

FACTUAL HISTORY

On August 8, 1995 appellant, then a 44-year-old clerk, filed an occupational disease claim alleging that bending over mail hampers caused a hip injury. She stopped work on October 21, 1995 and returned to limited duty on September 23, 1996. Appellant again stopped work on January 17, 1997 and has not returned. The Office accepted that she sustained an employment-related aggravation of right hip arthritis, aggravations of lumbosacral radiculopathy and spondylolisthesis at L4-S1 and of depression secondary to back pain. Surgery for a decompressive laminectomy with fusion and bone graft was authorized.

Appellant came under the care of Dr. Joseph Meerschaert, Board-certified in physical medicine and rehabilitation, who found her to be totally disabled for work. On August 20, 1997 the Office referred her for second-opinion evaluations with Dr. Richard S. Jackson, a Board-certified psychiatrist,¹ and Dr. Maury R. Ellenberg, Board-certified in internal medicine, physical medicine and rehabilitation.² Thereafter, the Office found that a conflict in medical opinion was created between the opinions of Dr. Ellenberg and Dr. Meerschaert regarding appellant's ability to work. The Office referred appellant to Dr. Bala S. Prasad, Board-certified in orthopedic surgery, for an impartial medical evaluation.³

On May 29, 1998 the employing establishment offered appellant a modified-duty position which she rejected on June 5, 1998.⁴ By letter dated June 18, 1998, the Office advised her that the position offered was found suitable. She was notified of the penalty provisions of 5 U.S.C. § 8106 and given 30 days to respond. Following her response that she could not work due to her doctor's orders, on July 23, 1998 the Office advised appellant that her reasons for refusing the offered position were not acceptable and she was given an additional 15 days to respond. Appellant again responded, contending that she remained totally disabled. By decision dated August 18, 1998, the Office terminated her wage-loss compensation effective August 15, 1998 on the grounds that she refused an offer of suitable work.

On August 19, 1998 appellant requested a hearing before an Office hearing representative that was denied as untimely on October 15, 1998. She then requested reconsideration on December 7, 1998 and June 23, 1999. In decisions dated January 11 and September 9, 1999, respectively, the Office denied modification of the August 18, 1998 decision. Appellant again requested reconsideration on October 4, 1999 and in a decision dated October 7, 1999, the Office

¹ Dr. Jackson diagnosed dysthymia, mixed personality disorder with traits of both narcissistic and borderline disorders. He advised that appellant was not disabled from a psychiatric standpoint.

² Dr. Ellenberg advised that appellant had significant problems from a psychoemotional point of view and pain complaints without major impairment. He stated that she could work with physical restrictions of no frequent bending, with permission to move around, no continuous over head lifting with lifting restrictions of 15 to 25 pounds frequently and 35 to 40 pounds occasionally.

³ In reports dated December 1, 1997 and January 8, 1998, Dr. Prasad advised that there were no objective findings for appellant's subjective complaints and opined that she could work where prolonged ambulation and lifting of no more than 5 to 10 pounds on a recurrent basis were avoided.

⁴ The modified position was for eight hours per day. Appellant was to sort mail weighing no more than three pounds with no overhead sorting and alternate sitting and standing for personal comfort.

denied the reconsideration request. Appellant, through her Congressional office, again requested reconsideration. In a decision dated October 27, 1999, the Office denied modification of the August 18, 1998 termination decision. On January 1, 2000 appellant again requested reconsideration in an April 11, 2000 decision, the Office denied her request. On July 1, 2001 she again requested reconsideration and submitted additional evidence. In a decision dated May 4, 2001, the Office denied appellant's request on the grounds that it was not filed within one year of the October 27, 1999 merit decision and did not establish clear evidence of error.

LEGAL PRECEDENT

The only decision before the Board is the May 4, 2001 decision in which the Office denied appellant's request for reconsideration. The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.⁵ The Office 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.⁶ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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 which 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. To show clear evidence of error, the evidence submitted 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.⁸

ANALYSIS

The Board finds that as more than one year had elapsed from the date of issuance of the October 27, 1999 merit decision and appellant's request for reconsideration dated February 1, 2001, her request for reconsideration was untimely. The Board further finds that the evidence submitted by appellant is insufficient to establish clear evidence of error in the termination of her wage-loss compensation.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁸ *Nancy Marcano*, 50 ECAB 110 (1998).

With her February 1, 2001 request for reconsideration appellant submitted medical reports regarding hospitalizations in April and May 2000 and reports from Dr. Meerschaert dated from January 28 to June 30, 2000. She also submitted a consent form for narcotic medication, Dr. Meerschaert's curriculum vitae, prescriptions for oxycontin, occupational therapy and a walker and lift and newspaper articles regarding Dr. Meerschaert and the job market for the disabled.

The Board finds that the evidence submitted by appellant in support of her reconsideration request does not raise a substantial question as to the correctness of the Office's August 18, 1998 and subsequent merit decisions. The evidence is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. Her compensation benefits were terminated on the basis that she rejected suitable employment. This decision was reached following evidence from Dr. Meerschaert, which conflicted with findings by Dr. Ellenberg. Because of this conflict on the issue of appellant's capacity for work, the case was referred to Dr. Prasad for an impartial medical evaluation. He found that she was not totally disabled for work. In his reports, Dr. Meerschaert merely reiterated his opinion that appellant continued to be totally disabled. He was on one side of the conflict resolved by Dr. Prasad⁹ and his opinion had been considered by the Office in each of its prior decisions. Thus, it cannot be said that Dr. Meerschaert's reports raise a substantial question as to the correctness of the Office's prior decisions. Furthermore, the remainder of the evidence submitted does not address the central issue of whether appellant was capable of performing the offered position at the time of the Office's August 18, 1998 decision. This evidence is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant or to raise a substantial question as to the correctness of the prior decisions.

The Board finds that the Office properly performed a limited review of the evidence and found that it did not demonstrate clear evidence of error. The Office properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish clear evidence of error and the Office properly denied further merit review of her claim.¹⁰

⁹ See *Barbara J. Warren*, 51 ECAB 413 (2000). (Reports from a physician who had been on one side of the conflict in the medical opinion that the impartial specialist resolved which merely reiterate previously stated findings and conclusions regarding appellant's condition are insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.)

¹⁰ The Board notes that appellant submitted medical evidence subsequent to the May 4, 2001 decision of the Office. The Board cannot consider this evidence, 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 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2001 is affirmed.

Issued: June 10, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member