United States Department of Labor
Employees' Compensation Appeals Board

RUTH A. EBNER, Appellant	)	
and	)	**Docket No. 04-193**
	)	**Issued: April 6, 2004**
U.S. POSTAL SERVICE, MAIN POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Ruth A. Ebner, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 27, 2003 appellant filed a timely appeal of the October 8, 2003 decision of the Office of Workers' Compensation Programs, which denied further merit review on the basis that appellant's September 11, 2003 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. The Office previously denied her claim on the merits in a decision dated March 5, 1999. Because more than one year has elapsed between the last merit decision dated March 5, 1999 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). Accordingly, the only decision properly before the Board is the Office's October 8, 2003 decision denying appellant's request for reconsideration.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that the September 11, 2003 request was untimely and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board on appeal. On February 29, 1996 appellant, then a 41-year-old clerk, filed a traumatic injury claim alleging that she sustained a lower back injury while lifting a mail tray.[1] By decision dated June 19, 1996, the Office denied his claim. The Office found that the medical evidence failed to demonstrate a causal relationship between appellant's claimed back injury and the February 29, 1996 employment incident.

Appellant filed several requests for reconsideration and the Office repeatedly denied modification of its prior decision. The Office issued its most recent merit decision on March 5, 1999. Appellant again requested reconsideration on February 6, 2001. In a decision dated February 20, 2001, the Office found that her request was untimely and failed to present clear evidence of error. Appellant filed an appeal and pursuant to an order of the Board dated May 22, 2002,[2] the Office reissued its February 20, 2001 decision on July 1, 2002. By decision dated January 2, 2003, the Board affirmed the Office's July 1, 2002 decision.[3] Additionally, appellant requested reconsideration before the Board, which the Board denied by order dated April 28, 2003.

On September 11, 2003 appellant requested that the Office reconsider her claim. She submitted various medical records and other documentation regarding her absence from work following her claimed February 29, 1996 back injury. In a decision dated October 8, 2003, the Office denied appellant's request as untimely and further found that appellant failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[5] The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[6] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[7] In those instances, when a request for reconsideration is not timely filed, the Board

[1] Appellant ceased working February 26, 1996, the day of her injury and she later resigned effective April 4, 1996.

[2] Docket No. 01-1587.

[3] Docket No. 02-2155.

[4] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] 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." 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.607 (1999).

[7] 20 C.F.R. § 10.607(a) (1999).

will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.[8] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[9]

ANALYSIS

The one-year time limitation begins to toll the day the Office issued its March 5, 1999 decision, as this was the last merit decision in the case.[10] Appellant's most recent request for reconsideration was dated September 11, 2003; therefore, she is not entitled to review of her claim as a matter of right. Because she filed her latest request more than one year after the Office's March 5, 1999 merit decision, appellant must demonstrate "clear evidence of error" on the part of the Office, in denying her claim for compensation.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[11] The evidence must be positive, precise and explicit and it must be apparent, on its face that the Office committed an error.[12] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] In the instant case, appellant failed to demonstrate clear evidence of error.

In her September 11, 2003 request for reconsideration, appellant argued that the employing establishment approved her workers' compensation claim for the period February 29 through April 13, 1996. She submitted leave requests (Form 3971) and correspondence between her and the employing establishment regarding her March 14, 1996 request for a 90-day leave of absence until more suitable employment was available. Appellant further advised that, to the extent her 90-day leave of absence could not be accommodated, the March 14, 1996 letter should be considered as her two-week notice of resignation. She also submitted February 29, 1996 Lutheran Medical Center emergency department treatment records for back strain signed by Dr. Gil Manalo, Board-certified in emergency medicine. Appellant also resubmitted June 13 and

[8] 20 C.F.R § 10.607(b) (1999).

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

[10] *See Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

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

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

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

[14] *See Leona N. Travis*, *supra* note 12.

[15] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

28, 1996 reports from Dr. Michael K. Houser regarding his treatment of appellant's back condition. In his June 28, 1996 narrative report, Dr. Houser described appellant's back condition as "definitely work related."[16] Additionally, appellant provided the last page of a June 11, 1999 decision from Administrative Law Judge James K. Steitz, regarding her entitlement to Social Security benefits effective August 14, 1997.

The Office denied appellant's claim because she failed to establish a causal relationship between the February 29, 1996 employment incident and her claimed back condition. The medical evidence she submitted with her most recent request for reconsideration does not establish clear evidence of error. As mentioned, Dr. Houser's June 13 and 28, 1996 reports were previously of record. In fact, the Office initially considered his June 28, 1996 narrative report in its August 15, 1996 decision denying modification. Additionally, the record previously included evidence that appellant was treated in the emergency room at Lutheran Medical Center on February 29, 1996 for a back strain. Thus, the February 29, 1996 emergency room report signed by Dr. Manalo is duplicative of evidence already in the record.

The fact that the employing establishment authorized appellant's absence from work for a period of time following her claimed injury of February 29, 1996, is not tantamount to a finding of entitlement under the Act. The employing establishment lacks the authority to determine appellant's entitlement under the Act. Consequently, her leave requests and the correspondence with the employing establishment regarding her absence from work is irrelevant for purposes of establishing clear evidence of error on the part of the Office. Similarly irrelevant is the fact that appellant was awarded Social Security benefits effective August 14, 1997. Judge Steitz's June 11, 1999 decision is not binding on the Office.[17] Furthermore, the portion of the decision provided by appellant does not address the cause of her disability.

Appellant's September 11, 2003 request for reconsideration and the accompanying evidence fail to demonstrate clear evidence of error on the part of the Office in denying her claim for compensation. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

CONCLUSION

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

[16] Dr. Houser is a Board-certified family practitioner, who initially examined appellant on March 1, 1996. In his June 13, 1996 attending physician's report (Form CA-20), he diagnosed an employment-related back strain and advised that appellant could resume light duty effective April 13, 1996.

[17] *See Henry C. Garza*, 52 ECAB 205, 208 n. 4 (2001).

ORDER

IT IS HEREBY ORDERED THAT the October 8, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member