

**United States Department of Labor
Employees' Compensation Appeals Board**

ANITA R. HARRIS, Appellant)	
)	
and)	Docket No. 04-1838
)	Issued: May 10, 2005
U.S. POSTAL SERVICE, POST OFFICE,)	
Phoenix, AZ, Employer)	

Appearances:
Sally F. LaMacchia, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 15, 2004 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated July 2, 2004 which denied her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated December 5, 1995 and the filing of this appeal on July 15, 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.

ISSUE

The issue is 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

The Office accepted that on July 27, 1986 appellant, then a 34-year-old letter carrier, sustained cervical, thoracic and lumbar strains, chronic pain and depression as a result of a work-related accident.

In a medical opinion dated February 15, 1994, Dr. Eugene R. Almer, a Board-certified psychiatrist, indicated that appellant's depression had completely resolved by October 19, 1992, and other factors precipitated another episode of depression five months later. He stated that it can be said with reasonable certainty that appellant's current depression was not the result of her orthopedic injuries of 1986.

Dr. Joseph Gimble, a Board-certified orthopedic surgeon, indicated in his February 18, 1994 report that appellant did not currently suffer from chronic pain caused by her work injuries, that she was stationary and no longer needed orthopedic care. He indicated that appellant could return to work with some limitations in view of her neck surgery of December 1988.

In a June 15, 1995 report, Dr. Richard J. Rosengard, an osteopath, indicated that appellant was significantly depressed. He indicated that appellant's pain was etiologic in her anxiety, nervousness and depression and that the difficulty in receiving services compounded it.

The Office referred appellant to Dr. John Mardock, a Board-certified psychiatrist, for a second opinion. In a medical opinion dated September 28, 1995, Dr. Mardock, did not find appellant to be experiencing a clinical depression at the time of the evaluation. He determined that upon review of the medical records that appellant's depression was not well documented except by Dr. Rosengard many years after the original injury and that in the intervening years there have been numerous stressors which may have contributed to appellant's depression. Dr. Mardock did find appellant to have histrionic personality traits of such severity that she would qualify for a diagnosis of histrionic personality disorder, a condition which would have preexisted the industrial injury, and that the industrial injury probably would have provided an opportunity for dramatization and exaggeration of her disability by the underlying personality traits. He did not find appellant to be disabled from work from a psychiatric standpoint. Dr. Mardock found that appellant's work-related depression had resolved if it ever in fact existed. He noted that her personality disorder would continue to interfere with her functioning both in work and social situations, but that disorder was not related to the industrial injury.

Appellant was offered a position as a modified letter carrier with the employing establishment, a position which the Office found to be suitable to her work capabilities and appellant was given appropriate notice to accept the position. Appellant did not return to work or provide any reason for her failure to return to work.

Accordingly, in a decision dated December 5, 1995, the Office terminated appellant's compensation benefits for the reason that appellant had refused an offer of suitable employment. The Office also terminated appellant's medical benefits for chronic pain and depression effective December 10, 1995.

Subsequent to this decision, appellant submitted medical reports by Dr. Charles T. Gauntt, a Board-certified orthopedic surgeon. In a September 17, 1997 report, Dr. Gauntt diagnosed appellant with chronic pain following injury and surgery, and opined that there was nothing he could offer from an orthopedic standpoint that has not already been done without lasting benefit. Appellant also submitted an October 31, 1997 note wherein Dr. Rosengard opined that appellant was unable to work from the perspective of her psychiatric condition in any capacity.

On April 19, 2004 appellant, through her attorney, filed a request for reconsideration. Appellant contended that the Office committed clear evidence of error when the Office failed to give proper weight to competent medical evidence which established ongoing injury and terminated appellant's compensation for a refusal of a job which was not suitable. Appellant's attorney raised specific objections to the competence of the report by Dr. Mardock, alleging, *inter alia*, that he did not conduct appropriate testing, that Dr. Mardock did not find appellant disabled from work. She also argued that the decision was internally inconsistent.

By decision dated July 2, 2004, the Office denied appellant's request for reconsideration as it found that it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.¹ 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.² When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.³ 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.⁴

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 be 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

¹ 5 U.S.C. §§ 8101-8193.

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

³ *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 merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607 (1999).

⁴ *Thankamma Mathews*, 44 ECAB 764 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

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 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. 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.⁵

ANALYSIS

The Office properly determined in this case 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.⁶ The last merit decision in this case was the Office's December 5, 1995 decision which terminated appellant's entitlement to compensation. As appellant's April 23, 2004 letter was submitted more than one year after the last merit decision of record, it was untimely.

As appellant's request was filed more than one year after the Office's December 5, 1995 decision, appellant must demonstrate "clear evidence of error" on the issue which was decided by the Office. In support of her request for reconsideration, appellant's attorneys made various arguments with regard to how the Office weighed the medical evidence, specifically the report of Dr. Mardock. The Board finds that appellant's complaints and arguments pertaining to Dr. Mardock's report are not sufficient to *prima facie* shift the weight and raise fundamental questions as to the correctness of the December 10, 1995 termination decision. There is no evidence in the record to support that Dr. Mardock's evaluation was improper and appellant has not submitted any evidence so demonstrating. Additionally, appellant has not demonstrated any error in the Office's issuance of the December 5, 1995 decision terminating compensation for failure on the part of appellant to accept an offer of suitable work. Moreover, appellant has not demonstrated that the Office erred in finding that Dr. Mardock's report constituted the weight of the medical evidence in terminating medical benefits or that the Office's December 5, 1995 decision was internally consistent. As the new physician's reports offer no new evidence on the issues in question, which was whether the Office properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work, they are not sufficient to raise a substantial question as to the correctness of the Office's decision and, thus, do not substantiate clear evidence of error.⁷ Accordingly, the Board finds that the arguments and evidence submitted by appellant are insufficient to demonstrate clear evidence of error.

⁵ *John Crawford*, 52 ECAB 395 (2001); *Pete F. Dorso*, 52 ECAB 424 (2001).

⁶ *Veletta C. Coleman*, 48 ECAB 765 (1993).

⁷ See *Thankamma Mathews*, *supra* note 4.

CONCLUSION

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.

ORDER

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

Issued: May 10, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member