

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

GINA D. MITCHELL, Appellant)	
)	
and)	Docket No. 06-614
)	Issued: July 25, 2006
)	
U.S. POSTAL SERVICE, POST OFFICE,)	
Bluegrass Station, Lexington, KY, Employer)	
)	

Appearances:
Gina D. Mitchell, *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 17, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated November 14 and 15, 2005 which denied her reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the most recent Office merit decisions of November 17, 1999 and June 29, 2000 and the filing of this appeal, 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 on appeal is whether the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

This is the second appeal in the present case. By decision dated April 21, 2003, the Board affirmed the decision of the Office dated November 19, 2001 which denied appellant's

request for a merit review on the grounds that she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new information not previously considered by the Office.¹ The facts and circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.²

In an October 28, 2003 letter to her representative, appellant requested additional compensation, a schedule award and job placement. In a letter dated June 13, 2005, she requested that the Office reopen her case. In a letter dated September 16, 2005, the Office notified appellant that her case had been closed since 2001. The Office further advised appellant of the procedure for filing a recurrence of disability claim.

By letter dated October 25, 2005, appellant requested reconsideration and submitted additional evidence. She indicated that she was submitting all the evidence concerning the extension for rescheduling of vocational rehabilitation, reports from Dr. Paul V. Brooks, a Board-certified physiatrist, correspondence from the Office to Dr. Brooks regarding her schedule award and a report from Dr. M.I. Malik, a Board-certified orthopedic surgeon, and Office referral physician. Appellant submitted a letter from a vocational rehabilitation counselor, Tina Stambaugh, dated January 5, 1999, indicating that she failed to attend a scheduled vocational rehabilitation evaluation and the Office was granting appellant an extension to reschedule the appointment. Also submitted were reports from Dr. Brooks dated January 8 and February 9, 1999, who noted that she sustained a 17 percent whole person impairment. Appellant submitted a letter dated March 1, 1999, from the Office to Dr. Brooks requesting that he provide an impairment rating to the affected body part rather than to the whole person. Also submitted was a report from Dr. Malik dated February 10, 2000, who noted that appellant sustained a 30 percent impairment of the right upper extremity or a 18 percent impairment to the body.

By decision dated November 14, 2005, the Office denied appellant's application for reconsideration of the decision dated November 17, 1999, on the grounds that the request was not timely and that she did not present clear evidence of error by the Office.

¹ The Office accepted appellant's claim for right shoulder sprain and right rotator cuff tear. In a decision dated March 15, 1999, the Office reduced appellant's compensation benefits to zero on the grounds that she failed to cooperate with vocational rehabilitation. This decision was affirmed by an Office hearing representative in a decision dated November 17, 1999. In a decision dated June 29, 2000, the Office granted appellant a schedule award for 17 percent impairment of the right arm. The period of the award was from February 10, 2000 to February 15, 2001.

² Docket No. 02-852 (issued April 21, 2003). The Board had previously dismissed the appeal for lack of jurisdiction on April 26, 2002 but, on December 5, 2002, the Board granted appellant's petition for reconsideration and reinstated her appeal.

By decision dated November 15, 2005, the Office denied appellant's application for reconsideration of the decision dated June 29, 2000, granting her a schedule award on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."³

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁴

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁵

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁶

Evidence that 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.⁸ This entails a

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁵ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁶ *Annie L. Billingsley*, *supra* note 4.

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.¹⁰

ANALYSIS

In its November 14, 2005 decision, the Office properly determined that appellant failed to file a timely application for review. She requested reconsideration of the reduction of her compensation in her October 25, 2005 letter. The Office rendered its most recent merit decision on November 17, 1999 which affirmed the reduction of her compensation benefits to zero on the grounds that she failed to cooperate with vocational rehabilitation. Thus, the reconsideration request was more than one year after November 17, 1999. Accordingly, appellant's request for reconsideration was not timely filed.

The Board has reviewed the evidence submitted with appellant's untimely reconsideration request and concludes that she has not established clear evidence of error on the part of the Office in its most recent merit decision.

Appellant submitted a letter from a vocational rehabilitation counselor, Ms. Stambaugh, dated January 5, 1999, indicating that appellant failed to attend a scheduled vocational rehabilitation evaluation and the Office was granting appellant an extension to reschedule the appointment. However, this evidence is insufficient to raise a substantial question as to the correctness of the Office's decision as this letter does not sufficiently address the underlying deficiency in the claim -- appellant's failure to cooperate with vocational rehabilitation, but merely indicates that she was granted an extension to reschedule her vocational rehabilitation evaluation. Also submitted were reports from Dr. Brooks and Dr. Malik pertaining to appellant's claim for a schedule award. However, these reports are irrelevant to the Office's reduction of her compensation due to noncooperation with vocational rehabilitation. The Board finds that this evidence is insufficient to raise a substantial question as to the correctness of the Office's decision and does not establish that the reduction of appellant's compensation to zero based on her failure to cooperate with vocational rehabilitation was improper.

The Board, therefore, finds that these records are insufficient to raise a substantial question as to the correctness of the Office's merit decision and the Office properly denied appellant's reconsideration request.

With regard to the Office's November 15, 2005 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on June 29, 2000 which granted her a schedule award for 17 percent impairment of the arm. Appellant requested reconsideration on October 25, 2005 which was more than one

⁹ *Id.*

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

year after June 29, 2000. Accordingly, appellant's request for reconsideration was not timely filed.¹¹

The Board has reviewed the evidence submitted with appellant's untimely reconsideration request and concludes that she has not established clear evidence of error on the part of the Office in its most recent merit decision.

Ms. Stambaugh's letter, dated January 5, 1999, regarding vocational rehabilitation is irrelevant to the Office's schedule award decision in this case. The Board finds that this evidence is insufficient to raise a substantial question as to the correctness of the Office's decision and does not establish that the schedule award granted was improper. Appellant submitted reports from Dr. Brooks dated January 8 and February 9, 1999, who noted that she sustained a 17 percent whole person impairment. She also submitted a letter dated March 1, 1999, from the Office to Dr. Brooks and the Office requested that he provide an impairment rating to the affected body part rather than to the whole person. However, this evidence is insufficient to raise a substantial question as to the correctness of the Office's schedule award decision, rather it supports the June 29, 2000 Office decision which granted appellant a 17 percent impairment of the right upper extremity. She submitted a report from Dr. Malik dated February 10, 2000, who noted that appellant sustained a 30 percent impairment of the right upper extremity or 18 percent whole body impairment. However, he failed to reference the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*) in his report. Dr. Malik did not reveal how his calculations for the rating including the percentage of impairment of the upper extremities using the A.M.A., *Guides*. The Board has determined that a medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value.¹² Moreover, the Office previously considered this report prior to issuing its June 29, 2000 schedule award. Appellant did not explain how this evidence was positive, precise and explicit in manifesting on its face that the Office committed an error. It is not apparent how resubmission of evidence previously considered is of sufficient probative value to raise a substantial question as to the correctness of the Office's decision. Therefore, this report does not establish clear evidence of error.

The Board, therefore, finds that these records are insufficient to raise a substantial question as to the correctness of the Office's merit decision and the Office properly denied appellant's reconsideration request.

¹¹ To the extent that appellant's June 13, 2005 letter, requested that the claim be "reopened," may be considered a reconsideration request, this was also untimely as it was more than a year after issuance of both the Office's November 17, 1999 and June 29, 2000 decisions.

¹² See *Paul R. Evans, Jr.*, 44 ECAB 646 (1993) (an attending physician's report is of little probative value where the A.M.A., *Guides* were not properly followed); *John Constantin*, 39 ECAB 1090 (1988) (medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

CONCLUSION

The Office properly determined that appellant's request for reconsideration dated October 25, 2005 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 15 and 14, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 25, 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