

FACTUAL HISTORY

This case was previously before the Board. By decision dated July 17, 2003, the Board affirmed a September 27, 2002 decision that denied appellant's July 10, 2002 request for reconsideration as untimely filed and lacking clear evidence of error in the last merit decision dated September 13, 1995.³ The July 17, 2003 Board decision is incorporated herein by reference.

On January 20, 2004 appellant requested reconsideration and submitted additional evidence. In a report dated September 19, 2002, Dr. J.C. Serrato, Jr., an attending orthopedic surgeon, stated that appellant had chronic low back syndrome, lumbar disc disease, spondylolisthesis at L3-4, lumbar canal stenosis, facet syndrome and protrusion of both hip joints into the pelvis. He opined that she was totally disabled.

In an October 23, 2002 report, Dr. Samuel T. Rice, an attending Board-certified urologist, stated that appellant had been treated for urinary problems that arose from a fall on the job in 1985. He diagnosed urethral stenosis, urinary retention, chronic cystitis and back pain secondary to spinal injury. Dr. Rice stated that these conditions were caused by the 1985 employment injury and she was totally disabled.

In a November 11, 2002 report, Dr. Daniel H. Serrato, a Board-certified anesthesiologist, stated that appellant sustained an injury to her lower back in the 1980s and continued to be treated for exacerbations of degenerative changes in her back. He diagnosed lumbar spondylosis with degenerative disc disease and myelopathy secondary to her lumbar spine pain. Dr. Serrato indicated that appellant was totally disabled due to her back injury and other medical problems.

In a report dated November 13, 2002, Dr. Mark R. Funk, an internist, stated that he did not treat appellant at the time of her December 20, 1985 employment injury but, since that time, she had developed fibromyalgia, hypertension and acquired spinal stenosis. He indicated that the acquired spinal stenosis "probably relates to the injury in 1985." Dr. Funk opined that appellant was totally disabled due to persistent discomfort in her low back with radiation to her legs, multiple trigger points and tender points and sleep dysfunction secondary to fibromyalgia.

³ Docket No. 03-918 (issued July 17, 2003). On December 20, 1985 appellant, then a 55-year-old military personnel clerk, filed a claim for a traumatic injury alleging that she sustained injuries in the performance of duty when her legs suddenly gave out and she fell to the floor. The Office accepted her claim for a low back strain and chronic low back syndrome. By decision dated June 16, 1994, the Office terminated appellant's compensation benefits effective June 26, 1994, finding that her accepted conditions had resolved. By merit decisions dated August 31, October 3 and November 16, 1994 and January 27, May 9 and September 13, 1995, the Office found that she submitted insufficient evidence to warrant modification of the June 16, 1994 termination decision. By decision dated September 27, 2002, the Office found that appellant's July 10, 2002 request for reconsideration was untimely and did not show clear evidence of error in the 1994 termination decision.

In a December 2, 2002 report, David Moyerman, Ph.D., a licensed psychologist, indicated that he had treated appellant for the past six years for major depression and dementia. He stated:

“[Periodically, [appellant] has taken several psychological tests to verify her cognitive problems.... She suffers from a memory disorder so severe that she cannot be expected to remember dates, organize a claim form, or respond to medical records requests in a timely or accurate manner. Her dementia is chronic and static, which indicates that her inability to file a timely appeal predates the September 13, 1996 deadline....

“In consideration of her cognitive diffusion and fragmented mental state, I hope that you will waive any filing or new evidence deadlines that she may have overlooked.”

In an August 26, 2004 report, Dr. Moyerman stated that appellant had required his assistance with her correspondence to the Office, “which includes the time period from the inception of her psychotherapy in 1997 to the present.” He stated:

“[Appellant’s] depression has intensified due to your continued dismissal of her case. As a result of chronic cognitive diffusion and severe chronic depression, I am still convinced that she has been unable to cope with administrative paperwork on her behalf for approximately the past 20 years.”

By decision dated January 10, 2006, the Office denied appellant’s request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.⁴

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees’ Compensation Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁷ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.⁸ The Board has found that the imposition of this one-year time

⁴ Appellant submitted additional evidence subsequent to the Office decision of January 10, 2006. The Board’s jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

⁵ 5 U.S.C. § 8128(a).

⁶ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁷ *Id.* at 768.

⁸ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁹

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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.¹⁶

ANALYSIS

The merits of appellant's case are not before the Board. As noted, the last merit decision in this case was issued September 13, 1995. Her most recent request for reconsideration was dated January 20, 2004. As this request was filed more than one year after the September 13, 1995 merit decision, it is not timely.¹⁷ The remaining issue is whether appellant demonstrated clear evidence of error in the September 13, 1995 decision.

⁹ *Thankamma Mathews*, *supra* note 6 at 769.

¹⁰ 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

¹¹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003).

¹⁴ *Leona N. Travis*, *supra* note 12.

¹⁵ *Darletha Coleman*, *supra* note 13.

¹⁶ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁷ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

Dr. J.C. Serrato stated that appellant had chronic low back syndrome, lumbar disc disease, spondylolisthesis at L3-4, lumbar canal stenosis, facet syndrome and protrusion of both hip joints into the pelvis. He opined that she was totally disabled. However, the Board has held that medical reports not containing rationale on causal relationship are entitled to little probative value.¹⁸ Therefore, Dr. J.C. Serrato's opinion does not demonstrate clear evidence of error in the Office's June 16, 1994 termination of appellant's compensation benefits based on resolution of her accepted medical conditions.

Dr. Rice stated that appellant had been treated for urinary problems that were caused by the 1985 employment injury and she was totally disabled. Dr. Daniel Serrato stated that appellant sustained an injury to her lower back in the 1980s and continued to be treated for exacerbations of degenerative changes in her back. He diagnosed lumbar spondylosis with degenerative disc disease and myelopathy and indicated that appellant was totally disabled due to her back injury and other medical problems. Dr. Funk stated that appellant had developed fibromyalgia, hypertension and acquired spinal stenosis since her December 20, 1985 employment injury. He indicated that the acquired spinal stenosis "probably relates to the injury in 1985" and opined that appellant was totally disabled due to persistent discomfort in her low back with radiation to her legs, multiple trigger points and tender points and sleep dysfunction secondary to fibromyalgia. However, these physicians did not provide sufficient medical rationale explaining how appellant's numerous medical conditions were causally related to her December 20, 1985 employment injury. Medical reports not containing adequate rationale on causal relationship are of diminished probative value and are generally insufficient to meet an employee's burden of proof.¹⁹ Therefore, the report from Dr. Rice does not demonstrate clear evidence of error in the September 13, 1995 decision.

Appellant alleged that she was not competent to file a timely request for reconsideration within one year of the last merit decision dated September 13, 1995. The Board has recognized, however, that the Office's federal regulations do not provide that the late filing of a request for reconsideration must be excused for extenuating circumstances, including incompetency.²⁰ The Office's regulations do provide that the time to file a request for reconsideration shall not include any periods subsequent to the decision for which the claimant can establish through probative medical evidence that she was unable to communicate in any way and her testimony is necessary to obtain modification.²¹ Appellant failed to submit such evidence in this appeal.

Dr. Moyerman stated that appellant had major depression and dementia and a memory disorder so severe that she could not be expected to remember dates, organize a claim form, or respond to medical records requests in a timely or accurate manner. He stated that appellant had been unable, for the past 20 years, "to cope with administrative paperwork on her behalf." However, this evidence does not establish that appellant was unable to communicate in any way

¹⁸ *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001)

¹⁹ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

²⁰ *John Crawford*, 52 ECAB 395 (2001); *see also* 20 C.F.R. § 10.607(c).

²¹ *Id.*

and her testimony is necessary to obtain modification of the Office's termination decision. Dr. Moyerman stated that he began treating appellant in 1997. Therefore, he could not know whether she was unable to communicate in any way prior to 1997. The one-year deadline for a timely request for reconsideration on the merits of her claim ended as of September 13, 1996. Further, Dr. Moyerman's opinion, expressed in his August 26, 2004 letter, that appellant had been incompetent to pursue her claim for the past 20 years, *i.e.*, since 1994, is not consistent with the fact that she filed numerous reconsideration requests during those 20 years and, therefore, was able to communicate. Appellant also did not establish that her testimony was necessary to obtain modification of the termination of her compensation benefits. The Office terminated her compensation benefits on the grounds that her accepted medical conditions had resolved. As appellant is not a physician, any testimony from her would not be probative regarding a medical issue and would not be necessary to obtain modification of the termination decision.

CONCLUSION

The Board finds that the Office properly determined that appellant's January 20, 2004 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 10, 2006 is affirmed.

Issued: August 3, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board