United States Department of Labor
Employees' Compensation Appeals Board

JAGDIP K. BHATIA, Appellant	)	
and	)	**Docket No. 04-1478**
	)	**Issued: October 18, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Salt Lake City, UT, Employer	)	

Appearances:
David J. Holdsworth, Esq., for the appellant
Jim C. Gordon, Esq., for the Director

Oral Argument September 14, 2005

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 12, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated March 12, 2004 which denied her reconsideration request 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 August 24, 1995 and the filing of this appeal on May 12, 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).

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This is the second appeal before the Board. Appellant, a 40-year-old letter carrier, injured her left hip and left leg on November 5, 1991 when she slipped and fell. The Office accepted a claim for a stress fracture of the left femur.

On January 26, 1993 appellant filed a Form CA-2a claim for a recurrence of disability, on September 10, 1992 which she attributed to her November 1991 employment injury.

By decisions dated July 22, 1993 and August 18, 1994, the Office denied appellant compensation for a recurrence of her accepted left femur condition. By decision dated August 24, 1995, the Office denied reconsideration. By decision dated March 13, 2001, the Office denied reconsideration, finding that appellant had not timely requested reconsideration and had failed to submit evidence sufficient to establish clear evidence of error. In a November 26, 2002 decision,[1] the Board affirmed the Office's decisions. The facts of this case are set forth in the Board's prior decision and are herein incorporated by reference.

On June 15, 2003 appellant's attorney requested reconsideration. He contended that the Office committed error by failing to develop the record for the purpose of determining whether she developed a low back condition causally related to her accepted November 1991 injury. Appellant submitted treatment notes from 2001 through 2002 which documented her complaints of low back pain during that period.

By decision dated March 12, 2004, the Office denied appellant's request for reconsideration, finding that she had not timely requested reconsideration and failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office noted that appellant was required to present evidence which showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle an employee to a review of an Office decision as a matter of right.[3] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

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

[1] Docket No. 01-1612 (issued November 26, 2002).

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] As one such limitation, the Office has stated that it 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.[5] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).[6]

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, an appellant 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 manifested 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's decision.[14] The Board makes

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[4] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

[5] 20 C.F.R. § 10.607(b).

[6] *See supra* note 2.

[7] *Rex L. Weaver,* 44 ECAB 535 (1993).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

[11] *See Jesus D. Sanchez, supra* note 3.

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

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

[14] *Leon D. Faidley, Jr., supra* note 3.

an independent determination of whether an appellant 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 Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on August 24, 1995. Appellant requested reconsideration on June 15, 2003; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's June 15, 2003 request for reconsideration failed to show clear evidence of error. The evidence appellant submitted is not pertinent to the issue on appeal. Appellant's attorney contended that the Office committed error by failing to further develop the record and determine whether appellant had a back condition causally related to her 1991 employment injury. The record contains no evidence indicating that appellant has ever filed a claim based on a low back condition. Further, counsel is essentially requesting a reweighing of the medical evidence which has already been considered by the Office in several previous decisions. The treatment notes appellant submitted merely contain findings on examination and relate appellant's complaints of back pain from 2001 through 2002. They are of limited probative value as they do not provide a reasoned medical opinion on the relevant issue, *i.e.*, whether appellant sustained a recurrence of her accepted disability on September 10, 1992 which was causally related to her November 1991 employment injury. No other evidence was received by the Office.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.[16]

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration request dated June 15, 2003. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on March 12, 2004.

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[15] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[16] The Board notes that appellant submitted additional evidence to the record following the October 26, 2004 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2004 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: October 18, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board