United States Department of Labor
Employees' Compensation Appeals Board

SHIRLEY G. LUCERO, Appellant	)	
and	)	**Docket No. 04-2109**
	)	**Issued: March 7, 2005**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Long Beach, CA, Employer	)	

Appearances:
Shirley G. Lucero, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 25, 2004 appellant filed a timely appeal from a May 12, 2004 nonmerit decision of the Office of Workers' Compensation Programs denying her request for a hearing as untimely under 5 U.S.C. § 8124 and a July 28, 2004 Office nonmerit decision denying her request for reconsideration on the grounds that it was untimely filed and did not establish clear evidence of error. As more than one year has elapsed from March 6, 2001, the last merit decision relevant to the issue in question, to the filing of this appeal on August 25, 2004, the Board lacks jurisdiction to review the merits of this case. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the May 12 and July 28, 2004 nonmerit decisions.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for a hearing as untimely; and (2) whether the Office properly refused to reopen appellant's claim for reconsideration on the merits on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case is before the Board for the second time. In the prior appeal, the Board reversed a May 2, 2003 Office decision terminating appellant's compensation benefits effective March 24, 2002 on the grounds that she had no further employment-related condition or disability due to her July 28, 1986 employment injury.[1] The Board found that the opinion of the impartial medical specialist was insufficient to establish that her accepted condition had resolved because he opined that she had not sustained the accepted condition of a permanent aggravation of degenerative disc disease. The Board noted that it appeared the Office was attempting to rescind acceptance of a permanent aggravation of degenerative disc disease without adequate notice to appellant or issuing a formal rescission decision. The findings of fact and the conclusions of law from the prior decision are hereby incorporated by reference.

Following the Board's decision, the Office returned appellant to the periodic rolls.

In a letter dated February 21, 2004, appellant requested information from the Office regarding her eligibility for compensation for the period October 1998 to 2002. The Office, in response, enclosed its March 6, 2001 decision denying her claim for monetary compensation benefits from October 30, 1998 to November 1, 2000 on the grounds that the medical evidence was insufficient to establish that she was disabled due to her accepted employment injury of low back strain and a permanent aggravation of degenerative disc disease. In a March 6, 2001 decision, the Office rescinded its finding that appellant was entitled to compensation beginning November 8, 1998 but determined that she was entitled to compensation for total disability effective November 2, 2000. On March 8, 2001 appellant timely requested an oral hearing on the Office's March 6, 2001 decision. Appellant, however, subsequently withdrew her request for a hearing. The Office accepted the withdrawal of her hearing request on June 7, 2001.

In a letter dated March 9, 2004, appellant requested information from the Office regarding whether she should appeal or request a hearing on the Office's March 6, 2001 decision denying disability compensation from October 30, 1998 to November 1, 2000. The Office, on April 7, 2004, informed her that she should follow the appeal rights accompanying the March 6, 2001 decision.

By letter postmarked April 21, 2004 and addressed to the Branch of Hearings and Review, appellant inquired whether she was eligible for a hearing on the March 16, 2001 decision. She noted that she withdrew her original request for a hearing in May 2001 and had new evidence to submit in support of her claim.

In a progress note dated April 22, 2004, Dr. Mark S. Ishimaru, a Board-certified orthopedic surgeon and appellant's attending physician, described the results of her magnetic resonance imaging (MRI) scan study as showing multiple disc protrusions and found that, regarding her employment injury, she was "permanent and stationary" with a need for continuing medical treatment.

[1] *Shirley G. Lucero*, Docket No. 03-1547 (issued January 9, 2004).

In a decision dated May 12, 2004, the Office denied appellant's request for a hearing as untimely under section 8124. The Office noted that she could pursue her claim through the reconsideration process.

The record contains a work restriction evaluation from Dr. Ishimaru dated May 7, 2004, and progress reports from Dr. Ishimaru dated 2003 and 2004 in which he detailed findings on examination and discussed his treatment plan for appellant's back condition. The record also contains reports dated March 2 and June 24, 2004 from Dr. Richard M. Paicius, a Board-certified anesthesiologist, describing his current pain management strategy for appellant's back problems.

In a letter dated June 21, 2004, appellant requested reconsideration of the Office's March 6, 2001 decision. She noted that her accepted condition of a permanent aggravation of degenerative disc disease was irreversible by definition. Appellant stated that the Office had inaccurately listed on a form that her accepted condition was an aggravation of preexisting degenerative disc disease. Additionally, she argued that the language in the Board's decision meant that the Office could not find that her injury initially disabled her, that the disability then ceased and that the disability subsequently recurred.

The record contains progress reports dated June 2004 from Dr. Ishimaru and Dr. Paicius relevant to appellant's current condition and treatment.

By decision dated July 28, 2004, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and the evidence failed to establish clear evidence of error.

LEGAL PRECECENT -- ISSUE 1

Section 8124(b) of the Act provides that "a claimant not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[2] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[3]

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter or right only if the request is filed within the requisite 30 days.[4] Even where the hearing request is not timely filed, the Office may, within its discretion, grant a hearing and must exercise this discretion.[5]

[2] 5 U.S.C. § 8124(b)(1).

[3] 20 C.F.R. §§ 10.616, 10.617.

[4] *See Claudio Vazquez*, 52 ECAB 496 (2001).

[5] *Id*.

ANALYSIS -- ISSUE 1

In this case, appellant requested a hearing on the Office's March 6, 2001 decision in a letter postmarked April 21, 2004.[6] Section 10.616 of the federal regulations provides: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision, for which a hearing is sought."[7] As the postmark date of the request was more than 30 days after issuance of the March 16, 2001 decision, appellant's request for a hearing was untimely filed. The Office, therefore, properly denied appellant's hearing as a matter of right as her request was not made within 30 days of the Office's March 16, 2001 decision.[8]

The Office then proceeded to exercise its discretion to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case could be resolved through the submission of evidence in the reconsideration process. The Office, therefore, properly found that appellant's request for a hearing was untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as she had other review options available.[9]

LEGAL PRECEDENT -- ISSUE 2

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[10] 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.[11] 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.[12] The Office procedures state 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, if the claimant's application for review shows "clear

[6] Appellant initially hearing on the Office's March 6, 2001 decision on March 8, 2001; however, she subsequently withdrew this request by letter dated April 17, 2001.

[7] 20 C.F.R. § 10.616.

[8] *See Claudio Vazquez, supra* note 4.

[9] *Id*.

[10] 5 U.S.C. §§ 8101-8193.

[11] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

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

evidence of error" on the part of the Office.[13] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[14]

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.[15] 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 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's decision.[16] 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.[17]

ANALYSIS -- ISSUE 2

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.[18] The last merit decision issued in this case on the issue of whether appellant is entitled to compensation for total disability from October 30, 1998 to November 1, 2001 was the Office's March 6, 2001 decision denying her claim on the grounds that the medical evidence was insufficient to establish that she was disabled due to her accepted employment injury. As appellant's June 21, 2004 letter requesting reconsideration was submitted more than one year after the last merit decision of record, it was untimely.

[13] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

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

[15] *Dorletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003); *Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004).

[16] *Id*.

[17] *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

[18] *Veletta C. Coleman*, *supra* note 12; *Larry L. Lilton*, 44 ECAB 243 (1992).

Consequently, she must demonstrate "clear evidence of error" by the Office in denying her claim for compensation.[19]

Appellant submitted medical evidence relevant to her current disability and condition. The relevant issue in this case, however, is whether she was disabled from work from October 30, 1998 to November 1, 2001 due to her accepted employment injury. As medical evidence addressing appellant's current condition is not relevant to the issue decided by the Office in its March 6, 2001 decision, it is insufficient to establish clear evidence of error.[20]

Appellant argued that the Board's prior decision stated that the Office could not find appellant disabled, that the disability ceased for a period and then find her disabled again. The Board's January 9, 2004 decision, however, addressed only the Office's termination of appellant's compensation for total disability effective March 24, 2002 on the grounds that she had no further employment-related disability. The Office, in its March 6, 2001 decision, found that appellant was entitled to compensation for total disability effective November 2, 2000 and that she was not entitled to compensation for total disability for the period October 30, 1998 to November 1, 2000. Appellant has the burden of proof to establish total disability for periods not accepted by the Office through the submission of rationalized medical opinion evidence.[21] Appellant's argument, therefore, does not have a reasonable color of validity sufficient to warrant a reopening of her case on the merits.

Appellant also requested that the Office change its acceptance of an aggravation of preexisting degenerative disc disease to a permanent aggravation of degenerative disc disease. It appears from the record that the Office has accepted that appellant sustained a permanent aggravation of degenerative disc disease due to her employment injury. The fact that the Office accepted a permanent aggravation of degenerative disc disease, however, is not relevant to the issue of whether appellant sustained disability from employment from October 30, 1998 to November 1, 2000. Whether an employment injury caused disability from employment and the duration of that disability is a medical question and requires the submission of medical evidence.[22] Appellant, consequently, has not raised a relevant legal argument sufficient to establish clear evidence of error.[23]

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing under section 8124 as untimely. The Board further finds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error on the part of the Office. The Office thus properly denied further merit review.

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[19] 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB ___ (Docket No. 03-2223, issued January 9, 2004).

[20] *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[21] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

[22] *See Laurie S. Swanson*, 53 ECAB 517 (2002).

[23] On appeal appellant raised contentions which have already been addressed by the Board in this decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 28 and May 12, 2004 are affirmed.

Issued: March 7, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member