United States Department of Labor
Employees' Compensation Appeals Board

DELORIS F. BERRY, Appellant	)	
and	)	**Docket No. 06-885**
	)	**Issued: July 25, 2006**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, College Park, GA, Employer	)	

Appearances:
Deloris F. Berry, 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 March 8, 2006 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated January 10, 2006, denying 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 most recent merit schedule award decision of November 6, 2003 and the filing of this appeal, the Board lacks jurisdiction to review the merits of that claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the January 10, 2006 decision.

ISSUE

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

FACTUAL HISTORY

On March 7, 2002 appellant, then a 48-year-old logistics supply specialist, filed a traumatic injury claim alleging that she sustained an injury to her right foot when she slipped down three steps in the performance of duty on that date. She did not stop work.[1] On June 21, 2002 the Office accepted appellant's claim for sprain of the right ankle. She received appropriate compensation and benefits. On January 8, 2003 appellant filed a Form CA-7 claim for a schedule award.

By letter dated March 11, 2003, the Office requested that Dr. William McCarthy, a Board-certified orthopedic surgeon and appellant's treating physician, provide an impairment rating utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (hereinafter, A.M.A., *Guides*) (5th ed. 2001). In a March 25, 2003 report, Dr. McCarthy opined that appellant had reached maximum medical improvement on November 27, 2002 and had a 10 percent impairment of the lower extremity as a result of her injury. On May 15, 2003 the Office medical adviser reviewed Dr. McCarthy's report and opined that he did not present any evidence to suggest a schedule award under the A.M.A., *Guides.*

By letter dated May 19, 2003, the Office advised appellant that her doctor did not present any findings upon which a schedule award could be based. The Office requested that she obtain clarification from her physician and an explanation of impairment pursuant to the fifth edition of the A.M.A., *Guides.*

In a June 2, 2003 report, Dr. McCarthy opined that "[m]y assessment was based on the fact that she still has persistent pain and swelling in the ankle." He noted that the A.M.A., *Guides* were "just a guide and not an absolute for determining the impairment." Dr. McCarthy opined that the impairment was given for the persistent pain and swelling in the ankle.

In an August 21, 2003 report, the Office medical adviser stated that appellant was not entitled to impairment as there was nothing presented by Dr. McCarthy pursuant to the A.M.A., *Guides* to justify his suggested rating.

By decision dated August 27, 2003, the Office denied appellant's claim for a schedule award. She requested reconsideration on October 27, 2003. In support of her request, appellant submitted copies of reports from Dr. McCarthy and noted that her physician did not use the fifth edition of the A.M.A., *Guides,* because his position was that they were just a "guide."

By decision dated November 6, 2003, the Office denied modification of the August 27, 2003 decision. The Office indicated that the evidence of file demonstrated that appellant did not have a ratable impairment.

On June 30, 2004 appellant again requested reconsideration. She enclosed additional medical evidence from Dr. McCarthy that included copies of previous reports, a physical therapy request and chart notes dated June 3 and October 26, 2004 in which he indicated that appellant returned after a long absence, conducted a physical examination and diagnosed recurrent pain

[1] The record reflects that her foot was placed in an air cast; however, she was returned to regular duty.

and swelling in the ankle. Appellant also submitted an undated chart note in which Dr. McCarthy again advised that A.M.A., *Guides* were just a guide and opined that "It is my opinion that because of the persistent pain and swelling in her ankle that was not there prior to her injury that impairment does exist and that is why I gave her the impairment rating that she was given."

In a July 19, 2004 report, Dr. Angus M. McBryde, Jr., a Board-certified orthopedic surgeon, determined that appellant was "[p]ost sprain debilitation, right ankle with no evidence of major neurological impairment, circulatory impairment either on venous side, tarsal tunnel entrapment, reflex sympathetic dystrophy or an anatomic problem."

By decision dated November 22, 2004, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision. The Office determined that the evidence was cumulative and repetitious and insufficient to warrant merit review.

On February 25, 2005 appellant requested reconsideration. She alleged that the medical evidence clearly showed that she had reached maximum medical improvement and had a 10 percent impairment to her ankle. Appellant enclosed copies of previously submitted reports, a physical therapy evaluation and a November 11, 2004 chart note and a January 14, 2005 report from Dr. McCarthy, who noted that appellant was seen for follow up of her ankle and determined that appellant was at maximum medical improvement. He opined that appellant was entitled to 10 percent impairment as a result of the injury.

In a decision dated January 10, 2006, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] 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's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8128(a).

of discretionary authority granted the Office under section 8128(a).[4] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[5]

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.[6]

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 manifest on its face that the Office committed an error. Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. 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.[7] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. 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.[8]

ANALYSIS

In its January 10, 2006 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on

[4] *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[5] 20 C.F.R. § 10.607(a).

[6] 20 C.F.R. § 10.607(b).

[7] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

[8] *Id.*

November 6, 2003. Appellant's February 25, 2005 letter requesting reconsideration was submitted more than one year after the November 6, 2003 merit decision and was, therefore, untimely.[9]

In accordance with internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's most recent merit decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for reconsideration does not raise a substantial question as to the correctness of the Office's most recent merit decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether appellant has shown clear evidence of error in the Office's November 6, 2003 decision which found that appellant was not entitled to a schedule award.

With her February 25, 2005 request for reconsideration, appellant alleged that the medical evidence clearly showed that she had reached maximum medical improvement and that she had 10 percent impairment to her ankle. However, the issue is medical in nature. Her allegation that she believed she was entitled to a schedule award is not relevant to the issue that was decided by the Office. The Board notes that appellant's claim for a schedule award was denied because there was no medical evidence utilizing the A.M.A., *Guides,* which supported a schedule award. The Board cases are clear that, if the attending physician does not properly utilize the A.M.A., *Guides,* his or her opinion is of diminished probative value in establishing the degree of any permanent impairment.[10]

Nothing in appellant's request for reconsideration establishes on its face that she was entitled to a schedule award.

Appellant also provided a copy of a previously submitted report from Dr. McBryde. However, his report is not relevant to the issue of a schedule award as he did not address a schedule award or provide any opinion regarding her entitlement to an award. Therefore, this report is insufficient to establish clear evidence of error.

Appellant also submitted copies of previously submitted reports from Dr. McCarthy along with a new report dated January 14, 2005. However, he failed to utilize the A.M.A., *Guides* to explain his findings. The Board notes that, while Dr. McCarthy reiterated that

[9] Appellant's February 25, 2005 letter was properly considered a request for reconsideration, as she was asserting that the Office's decision finding that she was not entitled to a schedule award was erroneous. She was not asserting that new exposure to employment factors or a progression of an employment-related condition resulted in a greater impairment. *See Candace A. Karkoff*, 56 ECAB ___ (Docket No. 05-677, issued July 13, 2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b (August 2002).

[10] *See Tonya D. Bell*, 43 ECAB 845. *See Thomas P. Gauthier*, 34 ECAB 1060 (1983); *Raymond Montanez*, 31 ECAB 1475 (1980).

appellant was entitled to 10 percent impairment to the ankle, he did not provide findings properly utilizing the A.M.A., *Guides,* explaining how he calculated this impairment. Therefore, his reports are not responsive to the reasons that the Office previously denied appellant's schedule award claim and are insufficient to establish that the Office erred in its decision dated November 6, 2003, which found that appellant was not entitled to a schedule award.

The physical therapy evaluation is not relevant to the issue of whether appellant was entitled to a schedule award and is insufficient to establish clear evidence of error, as physical therapists are not physicians under the Act. Thus, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value.[11] As the issue is medical in nature, this is not relevant to the issue that was decided by the Office.

The evidence submitted on reconsideration does not address appellant's impairment in accordance with A.M.A., *Guides*. It is insufficient to show that the Office's denial of the claim was erroneous or raise a substantial question as to the correctness of the Office's determination that appellant was not entitled to a schedule award.

Office procedures provide that 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 of a miscalculation in a schedule award). Evidence such as a detailed, well rationalized report, which if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.[12]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.[13]

[11] *Jan A. White,* 34 ECAB 515, 518 (1983).

[12] *Annie L. Billingsley,* 50 ECAB 210 (1998).

[13] Appellant, however, retains the right to file a claim for an increased schedule award based on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown,* 51 ECAB 115 (1999).

ORDER

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