United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 06-2141**
	)	**Issued: July 5, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Los Angeles, CA, Employer	)	

Appearances:
Appellant, 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 September 19, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 31, 2006 nonmerit decision denying her reconsideration request on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of the Office was its November 13, 2003 decision concerning appellant's wage-earning capacity and pay rate for compensation. Because more than one year has elapsed between the last merit decision and the filing of this appeal on September 19, 2006, the Board lacks jurisdiction to review the merits of this claim.[1]

[1] The record contains a January 10, 2006 decision of the Board finding that the Office properly denied appellant's request for further review of the merits of her claim under 5 U.S.C. § 8128(a). In the absence of further review by the Office on the issue addressed by the decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant did not seek reconsideration of the Board's January 10, 2006 decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

ISSUE

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

FACTUAL HISTORY

On December 17, 1980 appellant, then a 32-year-old injury compensation specialist, filed an occupational disease claim alleging that she sustained an employment-related aggravation of her intestinal condition. The Office accepted that she sustained a temporary aggravation of Crohn's disease. The Office later accepted, in 1984, that appellant sustained severe depression due to employment factors. Appellant last worked for the employing establishment in October 1982 and retired on disability retirement effective March 16, 1983.

In early 2000, appellant began to participate in a new vocational rehabilitation program after failing in prior rehabilitation attempts. The Office received a December 1, 1999 report from her attending clinical psychologist, Dr. Henry Levy, indicating that she could work four hours per day. In November 2000 appellant successfully completed a six-month training program in desktop publishing, which included coursework in computer graphics and business practices. In a report dated June 6, 2002, Dr. Irvin D. Godofsky, an attending Board-certified psychiatrist and neurologist, stated that appellant was capable of working four to six hours per day.

By decision dated July 1, 2002, the Office adjusted appellant's compensation based on its determination that she was capable of performing the constructed position of graphic designer for four hours per day. Appellant's vocational rehabilitation counselor determined that the position, which involved designing art and copy layouts for visual communications media, was reasonably available in her commuting area and paid $15.00 dollars per hour. The Office applied the principles set forth in the *Shadrick* decision to determine the pay rate for appellant's compensation.[2]

In statements dated July 20, September 4 and October 3, 2002, appellant argued that the Office improperly adjusted her compensation based on her ability to perform the constructed position of graphic designer because it did not take into consideration all the residuals of her injury, all significant preexisting impairments and all pertinent nonmedical factors such as her age and prior job experience. She contended that she did not have the necessary vocational skills to work as a graphic artist because her training program was not comprehensive, that employers were only looking for full-time workers with advanced skills to work as graphic designers and that her emotional condition and the physical effects of her Crohn's disease were not adequately considered. Appellant also alleged that the $15.00 per hour rate of pay chosen for the graphic designer position was too high and should have been based on actual wages of $10.00 per hour, that an improper figure was used for the current salary of the position she held when injured and that consideration was not given to the fact that she would have received merit based and step

[2] *See Albert C. Shadrick*, 5 ECAB 376 (1953).

increases in salary if she had not stopped work due to her employment injury. She submitted numerous medical reports and documents regarding her job duties, earnings, past job performance and job search efforts. An Office hearing representative performed a review of the written record and, by decision dated and finalized November 26, 2002, affirmed the July 1, 2002 decision.

By letter dated October 28, 2003, appellant requested reconsideration of her claim and repeated a number of the arguments she had made in her July 20, September 4 and October 3, 2002 statements. She submitted additional evidence in support of her claim, including medical reports, documents concerning entitlement to Medicare benefits, lists of appointments for physical and emotional ailments, as well as more documents regarding her job duties, earnings, past job performance and job search efforts. By decision dated November 13, 2003, the Office reviewed appellant's claim on the merits and affirmed its prior decisions regarding her wage-earning capacity and pay rate for compensation.

By letter dated November 10, 2004, appellant requested reconsideration of her claim. She provided argument which was similar to those she previously made and submitted more documents concerning Medicare benefits, medical appointments, diagnostic testing, job duties, earnings, past job performance and job search efforts. She submitted a November 10, 2004 report of Dr. Alvin Trotter, an attending Board-certified internist. By decision dated January 14, 2005, the Office denied appellant's request for merit review of her claim.

By decision dated January 10, 2006, the Board found that the Office properly denied appellant's request for further review of the merits of her claim under 5 U.S.C. § 8128(a). The Board noted that much of the evidence and argument appellant submitted in connection with her reconsideration request had previously been considered by the Office. The Board found that some of the administrative documents had not previously been submitted by appellant but that they were not relevant to the wage-earning capacity and pay rate issues of the present case. It determined that the report of Dr. Trotter was not relevant to the main issue of the present case because Dr. Trotter did not provide a clear opinion that appellant could not physically perform the constructed position of graphic designer at the time of the Office's wage-earning capacity determination.

In a letter dated April 27, 2006 and received by the Office on May 3, 2006, appellant requested reconsideration of her claim. She argued that the Office had ignored her physical condition when it determined that she could work in the constructed position of graphic designer and claimed that she had been totally disabled since 1982. Appellant submitted the findings of diagnostic testing obtained between February 2005 and March 2006, including reports of magnetic resonance imaging tests, computerized tomography scans and a polysomnograph test. In a report dated March 22, 2006, Dr. Godofsky stated that appellant was psychiatrically capable of working four to six hours per day. He indicated that he would defer to appellant's other physicians regarding the impact of her physical conditions on her ability to work.

In a July 31, 2006 decision, 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 demonstrate clear evidence of error.[3]

LEGAL PRECEDENT

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.[4] 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 Federal Employees' Compensation Act.[5]

The Office, however, 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."[6] 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.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed

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[3] Appellant submitted additional evidence after the Office's July 31, 2006 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[4] 20 C.F.R. § 10.607(a). According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (January 2004).

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

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

[7] 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.

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

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

[10] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

so as to produce a contrary conclusion.[11] 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.[12] 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 decision.[13]

ANALYSIS

In its July 13, 2006 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on May 3, 2006, more than one year after the Office's November 13, 2003 decision and therefore she must demonstrate clear evidence of error on the part of the Office in issuing this decision.[14]

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its November 13, 2003 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error. In connection with her untimely reconsideration request, appellant argued that the Office had ignored her physical condition when it determined that she could perform the constructed position of graphic designer. She claimed that she had been totally disabled since 1982. This argument is not relevant to the main issues of the present case, *i.e.*, whether the Office properly adjusted appellant's compensation in 2002 based on its determination that she was capable of performing the constructed position of graphic designer for four hours per day and whether the Office used a proper pay rate after it made this adjustment. Appellant has presented a medical argument that she was physically unable to perform the graphic designer position but she is not a physician and her opinion is not relevant with respect to this medical question.[15]

Appellant submitted the findings of diagnostic testing obtained between February 2005 and March 2006 and a March 22, 2006 report of Dr. Godofsky, an attending Board-certified psychiatrist and neurologist. These reports are not relevant to the main issues of the present case because they do not provide any opinion that appellant could not perform the graphic designer position at the time her compensation was adjusted in 2002. Dr. Godofsky stated that appellant was psychiatrically capable of working four to six hours per day whereas the graphic designer position only required working four hours per day. Moreover, he indicated that he would defer

[11] *See Leona N. Travis*, *supra* note 9.

[12] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[13] *Leon D. Faidley, Jr.*, *supra* note 5.

[14] The Board notes that the one-year period for requesting reconsideration began on the date of the Office's November 13, 2003 decision and not the date of the Board's January 10, 2006 decision because the Board's decision was not on the merits. *See supra* note 4.

[15] *See Jaya K. Asaramo*, 55 ECAB 200 (2004).

to appellant's other physicians regarding the impact of her physical conditions on her ability to work.[16]

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's November 13, 2003 decision and the Office properly determined that she did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 31, 2006 decision is affirmed.

Issued: July 5, 2007
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

[16] In addition, none of the evidence or argument submitted by appellant addressed the pay rate issue of the present case.