United States Department of Labor
Employees' Compensation Appeals Board

PAMELA D. PARIS, Appellant	)	
and	)	**Docket No. 04-545**
	)	**Issued: July 13, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Gaithersburg, MD, Employer	)	

Appearances:
Pamela D. Paris, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 22, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated November 6, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record is the Board's December 11, 1995 decision.[1] Because more than one year has elapsed between the last merit decision and the filing of this appeal on December 22, 2003, the Board lacks jurisdiction to review the merits of this claim.[2]

[1] According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but that the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (June 2002).

[2] The record also contains a March 17, 2003 nonmerit decision of the Board which was issued less than one year prior to appellant's filing of the present appeal on December 17, 2003. The matter adjudicated in this decision is *res judicata* and is not subject to further consideration by the Board. *See* 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant did not seek reconsideration of the Board's decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

This is the third appeal in the present case. In the first appeal,[3] the Board issued a decision on December 11, 1995 in which it affirmed the Office's April 8 and June 9, 1994 decisions on the grounds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after February 19, 1992 due to her accepted December 2, 1986 right hand and wrist injury.[4] The Board determined that the reports of appellant's attending Board-certified orthopedic surgeons, Dr. Rida N. Azer and Dr. William E. Gentry, did not show that she sustained such an employment-related recurrence of disability. In the second appeal,[5] the Board issued a decision on March 17, 2003 affirming the Office's February 21 and May 4, 2001 decisions on the grounds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) because her applications for review were not timely filed and failed to present clear evidence of error.[6] The facts and circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.[7] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[8]

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[3] Docket No. 95-802 (issued December 11, 1995).

[4] The Office accepted that appellant sustained tendinitis and de Quervain's complex of the right wrist and hand and paid compensation for periods of disability until December 29, 1990, when she returned to limited-duty work. The case number for this injury is A25-297044. In its December 11, 1995 decision, the Board also affirmed the Office's January 25, April 8 and August 8, 1994 decisions, as modified, to reflect that appellant had no disability after March 10, 1993 due to her February 9, 1992 left thumb injury. This injury (case number A25-398729) is not the subject of the present appeal.

[5] Docket No. 01-2038 (issued March 17, 2003).

[6] In support of her reconsideration requests, appellant submitted reports of Dr. Azer which she claimed showed that she sustained a recurrence of total disability on or after February 19, 1992 due to her December 2, 1986 right hand and wrist injury. The Board determined that these reports were not relevant and did not clearly show that the Office erred in its prior decisions because they did not contain a rationalized opinion that appellant sustained an employment-related recurrence of disability.

[7] 20 C.F.R. § 10.607(a).

[8] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[9] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[12] Evidence which 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] 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.[15] 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.[16]

ANALYSIS

In its November 6, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision of record is the Board's December 11, 1995 decision and appellant's request for reconsideration was dated September 4, 2003, more than one year after December 11, 1995.[17]

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[9] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states, "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 (for example, proof that a schedule award was miscalculated). 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 and would not require a review of the case...."

[11] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

[15] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[16] *Leon D. Faidley, Jr.*, *supra* note 8.

[17] *See supra* notes 2 and 3 and accompanying text.

In accordance with its 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 appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decisions were in error.

The Board finds that appellant's application for review does not raise a substantial question as to the correctness of the Office's prior merit decisions and is insufficient to demonstrate clear evidence of error. In connection with her application for review, appellant submitted a statement dated September 4, 2003. Appellant contended that her September 4, 2003 reconsideration request was timely because it was filed within one year of the Board's March 17, 2003 decision. However, the Board notes that this argument has no validity as the one-year period for requesting reconsideration begins on the date of the original Office decision and only also accompanies a decision of the Board if that decision is a merit decision.[18] The March 17, 2003 decision of the Board was a nonmerit decision denying appellant's request for reconsideration. As noted above, the last merit decision of the Board was dated December 11, 1995. Appellant's September 4, 2003 reconsideration request was filed more than one year after December 11, 1995.

Appellant also asserted that the Office improperly denied her claim that she sustained a recurrence of total disability on or after February 19, 1992 due to her accepted December 2, 1986 right hand and wrist injury. Appellant alleged that the opinion of Dr. Azer, an attending Board-certified orthopedic surgeon, showed that she had disability after February 19, 1992 due to her December 2, 1986 injury. She submitted numerous reports of Dr. Azer, dated between December 1986 and October 2003, which showed that she remained symptomatic in her right hand and wrist. However, these reports would not be relevant as they contain no rationalized medical opinion that appellant had disability on or after February 19, 1992 due to her December 2, 1986 employment injury.[19]

Appellant argued that the Office had the burden of proof to show that she had no disability after February 19, 1992 due to her December 2, 1986 employment injury. The record shows that appellant returned to limited-duty work on December 29, 1990 and then claimed that she sustained a recurrence of total disability on February 19, 1992. Appellant's argument would have no validity as Board precedent clearly shows that, under these circumstances, appellant would have the burden of proof to establish disability on or after February 19, 1992 due to her

[18] *See supra* note 2.

[19] Most of these reports were previously submitted to the Office. Appellant submitted September 30, 1992, August 8, 2001 and August 29, 2003 reports in which Dr. Azer stated that her condition and need for treatment were caused by the December 2, 1986 injury. In his August 8, 2001 and August 29, 2003 reports, he indicated that appellant sustained a "recurrence" on February 19, 1992. However, Dr. Azer provided no explanation for this opinion in his reports.

December 2, 1986 employment injury.[20] Appellant also made reference to case law involving the termination of compensation when an employee refuses or neglects to work in a position which is offered by the employing establishment and deemed to be suitable by the Office. She claimed that the Office did not abide by the precedent contained in these decisions. However, the present case does not involve the termination of compensation, whether due to the refusal of an offer of suitable work or any other reason. Therefore, the arguments and evidence that appellant submitted in connection with her application for review would not clearly show that the Office erred in its prior decisions.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[20] When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).