United States Department of Labor
Employees' Compensation Appeals Board

C.L., Appellant	)	
and	)	**Docket No. 06-1343**
	)	**Issued: July 2, 2007**
PEACE CORPS, HEALTH SERVICE OFFICE, Washington, DC, Employer	)	

Appearances:
Mark Feedman, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 28, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 11, 2005 and January 30, 2006 nonmerit decisions denying her requests for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's October 19, 2004 decision. Because more than one year has elapsed between the last merit decision and the filing of this appeal on April 28, 2006, the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for further review of the merits of her claim on the grounds that her November 2004 reconsideration request was timely filed but was not accompanied by new and relevant evidence or argument; and

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The record also contains a February 6, 2006 Office decision denying appellant reimbursement for expenses related to modifications of her home intended to accommodate her medical condition, including addition of an elevator and lighting fixtures. Appellant has not appealed this decision to the Board and the matter is not currently before the Board.

(2) whether the Office properly denied appellant's request for further review of the merits of her claim on the grounds that her October 2005 request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On May 1, 1972 appellant, then a 33-year-old volunteer, filed a claim alleging that she sustained an employment-related injury to her left leg. She previously sustained a left leg injury in August 1968 due to a nonwork-related motorcycle accident and asserted that her left leg condition was aggravated in May 1972 due to riding a mule in the Dominican Republic as part of her service with the employing establishment. Appellant claimed that her left femur was fractured on June 2, 1972 when a surgeon attempted to remove hardware which was placed in her left femur after the 1968 accident. The record contains a report of the June 2, 1972 surgery which indicates that the surgeon fractured the base of the neck of the left femur when he attempted to remove a lodged Kuntscher nail.

The Office accepted that appellant sustained a fracture of her left femur, shortening of the left leg, left leg gait abnormality and generalized abnormality of osteoarthritis of the left leg/hip.[2] In an October 2, 1972 decision, the Office determined that appellant was entitled to receive disability compensation based on a pay rate of $174.10 per week, the minimum wage of a GS-7 employee at the time she was terminated on June 18, 1972.[3] Appellant was terminated from the Peace Corps on June 18, 1972 and was reinstated effective May 1, 1973.[4] Her appointment to the Peace Corps ended on March 21, 1975. On May 1, 1979 appellant received a schedule award for a 64 percent permanent impairment of her left leg.[5]

Appellant did not receive disability compensation after her schedule award compensation ceased in late 1981. She later asserted that she was entitled to wage-loss compensation for periods of employment-related disability between 1981 and 1999.[6] Appellant submitted additional medical evidence concerning her condition, including December 6 and 7, 2000 reports of Dr. Paul V. Conescu, an attending Board-certified orthopedic surgeon, and an April 2, 2001 report of Dr. Lyle B. Amer, an attending physician specializing in family practice.

---

[2] Appellant's left leg became progressively shorter over the years. By 1979 her left leg was two centimeters shorter than her right leg.

[3] A Peace Corps volunteer under 22 U.S.C. § 2504, who is not a leader or does not have one or more minor children as defined by the relevant statutes, is entitled to receive the minimum rate of pay at the GS-7 level. 5 U.S.C. § 8142(a), (c). The pay rate for a volunteer is defined as the pay rate in effect on the date following separation, provided that the rate equals or exceeds the pay rate on the date of injury. The pay rate is defined in accordance with 5 U.S.C. § 8142(a), not 5 U.S.C. § 8101(4). 20 C.F.R. § 10.731.

[4] Appellant returned to work on April 21, 1973.

[5] An Office medical adviser had determined that appellant reached maximum medical improvement on June 1, 1978.

[6] The record contains very few records dated between 1979 and 1999. It is unclear whether appellant filed a formal claim for this period of claimed wage loss.

In a November 6, 2001 decision, the Office determined that effective July 1, 1999 appellant's wage-earning capacity was represented by her actual wages as a peer counselor for a nonfederal employer. In another November 6, 2001 decision, the Office determined that appellant had received an improper amount of compensation for the period April 16, 1999 to October 6, 2001 and noted that the compensation check issued on November 3, 2001 was in the proper amount of $1,836.00 every 28 days.

On October 15, 2002 appellant requested reconsideration of her claim. She argued that the Office improperly based her pay rate for disability compensation on the pay she received on May 1, 1972 rather than the pay she received on her last day of work for the employing establishment, March 21, 1975; that she should have received wage-loss compensation after her schedule award compensation ended in late 1981; and that additional conditions should have been included in the list of accepted employment-related injuries.

In a January 2, 2003 decision, the Office determined that it paid appellant an incorrect amount of compensation between June 1, 1978 and December 12, 1981 in connection with the May 1, 1979 schedule award. It found that appellant should have been paid at the 75 percent of pay compensation rate rather than the 66 percent of pay compensation rate because she was married during this period. The Office issued a check in the amount of $5,073.78 to correct this error.

In a January 3, 2003 decision, the Office determined that it had properly paid appellant disability compensation since November 1972 based on a weekly pay rate of $174.10 per week. The Office indicated that $174.10 per week was the appropriate pay rate despite the fact that she was reinstated to the employing establishment in 1973. In a July 25, 2003 decision, the Office modified its November 6, 2001 decision to find that appellant was entitled to additional compensation for wage-earning capacity. The Office determined that the pay rate for loss of wage-earning capacity beginning April 16, 1999 should have been based on a "recurrence" pay rate "which would be established by the pay in effect at the last termination date of March 21, 1975, and should include all applicable cost-of-living increases." The Office stated, "The pay rate used for the payment of schedule award was correctly calculated using the first pay rate, as there was no recurrence of disability between March 1975 and the period in which the impairment assessment was made for schedule award purposes."

On December 31, 2003 appellant requested reconsideration of her claim. She reiterated her earlier arguments regarding her pay rates for Office compensation, claimed periods of disability and inclusion of additionally accepted employment-related conditions. Appellant argued that her pay rate for schedule award compensation should have been based on the pay she received on the date of her maximum medical improvement, June 1, 1978. She alleged that the Office wrongly failed to accept her claim for a 115-degree varus deformity of her left femur neck, hip deformity and fracture of the intertrochanteric section of the left femur. On January 2, 2004 appellant again requested reconsideration and provided additional argument in support of her claim.

In March 17, 2004 decisions, the Office determined that appellant had already received appropriate disability and schedule award compensation. The Office found that appellant had not established entitlement to additional disability compensation because she had not submitted

medical evidence showing that she had employment-related disability for the claimed periods between 1981 and 1999. The Office found that appellant's schedule award compensation had been properly calculated based on her pay as a GS-7 ($9,053.00 per year) on May 1, 1972 (the date of injury) and that appropriate cost-of-living increases were added. It noted that it had considered whether appellant's pay on March 21, 1975 should be used to calculate a "recurrence" pay rate, but indicated that "the current rate of compensation $1,905.00 each 28 days is greater than the amount calculated using the March 21, 1975 monthly pay rate and applying the applicable cost-of-living increases." The Office did not accept any other medical conditions to the list of accepted conditions.

Appellant again requested reconsideration of her claim and submitted an April 28, 2004 report in which Dr. Conescu indicated that her condition had not changed. She continued to have limitations due to her shortened left femur and left hip and knee arthritis.

In an October 19, 2004 decision, the Office denied modification of its prior decisions regarding appellant's claim indicating that the evidence submitted by appellant on reconsideration did not show that she was entitled to any additional compensation. The Office indicated that the April 28, 2004 report of Dr. Conescu did not "address total disability" and showed that appellant's condition had not changed since her prior visit.

In November 22, 2004 and March 14, 2005 letters, appellant argued that the Office had not addressed her December 31, 2003 and January 2, 2004 reconsideration requests within the requisite 90 days.[7] In support of her reconsideration request, appellant submitted copies of previously submitted medical reports, letters from the employing establishment, Office decisions regarding her claim and prior reconsideration request letters, including those dated December 31, 2003 and January 2, 2004. She also submitted letters from congressional representatives and documents concerning her request to be reimbursed for modifications to her home.[8]

By decision dated May 11, 2005, the Office denied appellant's request for further review of the merits of her claim. The Office summarized its prior holdings regarding appellant's claim and determined that her reconsideration request was timely filed. It further found that the evidence submitted by appellant was either repetitious or irrelevant to the issues of her case.

In an October 18, 2005 letter, appellant, through her representative, requested reconsideration of her claim, contending error in appellant's pay rate for schedule award compensation, claimed periods of entitlement to wage-loss compensation, and clarification of her accepted employment injuries. The October 18, 2005 letter was added to the record on October 26, 2005 but the record does not contain the envelope showing when it was mailed by appellant.

[7] When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, the Office should conduct a merit review. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (January 2004). *See Geoma R. Munn*, 50 ECAB 242 (1999); *Debra E. Stoler*, 43 ECAB 561 (1992) (remanding cases for merit review where the Office delayed issuance of reconsideration decisions).

[8] A February 9, 2005 report of Dr. Conescu addressed a study conducted to evaluate the need for modifications to appellant's home, but it did not address her employment-related disability.

Appellant submitted June 20, 2005, January 2 and 11, 2006 documents in which her representative provided further argument regarding the issues discussed in the October 18, 2005 reconsideration letter. She submitted additional medical evidence. In a May 9, 2005 report, Dr. Conescu indicated that appellant was more sedentary than when she was last seen. He recommended a total knee arthroplasty of her left knee. In a July 20, 2005 report, Dr. Amer stated that appellant had a significant varus deformity of her left hip, degenerative joint disease, chronic fatigue and fibromyalgia. The record was also supplemented to include vocational rehabilitation effort reports, letters from the employing establishment and documents concerning her request to have her home modified to accommodate her medical condition.

By decision dated January 30, 2006, the Office denied appellant's request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to establish clear evidence of error. The Office determined that appellant filed her reconsideration request on October 26, 2005, the date her October 18, 2005 letter was received by the Office.[9]

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[10] the Office's regulation provides that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[11] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[12] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[13] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[14]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[15] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is

[9] Appellant submitted additional evidence after the Office's January 30, 2006 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[10] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(2).

[12] 20 C.F.R. § 10.607(a).

[13] 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[14] *William J. Kapfhammer*, 42 ECAB 271 (1990).

[15] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

not required where the legal contention does not have a reasonable color of validity.[16] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[17]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a fracture of her left femur, shortening of the left leg, left leg gait abnormality and generalized abnormality of osteoarthritis of the left leg/hip and paid her disability and schedule award compensation. Appellant raised various issues concerning pay rates for disability and schedule award compensation, periods of disability compensation and inclusion of accepted employment-related conditions. The Office addressed these matters in various decisions, including its March 17 and October 19, 2004 merit decisions. In a May 11, 2005 decision, the Office denied appellant's request for further review of the merits of her claim on the grounds that her November 2004 request was timely filed but was not accompanied by new and relevant evidence or argument.

In her November 22, 2004 and March 14, 2005 reconsideration letters, appellant argued that the Office had not addressed her December 31, 2003 and January 2, 2004 reconsideration requests within the requisite 90 days.[18] While a reopening of a claim may be predicated solely on a legal premise not previously considered, reopening of appellant's claim is not required because her legal contention does not have a reasonable color of validity.[19] Appellant's legal contention does not have such a reasonable color of validity because the Office considered the arguments contained in her December 31, 2003 and January 2, 2004 letters within 90 days when it issued its March 17, 2004 decisions.

In support of her reconsideration request, appellant submitted copies of previously submitted medical reports, letters from the employing establishment, Office decisions regarding her claim and prior reconsideration request letters, including those dated December 31, 2003 and January 2, 2004. The submission of these documents would not require reopening appellant's claim because the Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[20]

Appellant also submitted letters from congressional representatives and documents concerning her request to be reimbursed for modifications to her home. However, these documents are not relevant to the present claim and therefore would not require reopening of her claim for merit review.[21] The letters from congressional representatives merely repeat appellant's assertions regarding her claim and do not have any additional probative force.

[16] *John F. Critz*, 44 ECAB 788, 794 (1993).

[17] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[18] *See supra* note 7.

[19] *See supra* note 16 and accompanying text.

[20] *See supra* note 15 and accompanying text.

[21] *See supra* note 17 and accompanying text

Moreover, appellant's request to be reimbursed for modifications to her home is not the subject of the present appeal.[22]

Appellant has not established that the Office improperly denied her request for further review of the merits of its prior decisions under section 8128(a) of the Act, because the evidence and argument she submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

LEGAL PRECEDENT -- ISSUE 2

As noted above, to be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.[23] The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark, or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used.[24]

The Office may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[25] Office regulations and procedure provide 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(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[26] To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[27] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[28]

---

[22] *See supra* note 1.

[23] 20 C.F.R. § 10.607(a).

[24] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

[25] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[26] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "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 that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

[27] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[28] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

ANALYSIS -- ISSUE 2

In a January 30, 2006 decision, the Office denied appellant's request for further review of the merits of her claim on the grounds that her October 2005 reconsideration request was untimely filed and failed to demonstrate clear evidence of error. The last merit decision of record was the Office's October 19, 2004 decision. Appellant's reconsideration letter dated October 18, 2005 was not added to the record until October 26, 2005 but the envelope bearing the letter was not retained by the Office. Chapter 2.1602.3(b)(1) of the Office's procedure manual provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope. As the Office did not retain the envelope for appellant's October 18, 2005 letter, Office procedures state that, when there is no evidence to establish the mailing date, the date of the letter itself should be used. For this reason, the Board finds that appellant's reconsideration request was filed on October 18, 2005 and therefore constituted a timely reconsideration filed within one year of the Office's October 19, 2004 decision.

The Board will set aside the Office's January 30, 2006 decision denying appellant's reconsideration request as untimely and failing to show clear evidence of error and will remand the case to the Office for the purpose of exercising its discretionary authority under 5 U.S.C. § 8128(a). On remand, the Office shall consider appellant's timely October 2005 reconsideration request, along with any argument or evidence submitted in support thereof, and shall determine whether appellant may obtain review of the merits of her claim under the relevant standards for a timely reconsideration request.[29] After such development as it deems necessary, the Office shall issue an appropriate decision regarding appellant's claim.

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of her claim on the grounds that her timely November 2004 reconsideration request was not accompanied by new and relevant evidence or argument. The Board further finds that the Office improperly denied appellant's request for further review of the merits of her claim on the grounds that her October 2005 request was untimely filed and failed to demonstrate clear evidence of error. The case is remanded to the Office for proper consideration of appellant's timely October 2005 reconsideration request, including any argument or evidence submitted in support thereof.

[29] *See supra* notes 10 through 17 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 11, 2005 decision is affirmed. The Office's January 30, 2006 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: July 2, 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