to shift the weight of the evidence.[6] The facts and the history contained in the prior appeals are incorporated by reference.

On September 19, 2011 appellant's representative requested reconsideration and submitted additional evidence.[7] He submitted a new report from Dr. Cassaro and noted that he was of the opinion that all of her current conditions arose from her work-related injury on January 25, 1989. Appellant's representative further noted that Dr. Cassaro opined that appellant sustained a permanent aggravation and that she "would not have any of these current conditions but for the work-related injury on January 25, 1989. It is because of the original work-related injury that [appellant] is now currently suffering these conditions." Appellant's representative repeated that appellant would not have her current symptoms if it were not for the original injury and enclosed new reports from Dr. Cassaro.

In an August 10, 2011 report, Dr. Cassaro noted appellant's history of injury and examined her. He explained that she had permanent spinal cord damage which was consistent with her shoulder and chest pain. Dr. Cassaro advised that he discussed her condition and its relationship to the original work injury more than 20 years ago. He opined that Dr. Malik's finding that there was nothing wrong with appellant's shoulder may have been correct and explained that the issue was "not a shoulder problem, but a nerve problem. A spinal cord injury causing permanent spinal cord damage the nerve fibers that end up going to the shoulder, chest wall and even into her chest are the ones affected and this is consistent with a great deal of pain as well as the weakness and all of these nerve symptoms are consistent with a normal shoulder examination. A physician examining only the musculoskeletal aspect of the shoulder would completely overlook a nerve injury causing symptoms in the shoulder and surrounding tissues."

[3] Docket No. 01-1763 (issued April 24, 2002).

[4] Docket No. 03-2252 (issued February 2, 2004).

[5] Docket No. 07-135 (issued June 21, 2007).

[6] Docket No. 09-960 (issued December 8, 2009). An order dismissing appeal in Docket No. 10-654 and denying petition for reconsideration in Docket No. 09-960 was issued on November 19, 2010.

[7] Appellant's representative indicated that he was requesting reconsideration of the Board's November 19, 2010 decision. OWCP treated this as a request for reconsideration before OWCP.

Dr. Cassaro diagnosed cervical myelopathy, enthesopathy of the left levator scapulae muscle with entrapment neuropathy of the left suprascapular nerve, enthesopathy of the left splenius capitis muscle with entrapment neuropathy of the lessor occipital nerve on the left, left C7 radiculitis and enthesopathy of the left triceps muscle with entrapment neuropathy of the circumflex humeral nerve on the left.

In an August 19, 2011 report, Dr. Cassaro advised that appellant continued to experience problems as a result of her January 25, 1989 work injury. He explained that her current complaints included pain on the left side of her neck and her left shoulder as well as headaches arising from her neck problem and pains that radiated into her chest, left shoulder, arm, hand and fingers. Dr. Cassaro explained that appellant was unable to do things such as typing because she could not control her fingers. He noted that she had a spinal cord injury with significant spinal cord damage. Dr. Cassaro opined that all of appellant's current conditions arose from her work-related injury on January 25, 1989 and that her conditions continued to progress. He noted that she "was permanently aggravated by the work-related injury and she would not have any of these current conditions but for the work-related injury on January 25, 1989." Dr. Cassaro repeated that it was because of the original work-related injury that appellant was now currently suffering these conditions.

By decision dated November 15, 2011, OWCP denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.[8] This discretionary authority, however, is subject to certain restrictions. 20 C.F.R. § 10.607(a) provides that a request for reconsideration must be filed within one year of the date of OWCP's decision for which review is sought.[9] The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.[10]

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, it must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.[11]

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,[12] is positive, precise and explicit and manifests on its face

[8] *See* 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

[9] *W.G.*, Docket No. 08-2340 (issued June 22, 2009); *D.O.*, Docket No. 08-1057 (issued June 23, 2009).

[10] *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[11] *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

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

that OWCP committed an error.[13] The evidence 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 OWCP's decision for which review is sought. Evidence that does not raise a substantial question 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. A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.[14]

ANALYSIS

In its November 15, 2011 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on August 17, 2005. Appellant's representative's September 19, 2011 letter requesting reconsideration was submitted more than one year after the August 17, 2005 merit decision and was, therefore, untimely.

The Board also finds that appellant's untimely request failed to demonstrate clear evidence of error. The evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The underlying issue in this case is whether OWCP properly terminated appellant's compensation and benefits effective July 19, 1998 on the grounds that she no longer had a continuing employment-related disability.

Appellant's representative alleged that his new medical reports from Dr. Cassaro supported that appellant sustained a permanent aggravation and that she "would not have any of these current conditions but for the work-related injury on January 25, 1989. It is because of the original work-related injury that [appellant] is now currently suffering these conditions." Dr. Cassaro repeated that she would not have her current symptoms if it were not for the original injury. The Board notes that his opinion is not sufficient to establish clear evidence of error, as the issue in this case is medical in nature. His opinion as a lay person does not establish clear evidence of error as lay persons are not competent to render a medical opinion.[15]

In an August 10, 2011 report, Dr. Cassaro noted that appellant had permanent spinal cord damage that was consistent with her shoulder and chest pain. He distinguished Dr. Malik's finding that there was nothing wrong with her shoulder by asserting that appellant had a nerve problem which Dr. Malik overlooked. In his August 19, 2011 report, Dr. Cassaro indicated that appellant had continued problems as a result of her January 25, 1989 work injury. He noted her current complaints and opined that she had a spinal cord injury with significant spinal cord damage and opined that all of her current conditions arose from her work-related injury on January 25, 1989. Dr. Cassaro further opined that appellant sustained a permanent aggravation and that she would not have any of these injuries "but for the work-related injury on

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

[14] *See J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

[15] *Jaja K. Asaramo*, 55 ECAB 200, 206 (2004).

January 25, 1989." While these reports provide some support for a continuing work-related condition, the term "clear evidence of error" is intended to represent a difficult standard. The submission of 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.[16] 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 OWCP erred in denying benefits on or after July 19, 1998. Therefore, the Board finds that she has not presented clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[16] *D.G.*, 59 ECAB 455 (2008).