United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 06-1393**
	)	**Issued: January 18, 2007**
DEPARTMENT OF THE AIR FORCE, WILFORD HALL MEDICAL CENTER, LACKLAND AIR FORCE BASE, TX, Employer	)	

Appearances:
Appellant, pro se
Miriam D. Ozur, Esq., for the Director

Oral Argument December 20, 2006

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 6, 2006 appellant filed a timely appeal from the April 19, 2006 nonmerit decision of the Office of Workers' Compensation Programs which denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the denial of her request. The Board has no jurisdiction to review the merits of the Office's December 30, 2003 decision denying compensation for wage loss.

ISSUE

The issue is whether the Office properly denied appellant's January 7, 2005 request for reconsideration.

FACTUAL HISTORY

On May 20, 2002 appellant, then a 27-year-old animal caretaker, sustained an injury in the performance of duty when the dog she was holding on a leash jumped up and hit her under the jaw. The Office accepted her claim for jaw contusion.

On October 23, 2002 appellant claimed compensation for disability from October 16 to 17, 2002. On January 11, 2003 the Office denied her claim. On December 30, 2003 it reviewed the merits of appellant's claim for compensation and denied modification of its earlier decision. In the attached statement of appeal rights, the Office notified appellant that she must make a request for reconsideration within one calendar year of the date of that decision.

On January 13, 2004 the Office informed appellant that it had upgraded the accepted condition in her case:

> "Per our telephone conversation this date, I am forwarding a copy of your decision to the address in Pennsylvania that you provided me and also to your Texas address as reflected above.
>
> "As we discussed I have reopened your case for medical care and upgraded your condition to include cervical sprain. You do[,] however[,] have to follow your appeal rights in the decision for your CA-7 compensation claim that is enclosed with your decision."[1]

On January 7, 2005 appellant requested reconsideration on the grounds that the employing establishment did not ensure that all available documentation was complete and submitted to the Office and that the Office did not read her file in its entirety. She enclosed emergency room records from October 11, 2002. Appellant's chief complaint at the time was dizziness. She related that she was on Valium for a workers' compensation injury to her right shoulder, which had made her so somnolent that she could no longer engage in work activities or drive a car. The doctor noted:

> "[Appellant] does have adequate follow-up in the next three working days which I feel is acceptable to excuse the patient from work until that time until a definitive adjustment can be made in terms of her return to work and the medication she will need as they have the full history on exactly what is going on with the work[er's] complications [sic] issue."

The doctor restricted appellant from driving and stated that she should continue to take Valium and recheck with attending physician on October 16, 2002. Appellant also enclosed an October 16, 2002 treatment note from her attending physician, who noted the development of severe neck pain on September 24, 2002 "that was not associated with a new injury." He diagnosed cervical strain, rule out disc tear and restricted her to light duty.

On April 19, 2006 the Office denied appellant's January 7, 2005 request for reconsideration. It found the request untimely and determined that it did not present clear evidence of error: "The basis for this decision is that the medical evidence of record is not sufficient to explain the need for you to be incapacitated for all work beginning October 16, 2002 or how such alleged incapacitation is medically connected to the accepted work injury of May 20, 2002."

[1] On April 28, 2004 appellant claimed compensation for wage loss from November 8 to December 12, 2002. The Office has not issued a final decision on this claim.

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."[2]

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 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[3]

The term "clear evidence of error" is intended to represent a difficult standard.[4] If clear evidence of error has not been presented, the Office should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[5]

ANALYSIS

The Office's December 30, 2003 decision denying compensation for wage loss from October 16 to 17, 2002 stands as the last decision on the merits of appellant's October 23, 2002 claim for compensation. That decision properly notified appellant that she must make any request for reconsideration within one calendar year of the date of that decision. This gave her until December 30, 2004 to file a timely request for reconsideration. Appellant's January 7, 2005 request, the Board finds, is untimely.

Appellant argues that she thought she had one year from January 13, 2004, the date the Office informed her that it had upgraded the accepted condition in her case, but its January 13, 2004 correspondence was not a decision. It was merely an informational letter. In no way did it toll or otherwise extend the one-year period appellant had to request reconsideration of the Office's December 30, 2003 decision. The January 13, 2004 correspondence did not look like a

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607 (1999).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

[5] *Id*. at Chapter 2.1602.3.d(1).

decision.[6] It did not advise appellant that she had one year from January 13, 2004 to request reconsideration. Indeed, it specifically advised that she had to follow the appeal rights enclosed with her December 30, 2003 decision. Appellant, therefore, should have known that she had one year from December 30, 2003 to request reconsideration, not one year from January 13, 2004. Further, an application for reconsideration must be sent within one year "of the date of the Office decision for which review is sought." Appellant did not seek review of the Office's January 13, 2004 letter. She sought review of the denial of compensation for wage loss in October 2002. In other words, she sought review of the Office's December 30, 2003 decision. The one-year period for requesting reconsideration of that decision began on December 30, 2003.

Because appellant's January 7, 2005 request for reconsideration is untimely, the Board must determine whether the request shows clear evidence of error in the Office's December 30, 2003 decision. The Board finds that it does not. Neither the argument appellant presented nor the evidence she submitted shows on its face that the December 30, 2003 decision was erroneous. As the Office explained in its December 30, 2003 decision, appellant has the burden of proof to establish that her accepted condition resulted in disability for work for the specific period claimed. The necessary medical evidence must include findings on examination and the physician's opinion, supported by medical rationale, showing how the accepted injury caused the employee's disability for her particular work. The Office found that appellant failed to submit any rationalized, probative and objective medical evidence to support that her accepted condition had disabled her for all work from October 16 to 17, 2002.

Far from establishing that appellant's May 20, 2002 jaw contusion or cervical sprain disabled her from October 16 to 17, 2002, the emergency room records appellant submitted indicated that she was taking Valium for an injury to her right shoulder, a condition not accepted as work related. The doctor thought it reasonable to excuse appellant from work for the next three working days, but he did relate this disability to what happened on May 20, 2002. To the contrary, he indicated his unfamiliarity with appellant's history and her workers' compensation issue.

Appellant did see her attending physician on October 16, 2002. The doctor noted a history of severe neck pain on September 24, 2002 and diagnosed cervical strain, rule out disc tear, but he did not explain whether or how this was causally related to the May 20, 2002 incident at work. He also did not explain appellant's complaint of dizziness.

The Office correctly found that the medical evidence appellant submitted fails to overcome the deficiencies in her claim for compensation from October 16 to 17, 2002. Because it is not apparent on the face of this evidence that the Office's December 30, 2003 decision was wrong in denying the benefits claimed, the Board finds that appellant's January 7, 2005 request for reconsideration does not show clear evidence of error. It does not meet the appropriate standard for obtaining a merit review of her case. The Board will, therefore, affirm the Office's April 19, 2006 decision denying appellant's request.

[6] 20 C.F.R. § 10.126 (1999) (a decision shall contain findings of fact, a statement of reasons and appeal rights).

CONCLUSION

The Board finds that the Office properly denied appellant's January 7, 2005 request for reconsideration. The request was untimely and failed to show clear evidence of error in the Office's December 30, 2003 decision to deny compensation for wage loss on October 16 and 17, 2002.

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board