United States Department of Labor
Employees' Compensation Appeals Board

A.H., Appellant	)	
and	)	**Docket No. 07-1331**
	)	**Issued: October 1, 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:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 18, 2007 appellant filed a timely appeal of a February 5, 2007 decision of the Office of Workers' Compensation Programs finding that her request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal. Since the last merit decision was issued February 5, 2004, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant's application for reconsideration was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

This case was before the Board on a prior appeal. By decision dated October 26, 2005, the Board affirmed a March 31, 2005 Office decision finding that appellant's application for

reconsideration did not warrant reopening the claim for merit review.[1] The history of the case is provided in the Board's prior decision and is incorporated herein by reference.

By letter dated September 23, 2006, appellant requested reconsideration of her claim. She argued that her right of due process had been denied and her claim adjudicated on an erroneous and visibly altered second opinion examination. Appellant submitted a January 29, 2004 decision from a different claim and argued that it negated the findings in the decisions in this case. She also argued that her cerebral aneurysm and emotional stress were related to performing job duties outside her work restrictions job duties and that her claim should have been scrutinized more carefully.

In a decision dated February 5, 2007, the Office determined that appellant's application for reconsideration was untimely filed and failed to show clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.[2] The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[3]

Section 8128(a) of the Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[8] The Board has found that the imposition of this one-year limitation does

[1] Docket No. 05-1461 (issued October 26, 2005).

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.605 (1999).

[4] 5 U.S.C. § 8128(a).

[5] *Leon D. Faidley, Jr.,* 41 ECAB 104 (1989).

[6] 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 his own motion or on application."

[7] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[8] 20 C.F.R. § 10.607(a).

not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[9]

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[10] In accordance with this holding the Office has stated in its procedure manual that it 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.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17] 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.[18]

ANALYSIS

The last decision on the merits of this claim was the Office hearing representative's decision dated February 5, 2004. Appellant's letter requesting reconsideration was dated

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

[10] *Leonard E. Redway*, 28 ECAB 242 (1977).

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

[12] *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

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

[15] *See Leona N. Travis, supra* note 13.

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

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

[18] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

September 23, 2006. Since this is more than one year after the last merit decision, appellant's application for reconsideration is untimely.

An untimely application for reconsideration, as noted above, must demonstrate clear evidence of error by the Office in order to require reopening the claim for merit review. The September 23, 2006 letter argued that appellant had been denied due process in the adjudication of her claim. Appellant had raised this argument in her December 31, 2004 application for reconsideration and the Board considered the argument in its prior decision. With respect to the argument regarding an erroneous second opinion examination, she provided no relevant information or supporting evidence. There is no evidence that appellant was referred for a second opinion examination pursuant to this claim. She submitted a January 29, 2004 decision from another claim finding that she continued to have residuals of a sacroiliac strain and was entitled to medical benefits for the accepted condition. The decision does not negate the findings made in this case that appellant did not establish a compensable work factor regarding her claim of stress and resulting cerebral aneurysm. It does not establish clear evidence of error by the Office.

Appellant also reiterated her belief that her stress, high blood pressure and cerebral aneurysm were the result of performing assigned duties outside her work restrictions. She did not submit any probative evidence in support of her allegation. The Office considered the issue and the relevant evidence in its February 20, 2003 and February 5, 2004 decisions. Appellant has not established clear evidence of error by the Office in this regard.

The Board accordingly finds that appellant did not establish clear evidence of error by the Office with respect to her claim. Since appellant did not establish clear evidence of error, the Office properly determined that she was not entitled to merit review of her claim.

CONCLUSION

The September 23, 2006 application for reconsideration was untimely and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 5, 2007 is affirmed.

Issued: October 1, 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