United States Department of Labor
Employees' Compensation Appeals Board

PEGGY BROWN, Appellant	)	
and	)	**Docket No. 04-1567**
	)	**Issued: November 17, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

Appearances:
Peggy Brown, 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 June 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated March 2, 2004 which denied her reconsideration request because her request was untimely and did not show clear evidence of error. 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 the Office was the August 3, 1998, decision terminating appellant's compensation effective that date. Appellant did not appeal this decision to the Board within one year of its issuance.[1] Therefore, the Board does not have jurisdiction over the merits of this case.

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The record also contains a March 15, 2000 decision of the Board. In the absence of further review by the Office on the issue addressed by the decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 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 request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on March 15, 2000 which affirmed the August 3, 1998 decision of the Office, on the grounds that the Office properly terminated appellant's compensation effective August 3, 1998 because she had no disability due to her August 25, 1993 employment back strain injury after that date.[2] The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

After the Board's March 15, 2000 decision, appellant submitted a November 16, 2003 letter to the Office in which she requested reconsideration of her claim. Appellant argued that diagnostic testing from 1994 and 2003, showed that she had a hemangioma in her low back and alleged that this condition was caused or aggravated by her employment injury on August 25, 1993. She submitted various diagnostic testing reports in support of her claim, including the findings of magnetic resonance imaging (MRI) scan testing obtained on September 16, 1994 which showed degenerative changes of her low back and a possible hemangioma in the left side of the body of L4. She also submitted a report of MRI scan testing from May 10, 2003 which revealed an abnormal signal at L4, a finding which was interpreted as possibly representing an atypical hemangioma and a report of computerized tomography (CT) scan testing from May 31, 2003 which showed degenerative changes at the facet joints of L3-4, L4-5 and L5-S1 and prominent trabeculation in the body of L4 which seemed to be due to a hemangioma.[3]

Appellant submitted an August 6, 2003 report in which Dr. Leslie Schaffer, an attending Board-certified neurosurgeon, noted that she reported low back and bilateral leg pain and indicated that she had a hemangioma of her lumbar region. In an August 18, 2003 note, Dr. Schaffer diagnosed "lumbar hemangioma" and prescribed a lumbar corset. In a note dated January 29, 2004, Dr. Robin D. Snead, an attending Board-certified internist, stated that appellant had an L4

[2] Docket No. 99-45 (issued March 15, 2000). On August 25, 1993 appellant, then a 41-year-old mail carrier, sustained employment-related cervical, dorsal and lumbosacral strains when a mail case fell against her at work. She stopped work on August 25, 1993 returned to limited-duty work in October 1993 and was terminated from the employing establishment in October 1997, due to failure to perform her job. By decision dated August 3, 1998, the Office terminated appellant's compensation effective August 3, 1998, on the grounds that she had no disability due to her August 25, 1993 employment injury after that date. The Office based its termination on a May 21, 1998 report of Dr. Hilliard E. Slavick, a Board-certified orthopedic surgeon, to whom it referred appellant for a second opinion.

[3] Bone scan testing obtained on the same date showed an area of faint increased activity in the projection of L4 on the left. Appellant also submitted a report which concerned her cervical region. MRI scan testing from May 7, 2001 showed cervical spondylosis at C3-4 through C5-6 and moderate right-sided foraminal stenosis at C4-5 and C5-6.

hemangioma diagnosed in 1994. He noted, "Pain from hemangioma probably aggravated by contusion on her back."

By decision dated March 2, 2004, the Office refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

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.[4] 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.[5]

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."[6] Office regulations and procedure 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.[7]

ANALYSIS

In its March 2, 2004 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on November 16, 2003, more than one year after the Board's March 15, 2000 decision and therefore she must demonstrate clear evidence of error on the part of the Office in issuing its prior decision dated August 3, 1998.[8]

---

[4] 20 C.F.R. § 10.607(a). According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but 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 (January 2004).

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

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

[7] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "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." *Id.* at Chapter 2.1602.3c.

[8] *See supra* note 4 and accompanying text.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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.[14]

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its prior decision. She argued that diagnostic testing showed that she had a hemangioma in her low back since at least 1994. Appellant claimed that this condition was caused or aggravated by her employment injury on August 25, 1993 and suggested that it caused her to have disability after August 3, 1998, the date her compensation was terminated. She submitted various medical reports from 1994, 2003 and 2004, in support of her reconsideration request. But this argument and evidence is not relevant to the main issue of the present case, *i.e.*, whether the medical evidence shows that appellant had disability due to her August 25, 1993 employment injury on or after August 3, 1998. Appellant's argument has no probative value with regard to what is essentially a medical issue and none of the submitted medical evidence contains an opinion that she had disability due to her August 25, 1993 employment injury on or after August 3, 1998.[15]

Appellant submitted the findings of MRI scan testing from September 16, 1994 and May 10, 2003 and CT scan testing and bone scan testing from May 31, 2003 which showed that she possibly had a hemangioma of her lumbar region. However, none of these reports provided any indication that the hemangioma was related to the August 25, 1993 employment injury or that it was disabling.[16] Appellant also submitted August 6 and 18, 2003 reports of Dr. Schaffer, an attending Board-certified neurosurgeon and a January 29, 2004 report of Dr. Snead, an attending Board-certified internist, which indicated that she had a hemangioma of her lumbar region.

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

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

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

[12] *See Leona N. Travis*, *supra* note 10.

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

[14] *Leon D. Faidley, Jr.*, *supra* note 5.

[15] 5 U.S.C. § 8101(2); *see John E. Lemker*, 45 ECAB 258, 264 (1993) (the determination of whether an employee is physically capable of working is a medical question that must be resolved by medical evidence).

[16] Appellant submitted the findings of MRI scan testing of her cervical region, but the report did not provide any indication that the findings were related to an employment injury.

Neither Dr. Schaffer nor Dr. Snead provided any opinion on the cause of the hemangioma or otherwise indicated that appellant had disability due to her August 25, 1993 employment injury on or after August 3, 1998. Dr. Snead indicated that pain from the hemangioma was probably aggravated by a contusion on appellant's back, but he did not provide any further description of the contusion or its cause. Therefore, this evidence does not raise a substantial question as to the correctness of the Office's decision and, appellant has not shown clear evidence of error.

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 request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 17, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member