United States Department of Labor
Employees' Compensation Appeals Board

DIANE R. JACHOWICZ, Appellant	)	
and	)	**Docket No. 06-405**
	)	**Issued: April 14, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer	)	

Appearances:
Diane R. Jachowicz, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 5, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 2, 2005 nonmerit decision denying her request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's March 25, 2003 decision denying her claim for a July 6, 2001 employment injury. Because more than one year has elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On July 6, 2001 appellant, then a 40-year-old postal clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained injury to her back and left lower extremity on that date while lifting a heavy tub from the bottom of a canvas hamper. Appellant indicated on the form that she wished to receive continuation of pay.[2]

In a report dated July 6, 2001, Dr. George Batayias, an attending physician Board-certified in preventive medicine, indicated that appellant reported experiencing low back pain after lifting a heavy tub of mail at work on that date. Dr. Batayias detailed the findings on examination including the fact that appellant reported low back pain on palpation, but did not exhibit any spasms or sciatic notch tenderness. He indicated that left straight leg raising revealed a peculiar "sleep feeling" but no immediate electric shock-like phenomenon. Dr. Batayias provided a diagnosis of "low back strain" and recommended work restrictions.[3]

The record also contains notes dated July 6, 2001 in which an attending physical therapist discussed appellant's condition and treatment. The results of June 6, 2001 x-ray testing of the lumbar spine revealed normal joint spaces with no evidence of fracture, dislocation or other bony abnormality.[4]

On July 12, 2002 appellant completed a recurrence of disability form (CA-2a) in which she alleged that she sustained a recurrence of disability on February 11, 2002 due to an unspecified employment injury.[5] She indicated that her back pain appeared for no apparent reason, but that prolonged walking, sitting or standing had a "negative impact."

By letter dated February 7, 2003, the Office advised appellant that her claim had not been accepted for an employment injury and requested that she submit additional factual and medical evidence in support of her claim. The Office provided appellant 30 days to submit the additional evidence.[6]

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[2] It appears that appellant stopped working for the employing establishment in August 2001.

[3] In a note dated July 18, 2001, Dr. Michael Boschek, an attending physician specializing in internal medicine, indicated that appellant had been seen and treated for a "low back strain" and was disabled from July 7 to 23, 2001. In a note dated July 23, 2001, Dr. Boschek indicated that appellant could return to work on July 25, 2001 for four hours per day and then could return to full-time work after physical therapy had been completed.

[4] The record contains several "activity status report" forms dated July 6, 2001 which list Dr. Batayias as a providing physician and which list the diagnosis of "lumbar strain." However, these forms are not signed by a physician.

[5] The form was not received by the Office until February 4, 2003.

[6] Appellant indicated that she would be submitting additional medical evidence, but she did not do so within the allotted period.

By decision dated March 25, 2003, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained an injury in the performance of duty on July 6, 2001.[7]

On August 4, 2005 the Office received a letter dated July 21, 2005 which appellant initially addressed and sent to a congressional representative. Appellant stated that she sustained a back injury at work in July 2001 and indicated that she was off work for two or three weeks due to the injury and then worked on a part-time basis for two weeks. She noted that during this period she received continuation of pay. Appellant asserted that prior to February 2003 she sustained four or five recurrences of disability for which she did not file claims and stated that she then filed a Form CA-2a in February 2003. She indicated that the Office denied her entire claim rather than just the recurrence of disability aspect and asserted that in December 2003 she received a bill from the employing establishment requesting repayment for $2,000.00 of continuation of pay. Appellant contacted her union representative who indicated that he would take care of the problem. She stated that she stopped working for the employing establishment in August 2001 and was officially terminated in November 2001. Appellant asserted that a Department of Labor official told her that her situation could not be "undone" and she requested help from her congressional representative. On September 14, 2005 the Office received a copy of an email transmission dated July 20, 2005 which appellant initially addressed and sent to another congressional representative. This document contained statements which were similar to those contained in appellant's July 21, 2005 letter.

By decision dated November 2, 2005, the Office denied appellant's request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.[8] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[9]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[10] Office regulations and procedure provide that the Office

[7] The Office accepted the occurrence of an employment incident on July 6, 2001 in the form of lifting a heavy mail tub, but found that the medical evidence was not sufficient to show that she sustained an injury as a result of that incident.

[8] 20 C.F.R. § 10.607(a).

[9] 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[10] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17]

ANALYSIS

In its November 2, 2005 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on August 4, 2005, more than one year after the Office's March 25, 2003 decision. Therefore she must demonstrate clear evidence of error on the part of the Office in issuing this decision.[18]

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its March 25, 2003 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

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[11] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

[12] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[13] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[14] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[15] *See Leona N. Travis*, *supra* note 13.

[16] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[17] *Leon D. Faidley, Jr.*, *supra* note 9.

[18] The Office interpreted the two letters that appellant initially sent to her congressional representatives as constituting a request for reconsideration of its March 25, 2003 decision. The first of these letters was received by the Office on August 4, 2005.

Appellant argued that she sustained an employment-related injury on July 6, 2001, that her claim had already been accepted and, therefore, it was improper for the Office to deny her claim for a July 6, 2001 employment injury in its March 25, 2003 decision.[19] However, this argument is not relevant as the record provides no indication that the Office ever accepted her claim that she sustained an employment-related injury on July 6, 2001. Appellant alleged that she should not be required to repay $2,000.00 in continuation of pay to the employing establishment, but she submitted no specific evidence or argument to support this assertion. This argument is not relevant in that the record does not contain any Office decision pertaining to continuation of pay matters. The Office's March 25, 2003 decision dealt primarily with a medical issue that is to be resolved by medical evidence, *i.e.*, whether appellant submitted sufficient medical evidence to establish that she sustained an injury in the performance of duty on July 6, 2001. Appellant did not submit any additional medical evidence or any argument pertaining to medical evidence already of record.

For these reasons, the argument submitted by appellant does not raise a substantial question concerning the correctness of the Office's March 25, 2003 decision and the Office properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 2, 2005 decision is affirmed.

Issued: April 14, 2006
Washington, DC

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

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

[19] Appellant indicated that the Office should have considered her claim for recurrence of disability which was received by the Office in February 2004.