United States Department of Labor
Employees' Compensation Appeals Board

LOIS E. KECK, Appellant	)	
and	)	**Docket No. 06-558**
TENNESSEE VALLEY AUTHORITY, BULL RUN FOSSIL PLANT, Clinton, TN, Employer	)	**Issued: July 24, 2006**

Appearances:
Lois E. Keck, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 4, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 1, 2005 nonmerit decision, denying her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. The most recent merit decision of record is a May 22, 2001 decision terminating her compensation benefits. 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. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's request for reconsideration of the merits of his claim on the grounds that his request was not timely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On November 27, 1990 appellant, then a 50-year-old laborer, filed a claim for a traumatic injury alleging that she sustained a left-sided lumbar back strain on November 19, 1990 while in the performance of duty. The Office accepted low back strain, lumbago, aggravation of degenerative disc disease and temporary aggravation of dysthymic disorder. It paid appropriate benefits. Appellant has not worked since June 3, 1991.

On April 19, 2001 the Office proposed termination of her compensation benefits on the grounds that she no longer had residuals of her accepted work-related conditions. On May 22, 2001 the Office terminated her benefits effective June 17, 2001.

On August 8, 2005 appellant filed a claim for a schedule award. On August 30, 2005 the Office advised appellant that it could not process her claim noting that on August 19, 2001 it terminated her compensation benefits including entitlements to wage loss, schedule awards and medical benefits because her work-related injuries had resolved. It stated that, in order for it to process her claim for a schedule award, she would have to show that her conditions had not resolved and that the August 19, 2001 decision was in error. The Office recommended that she follow the appeal rights included with the August 19, 2001 decision.[1]

On October 17, 2005 appellant requested reconsideration of the Office's decision terminating benefits, including schedule award benefits. In support of her request, appellant submitted a report dated September 21, 2005 from Dr. Luis C. Pannocchia, her treating physician and Board-certified in family medicine, who stated that appellant was totally disabled as a result of her cervical and lumbar injuries sustained at work in November 19, 1990.

By decision dated November 1, 2005, the Office denied appellant's request for merit review on the grounds that it was untimely filed and failed to establish clear evidence of error in its May 22, 2001 decision.

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.[2] 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.[3] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents

[1] The Office's August 30, 2005 letter is not a final decision of the Office, as it was merely informational in nature, a reply to appellant's August 8, 2005 request for a schedule award. Section 10.126 of the Office's regulations provides that a decision of the Office shall contain findings of fact, a statement of reasons and shall include information about the claimant's appeal rights. 20 C.F.R. § 10.126. Further, the August 30, 2005 letter stated that appellant's benefits were terminated on August 19, 2001; however, the Office's decision was issued on May 22, 2001 and the effective date of termination was June 17, 2001.

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

clear evidence that the Office's final merit decision was in error.[4] 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 evidence of error on the part of the Office.[5] 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.[6]

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.[7] 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.[8] The Board makes an independent determination 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.

ANALYSIS

The Office accepted that appellant sustained employment-related lower back strain, lumbago, aggravation of degenerative disc disease and temporary aggravation of dysthymic disorder and paid appropriate benefits. The date of injury was November 19, 1990. The Office subsequently terminated appellant's compensation benefits effective June 17, 2001 on the grounds that she no longer had residuals of her work-related injuries.

Appellant then filed a claim for a schedule award on August 8, 2005. The Office, in a letter dated August 30, 2005, stated that her claim for a schedule award could not be processed because the Office had terminated her entitlement to any schedule award in a decision dated May 22, 2001 and advised her to follow the appeal rights attached to that decision. However, the May 22, 2001 decision terminated only appellant's compensation for her accepted injuries at that

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

[5] *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).

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

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

[8] *Id*.

time. It did not purport to deny a claim for a schedule award due to impairment related to her November 19, 1990 work-related injuries. Nonetheless, appellant complied with the Office's requirement to comply with the appeal rights included in the May 22, 2001 decision and filed a request for reconsideration on October 15, 2005.

To the extent that appellant sought reconsideration of the Office's May 22, 2001 decision, the October 17, 2005 reconsideration request is untimely as it was made more than one year after the May 22, 2001 Office decision. Furthermore, Dr. Pannochia's report is insufficient to establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's May 22, 2001 decision because it does not provide medical reasoning, or rationale, in support of the physician's opinion on causal relationship.[9] Appellant also advanced no legal argument sufficient to shift the weight of the evidence in her favor.

However, the record indicates that appellant only requested reconsideration because, after filing a claim for a schedule award, the Office incorrectly advised her, in its August 30, 2005 letter, that it would only consider her schedule award claim if the Office's previous termination decision was overturned by exercise of appellant's appeal rights. She then pursued the reconsideration process that was included in her appeal rights. Section 8128 of the Act, covering reconsiderations, provides that the Office may review an award for or against payment at any time.[10] In this case, however, there has been no award for or against the claimed schedule award. The Board notes that the Office's May 22, 2001 decision did not adjudicate entitlement to a schedule award. Only after the Office issues a decision on appellant's claim for a schedule award would the issue of a schedule award determination be in posture for a possible reconsideration request.[11] However, the Board notes that appellant has filed a claim for a schedule award that has not been adjudicated. The Office, upon return of the case record, should adjudicate the schedule award claim.[12]

CONCLUSION

The Board finds that the reconsideration request was not timely filed and that clear evidence of error was not established. However, appellant has filed a claim for a schedule award, for which appropriate development and decision is warranted.

[9] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[10] 5 U.S.C. § 8128(a). *See* 20 C.F.R. § 10.605.

[11] *See id*.

[12] Proceedings under the Act are not adversarial in nature. The Office shares responsibility in the development of the evidence and has an obligation to see that justice is done. *William B. Webb*, 56 ECAB ___ (Docket No. 04-1413, issued November 23, 2004).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated November 1, 2005 is affirmed with regard to denial of the reconsideration request and the case is returned for adjudication of appellant's claim for a schedule award.

Issued: July 24, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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