United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 07-1287**
	)	**Issued: September 20, 2007**
SOCIAL SECURITY ADMINISTRATION, Los Angeles, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 10, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 4, 2007 nonmerit decision denying her request for further merit review of her claim. 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 record was the Office's December 6, 2005 decision. Because more than one year has elapsed between the last merit decision and the filing of this appeal on April 10, 2007, the Board lacks jurisdiction to review the merits of this claim.

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 July 20, 2005 appellant, then a 34-year-old teleservice representative, filed a traumatic injury claim alleging that on July 18, 2005 she sustained an injury to her back, neck,

shoulder, head, left leg, wrist and arms when she slipped on construction dust while exiting the elevator. A witness statement was included in her claim. In support of her claim, medical documentation was submitted including a visit note and an attending physician's report from Dr. Alejandro B. Platon, a chiropractic physician, both dated July 19, 2005. Dr. Platon diagnosed lumbosacral neuritis, cervalgia and sprain of the left shoulder.

On October 12, 2005 the Office requested additional medical information in support of appellant's claim. On October 26, 2005 the Office informed appellant that chiropractors are deemed physicians only to the extent that the treatment is for a subluxation demonstrated by an x-ray. Her chiropractor was not considered a physician as he did not diagnose subluxation and the medical evidence she submitted had no value to establish her claim.

On December 6, 2005 the Office denied appellant's claim on the grounds that there was no medical evidence of a diagnosis connected to the accepted accident.

On December 18, 2006 appellant requested reconsideration arguing that she did not receive the denial letter due to a change in address. She also submitted a December 15, 2006 letter from Dr. Platon in which he clarified his opinion that appellant's condition was caused by an employment activity.

On January 4, 2007 the Office denied reconsideration on the grounds that the request was made more than one year after the last merit decision and did not present clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[1] The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[2] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[3] The Office procedure manual states 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, if the claimant's application for review shows clear evidence of error on the part of the Office.[4] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[5]

[1] 5 U.S.C. §§ 8101-8193

[2] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[3] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[4] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: [The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b).

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

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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 which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] 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. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinions 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.[7] 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

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date following the original Office decision.[9] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[10] In this case, appellant's December 18, 2006 letter requesting reconsideration was submitted more than one year after the last merit decision of record, December 6, 2005, and, thus, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim for compensation.[11]

Appellant contends that her request was a few days late because she did not receive the denial letter due to a change in address. The December 6, 2005 decision was sent to appellant's address of record and there is no evidence in the record that appellant's address had changed. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual.[12] The Office therefore properly found that appellant's request for reconsideration was untimely filed.

[6] *Leon J. Modrowski*, 55 ECAB 196 (2004); *Dorletha Coleman*, 55 ECAB 143 (2003).

[7] *Id*.

[8] *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

[9] *See Angel M. Lebron, Jr.*, 51 ECAB 488, 490 (2000).

[10] *Veletta C. Coleman*, *supra* note 3.

[11] 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB 241 (2004).

[12] *Joseph R. Giallanza*, 55 ECAB 186 (2003).

Appellant submitted a December 15, 2006 letter from Dr. Platon in which he clarified his opinion that appellant was injured due to her employment. Dr. Platon is a chiropractor. As the Office informed appellant on October 26, 2005 a chiropractor is considered a physician under the Act only when a spinal subluxation is diagnosed and supported by an x-ray. As Dr. Platon did not treat appellant for a subluxation he is not considered a physician under the Act. Therefore, his report does not constitute probative medical evidence on the underlying issue in this claim or establish clear evidence of error in the Office's denial of appellant's claim.

Appellant has not established error by the Office in denying her claim on the grounds that her claim was untimely filed. To establish clear evidence of error, the evidence must be of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the merits of the Office's decision.[13] As the evidence submitted has no probative value and appellant's argument was unsubstantiated she has failed to meet this standard and therefore the Office properly denied merit review.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration on the merits on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 4, 2007 is affirmed.

Issued: September 20, 2007
Washington, DC

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

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

[13] *See Veletta C. Coleman, supra* note 3