United States Department of Labor
Employees' Compensation Appeals Board

GWENDOLYN E. LONG, Appellant	)	
	)	**Docket No. 05-222**
and	)	**Issued: June 6, 2005**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Columbus, OH, Employer	)	

Appearances:
Gwendolyn E. Long, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 29, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated July 28, 2004, which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated June 6, 2003 and the filing of this appeal on October 29, 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.

ISSUES

The issues on appeal are: (1) whether the Office properly denied reconsideration of the January 9, 2003 termination decision as it was untimely filed and did not show clear evidence of error; and (2) whether the Office failed to rule on the reconsideration request of its June 6, 2003 decision.

FACTUAL HISTORY

On June 8, 2001 appellant, then a 35-year-old flat sorter machine operator, filed an occupational disease claim alleging that she developed back pain as a result of repetitive

bending, lifting, carrying, twisting, pushing and pulling while in the performance of duties. She became aware of her condition on July 31, 1993. The Office accepted appellant's claim for temporary aggravation of thoracolumbar strain. She did not stop work but returned to a light-duty position.

Appellant came under the care of Dr. R. Earl Bartley, a Board-certified orthopedist, who noted treating her for a back injury sustained in an automobile accident on May 1, 1998. He advised, in a report dated June 6, 2001, that appellant's job duties required bending, lifting, squatting and turning which aggravated her middle and low back condition. Dr. Bartley noted that appellant recently experienced a recurrence of symptoms and opined that her repetitive work duties aggravated her thoracolumbar sprain/strain.

By letter dated September 14, 2001, the Office asked appellant to submit additional information including a detailed description of the employment factors or incidents which she believed had contributed to her claimed illness and a comprehensive medical report from her treating physician to include a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to her claimed condition.

Appellant submitted reports from Dr. Bartley dated from February 18, 1999 to September 18, 2002. He noted treating appellant from February 18, 1999 to March 10, 2000 for persistent thoracic back pain due to an automobile accident in 1998. She stopped work on February 23, 2000 and underwent epidural steroid injections from April 12 to June 7, 2000 without relief from the pain. Dr. Bartley's notes from August 23, 2000 to February 23, 2001 noted that appellant's back pain had not subsided and advised that she could return to work under restrictions on February 26, 2001. The record reflects that appellant returned to work in April 2001 with restrictions; however, continued to experience flare-ups of her back condition.

On October 29, 2002 the Office referred appellant for a second opinion evaluation by Dr. James H. Rutherford, a Board-certified orthopedist. In a report dated November 13, 2002, he indicated that he reviewed the records provided to him and performed a physical examination of appellant. Dr. Rutherford noted an essentially normal physical examination. He opined that appellant sustained a temporary aggravation of thoracolumbar strain and that her work restrictions were due to the preexisting conditions which include prior injuries to her back in automobile accidents which occurred in January 1993 and May 1998. Dr. Rutherford opined that appellant did not continue to have residuals of her accepted occupational disease and could return to work with permanent restrictions which were attributed to her preexisting conditions of thoracolumbar strain.

Appellant continued to submit reports from Dr. Bartley dated October 16 to November 13, 2002, who noted that she continued to experience thoracolumbar spine pain.

On November 29, 2002 the Office issued a notice of proposed termination of medical benefits on the grounds that Dr. Rutherford's November 13, 2002 report established no continuing residuals due to her employment injury.

By decision dated January 9, 2003, the Office terminated appellant's medical benefits effective January 6, 2003, on the grounds that Dr. Rutherford's report constituted the weight of the medical evidence and established that appellant's work-related residuals had resolved.

The Office subsequently received several CA-7 forms from appellant, claiming compensation for intermittent periods from July 31, 1998 to September 21, 2002.

In a decision dated June 6, 2003, the Office denied appellant's claim for compensation for intermittent periods between July 31, 1998 to September 21, 2002.

By letter dated June 1, 2004 and received June 4, 2004, appellant requested reconsideration of her claim. She indicated that she was submitting additional medical documentation to "reopen" her back claim because she was experiencing back problems. Appellant also requested that the condition of fibromyalgia be accepted by the Office. Accompanying her request was additional medical evidence including reports from Dr. Kevin V. Hackshaw, a Board-certified orthopedist, dated January 14, 2003 and May 25, 2004, who diagnosed thoracolumbar strain and fibromyalgia. He requested modification of appellant's job functions to avoid repetitive activities such as filing, pushing, stooping and keying, which exacerbated her diagnosed conditions of thoracolumbar strain and fibromyalgia. Dr. Hackshaw recommended a sedentary position without repetitive motions. Also submitted were reports dated February 26 and March 26, 2003 and April 21, 2004 from Dr. Bartley who noted that appellant was diagnosed with fibromyalgia; however, he could not comment on this condition as he is an orthopedic surgeon. He indicated that he did not fully agree with the findings of the second opinion physician, Dr. Rutherford, and noted that he agreed that appellant's thoracolumbar injury was initially started as a result of her nonwork-related automobile accident; however, appellant's job duties and the repetition of her work constantly exacerbated her thoracolumbar injury. Dr. Hackshaw opined that her current thoracolumbar injury was stable and could be and will be exacerbated by work conditions, temperature changes and fibromyalgia.

By decision dated July 28, 2004, the Office denied appellant's application for reconsideration on the grounds that the request was not timely filed within one year of the January 9, 2003 decision and that appellant did not present clear evidence of error by the Office.

LEGAL PRECEDENT -- ISSUES 1 & 2

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[1]

[1] 5 U.S.C. § 8128(a).

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[2] The Board has held that the imposition of the one-year time limitation period for filing a request for reconsideration is not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[3]

With regard to when the one-year time limitation period begins to run, the Office's procedure manual states:

> "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. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any decision by the 'Employees' Compensation Appeals Board, and any de novo decision following action by the Board, but does not include prerecoupment hearing/review decisions."[4]

The Board has held that Chapter 2.1602.3(b)(1) of the Office's procedure manual should be interpreted to mean that a right to reconsideration within one year accompanies any subsequent merit decision on the issues, including any merit decision by the Board.[5]

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[6]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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's decision.[7] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that

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[2] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

[3] *See Annie L. Billingsley*, *supra* note 2.

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602, para. 3b(1) (January 2004).

[5] *Larry J. Lilton*, 44 ECAB 243 (1992); *see John W. O'Connor*, 42 ECAB 797 (1991).

[6] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[7] *Annie L. Billingsley*, *supra* note 2.

[8] *Jimmy L. Day*, 48 ECAB 652 (1997).

the evidence could be construed so as to produce a contrary conclusion.[9] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[10] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[11]

ANALYSIS -- ISSUE 1

In its July 28, 2004 decision, the Office properly determined that appellant failed to file a timely application for review with respect to the termination issue. The Office rendered a merit decision on January 9, 2003 terminating appellant's compensation and appellant's request for reconsideration was dated June 1, 2004 and received June 4, 2004 which was more than one year after January 9, 2003. Accordingly, appellant's request for reconsideration was not timely filed.

The Board has reviewed evidence submitted with appellant's most recent reconsideration request and concludes that appellant has not established clear evidence of error. The reports from Dr. Hackshaw dated January 14, 2003 and May 25, 2004 diagnosed thoracolumbar strain and fibromyalgia. He requested modification of appellant's job function to avoid repetitive activities such as filing, pushing, stooping and keying, which exacerbates her diagnosed conditions of thoracolumbar strain and fibromyalgia. However, these reports do not specifically address the termination of appellant's medical benefits issue and do not establish that appellant continued to have residuals of her work-related injury of thoracolumbar strain, but merely place prophylactic modification of appellant's job functions to prevent future injury. Other reports from Dr. Bartley dated February 26 and March 26, 2003 and April 21, 2004 noted that he did not fully agree with the findings of Dr. Rutherford and noted appellant's job duties and the repetition of her work constantly exacerbated her thoracolumbar injury. The Board finds that this evidence does not *prima facie* shift the weight of the evidence in appellant's favor with regard to whether she continued to have residuals of her accepted work-related condition of thoracolumbar strain or that the termination of appellant's medical benefits was improper. Rather, Dr. Bartley opined that appellant's current thoracolumbar injury was stable. Additionally, the Board notes that fibromyalgia is not an accepted condition in this case. It cannot be said that these reports raise a substantial question as to the correctness of the Office's prior decisions.

The Board, therefore, finds these records are insufficient to raise a substantial question as to the correctness of the Office's merit decision and the Office properly denied appellant's reconsideration request.

ANALYSIS -- ISSUE 2

The Office issued its most recent merit decision on June 6, 2003 which denied appellant's claim for intermittent periods of compensation. The July 28, 2004 Office decision found that

[9] *Id.*

[10] *Id.*

[11] *Cresenciano Martinez,* 51 ECAB 322 (2000); *Thankamma Mathews,* 44 ECAB 765,770 (1993).

appellant's request for reconsideration dated June 1, 2004, and received June 4, 2004, was untimely. Since appellant's request for reconsideration was received by the Office on June 4, 2004, it was filed within a year of the Office's June 6, 2003 merit decision and was timely. While the Office apparently made its finding on timeliness with regard to the January 9, 2003 termination decision, nothing in appellant's reconsideration request limited the scope of the request only to the January 9, 2003 decision. The Board finds that the reconsideration request was timely filed with respect to the June 6, 2003 Office decision.

On remand the Office should treat as timely appellant's June 1, 2004 request for reconsideration and consider whether the request is sufficient to warrant a merit review under the standard for evaluating a timely reconsideration request.[12] Following this and such other development as necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration dated June 1, 2004 of the January 9, 2003 termination decision was untimely filed and did not demonstrate clear evidence of error, and that the Office improperly denied as untimely appellant's request for reconsideration of the June 6, 2003 decision.

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2004 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and remanded for further proceedings consistent with this decision of the Board.

Issued: June 6, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *See* 20 C.F.R. § 10.606(b).