United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 08-1646**
	)	**Issued: December 12, 2008**
DEPARTMENT OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL, Atlanta, GA, Employer	)	

Appearances:
Darryl A. Hines, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 22, 2008 appellant filed an appeal of a nonmerit decision of the Office of Workers' Compensation Programs, dated February 21, 2008, denying her request for reconsideration as it was untimely and did not establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision of the Office dated June 2, 2006 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On February 21, 2006 appellant, then a 48-year-old public health adviser, filed an occupational disease claim, CA-2 form, alleging "toxic reaction to occupational exposure to

chemical irritant contained in paint." She noted that she first realized the condition was causally related to her federal employment on September 12, 2005. In support of her claim, appellant submitted an undated letter from Dr. Elise C. Morris, a specialist in allergy and immunology, stating that appellant's symptoms were "suggestive" of a hypersensitivity reaction or toxic reaction due to chemicals in the workplace. Dr. Morris stated that she had received a letter from a Mark Wilson, an industrial hygienist, stating that he had sampled the air in appellant's office and did not detect any volatile organic compounds.

By letter dated April 20, 2006, the Office notified appellant that the evidence submitted was insufficient because it lacked a conclusive diagnosis from a physician. In response to this letter, appellant submitted additional statements from herself, medical records from Peachtree Allergy and Asthma Clinic, a Form CA-20 and duplicate CA-2 forms. In a report dated March 2, 2006, Dr. Theodore Lee, Board-certified in allergy and immunology, stated that appellant's diagnosis as: episodic bronchial constriction associated with vasomotor rhinitis. In a form report dated April 27, 2006, Dr. Lee stated that appellant's diagnosis was: bronchial hyperresponsiveness and vasomotor rhinitis and indicated by checkmark that this condition was causally related to her employment.

By decision dated June 2, 2006, the Office denied appellant's claim because the medical evidence submitted did not demonstrate that the alleged condition was related to employment-related events as required by the Federal Employees' Compensation Act.

By letter dated June 2, 2006, appellant requested an oral hearing before the Branch of Hearings and Review. An oral hearing was granted and scheduled for November 30, 2006. Appellant failed to appear. By letter dated January 9, 2007, the Office informed appellant that as she had not contacted the Office prior to or subsequent to the scheduled hearing to explain her failure to appear, therefore, because of her unexplained failure to appear at the scheduled hearing, the Branch of Hearings and Review deemed her to have abandoned her request for a hearing.

By letter dated January 7, 2008, appellant requested review of her claim through Senator Saxby Chambliss' office. She submitted a statement dated August 16, 2007 from Dr. Susan Tanner, her treating physician, concerning her condition and prognosis. Dr. Tanner diagnosed appellant as suffering from severe allergic and autonomic nervous system dysfunction when exposed to certain chemical compounds, particularly volatile aromatics, including, cleaning products, gasoline and solvents. She concluded that appellant was unable to complete "normal daily activities" without assistance including cleaning and cooking, interacting with friends and family. Dr. Tanner explained that appellant must maintain a dust and irritant free living space, limit exposure to fragrances, avoid fumes from plastics, rubber, paint, formaldehyde, and exposure to extreme weather conditions. She stated that appellant's prognosis was guarded and she should avoid exposure to irritants whenever possible. Appellant also submitted a June 2007 report from Dr. Diane Bennett-Johnson, an internist, who noted that over the past year appellant had been having symptoms consistent with multiple chemical sensitivity illness. Dr. Bennett-Johnson recommended that appellant's employment be changed to avoid chemical triggers. Appellant also submitted a memorandum dated November 27, 2007 from an employing establishment physician, Dr. Patricia M. Simone, who concluded that appellant was no longer qualified to perform the essential duties of her position.

By decision dated February 21, 2008, the Office found that appellant's request for review was untimely filed. It performed a limited review of the evidence submitted to ascertain whether the evidence submitted demonstrated clear error on the part of the Office at the time of the original decision. The Office concluded that the evidence submitted did not manifest on its face that it committed clear error and denied appellant's request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of the Act does not entitle a claimant to a review of an Office decision as a matter of right.[1] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[2] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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.[3] If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date.[4] In the absence of this evidence, the Office procedures state that the date of the reconsideration request letter should be used to determine timeliness.[5] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[6]

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows clear evidence of error on the part of the Office.[8]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and

---

[1] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[2] *Id*. at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[3] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[4] 20 C.F.R. §§ 10.607; 10.608(b).

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

[6] 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 1 at 769; *Jesus D. Sanchez*, *supra* note 2 at 967.

[7] *Rex L. Weaver*, 44 ECAB 535 (1993).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

must be manifested on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office s decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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's decision.[14] The Board makes an independent determination of whether an appellant 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.[15]

ANALYSIS

The Office correctly determined that appellant's request for reconsideration was untimely filed. The last merit decision in the case was dated June 2, 2006. The one-year time limitation began running June 3, 2006. Therefore, because appellant's request for reconsideration was submitted January 7, 2008, after the one-year time limit had expired, the request was untimely.

But even when an application for review is untimely, the Office will undertake a limited review to determine whether the application presents clear evidence that the final merit decision was in error. Office procedures provide that 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.

The Office denied appellant's occupational disease claim on the grounds that she failed to submit medical opinion evidence establishing a causal relationship between her diagnosed autonomic nervous system dysfunction and the duties of her federal position as a public health adviser. Appellant submitted reports prepared during the year 2007 from Drs. Tanner, Bennett-Johnson and Simone in support of her request for reconsideration. These letters indicate that appellant has been diagnosed with severe allergic and autonomic nervous system dysfunction and that her medical condition deteriorated in 2007. The evidence submitted in support of

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

[11] *See Jesus D. Sanchez, supra* note 2.

[12] *See Leona N. Travis, supra* note 10.

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

[14] *See Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[15] *Gregory Griffin, supra* note 3.

appellant's untimely request for reconsideration also supports that appellant was found to be "unfit" for duty by the employing establishment because she could no longer travel. The evidence submitted by appellant however is not sufficient to establish clear evidence of error on the part of the Office in denying appellant's claim for lack of rationalized medical evidence supporting causal relationship between the medical diagnosis and appellant's employment.

The new evidence submitted in support of the untimely request for reconsideration is not 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. While the evidence does offer a diagnosis of appellant's condition, it lacks the requisite detailed discussion of appellant's employment work duties and any semblance of medical reasoning in support of a finding of causal relationship between appellant's diagnosed condition and factors of her federal employment.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration request dated January 7, 2008. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on February 21, 2008.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 12, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board