United States Department of Labor
Employees' Compensation Appeals Board

MARIA R. SORIANO, Appellant	)	
and	)	**Docket No. 05-478**
	)	**Issued: August 4, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Humble, TX, Employer	)	

Appearances:
Maria R. Soriano, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On December 20, 2004 appellant filed a timely appeal from the September 14, 2004 nonmerit decision of the Office of Workers' Compensation Programs, which denied her untimely request for reconsideration and found that she failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated January 24, 1995 and the filing of the appeal on December 20, 2004 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), but has jurisdiction over the nonmerits.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On May 11, 1989 appellant, then a 30-year-old clerk, filed an occupational disease claim alleging that her left shoulder blade and arm injuries were caused by factors of her federal

employment. She stated that she worked 5 days a week on a regular basis and sometimes 6 days, usually 10 hours a day, standing or handling bundles and flats of letters in her left hand.[1] By decision dated October 30, 1989, the Office denied appellant's claim on the grounds that she failed to establish that she sustained an injury while in the performance of duty. Appellant disagreed with the Office's decision and requested an oral hearing before an Office hearing representative. In a February 22, 1990 decision, a hearing representative found that, although the medical evidence of record was insufficient to establish appellant's claim, it was sufficient to require further development of the case. Thus, the hearing representative set aside the Office's October 30, 1989 decision and remanded the case to the Office. After further development of the case record, the Office, in a letter dated September 24, 1991, accepted appellant's claim for left shoulder impingement syndrome.

On February 24, 1992 appellant filed a claim for wage-loss compensation (Form CA-7) for the period June 30, 1988 through January 1, 1992.[2] By decision dated November 16, 1993, the Office denied appellant's claim on the grounds that she failed to establish that she was totally disabled beginning June 30, 1988 due to her employment-related left shoulder impingement syndrome. Appellant requested an oral hearing before an Office hearing representative. On September 23, 1994 a hearing representative issued a decision finding that appellant failed to submit rationalized medical evidence establishing that her total disability beginning June 30, 1988 was causally related to her accepted employment-related injury. In a November 11, 1994 letter, appellant requested reconsideration.

By decision dated January 24, 1995, the Office found the evidence of record insufficient to establish that appellant was totally disabled during the claimed period. In an April 23, 1996 decision, the Office denied appellant's request for reconsideration without a merit review on the grounds that the evidence submitted was of a repetitious, irrelevant and cumulative nature.[3]

By letter dated August 25, 2004, appellant requested reconsideration. She submitted a chronological summary of her claim and numerous medical records which included laboratory test results and reports and treatment notes which found that she experienced left shoulder, cervical spine, stress-related problems and that she was totally disabled for work. Appellant also submitted medical literature regarding the rotator cuff and chronic fatigue syndrome and correspondence from herself, her attorney and the Office regarding her claim including, copies of the Office's decisions.

By decision dated September 14, 2004, the Office stated that appellant's letter requesting reconsideration was dated August 25, 2004 and, therefore, found it was filed more than a year after the Office's January 24, 1995 merit decision and was untimely. The Office also found that

[1] On appellant's claim form, the employing establishment indicated that she resigned from her clerk position on July 15, 1988.

[2] On the Form CA-7 the employing establishment indicated that appellant used annual leave from July 5 through 15, 1988.

[3] By decision dated June 6, 1996, the Office suspended appellant's compensation benefits because she failed to attend several scheduled second opinion medical examinations.

appellant did not submit any evidence establishing clear evidence of error in the Office's prior decisions. Consequently, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[6] Pursuant to this section, if a request for reconsideration is submitted by mail, "the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as, (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date." Otherwise, the date of the letter itself should be used."[7]

Section 10.607(a) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[8]

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 be manifest on its face that the Office committed an error.[10] Evidence that 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]

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[4] 5 U.S.C. § 8128(a).

[5] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[6] 20 C.F.R. § 10.607(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

[8] 20 C.F.R. § 10.607(b).

[9] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[10] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[11] *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

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

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

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] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[15]

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[16]

The last merit decision in this case was issued by the Office on January 24, 1995, which found that appellant failed to establish that she was totally disabled during the period June 30, 1988 through January 1, 1992 due to her employment-related left shoulder impingement syndrome. As her August 25, 2004 letter requesting reconsideration was made more than one year after the Office's January 24, 1995 merit decision, the Board finds that it was untimely filed.

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was an error in the Office's determination that she was not totally disabled due to her accepted employment-related left shoulder impingement syndrome during the period June 30, 1988 through January 1, 1992. The Board notes that this issue is medical in nature. Appellant submitted numerous copies of medical records that were already of record which found that she suffered from left shoulder, cervical and stress-related problems and that she was totally disabled for work. This evidence is not sufficient to shift the weight of the evidence in favor of the claim as the Board has held that duplicate evidence does not raise a substantial question as to the correctness of the Office's denial of compensation.[17] Insofar as the Office has already weighed the evidence presented by appellant and found it to be insufficient to carry her burden of proof in establishing that she was totally disabled during the period June 30, 1988 through January 1, 1992 due to the accepted employment-related left shoulder impingement syndrome, the Board is unable to find that the Office erred in denying appellant's reconsideration request.

[14] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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

[16] *Larry L. Litton*, 44 ECAB 243 (1992).

[17] The Board has held that the submission of evidence or legal argument that repeats or duplicates that already in the case record does not constitute a basis for reopening a case. *Denis M. Dupor*, 51 ECAB 482 (2000).

Further, the Board finds that the chronological summary of appellant's claim and the medical literature regarding the rotator cuff and chronic fatigue syndrome are not relevant to the issue in this case, whether the medical evidence establishes that appellant was totally disabled from June 30, 1988 through January 1, 1992 due to her employment-related left shoulder impingement and, therefore, do not establish that the Office's September 14, 2004 decision was incorrect.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 4, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board