United States Department of Labor
Employees' Compensation Appeals Board

M.Y., Appellant	)	
and	)	**Docket No. 07-2202**
	)	**Issued: February 12, 2008**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Washington, DC, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 30, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 6, 2007 nonmerit decision denying her request for further review on the grounds that it was untimely filed and did not establish 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 record was the Office's June 11, 2005 decision. Because more than one year has elapsed between the last merit decision and the filing of this appeal on August 30, 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 January 12, 2005 appellant, then a 49-year-old special use park coordinator, filed a traumatic injury claim alleging that on December 13, 2004 she was rear-ended while a passenger in a government vehicle and sustained a left shoulder condition and a headache.

In an April 25, 2005 letter, the Office informed appellant that the evidence was insufficient to support her claim and requested additional information.

On June 1, 2005 the Office denied appellant's claim on the grounds that evidence was insufficient to establish that she sustained an injury in the performance of duty as there was no diagnosed condition but did accept that the claimed event occurred.

In a June 12, 2005 letter to the Office, appellant explained the actions she took subsequent to the accident. Additional emergency room records dated December 13, 2004 were submitted. An unidentified physician noted that appellant had motor vehicle collision with left shoulder pain and headache.

On March 8, 2007 appellant requested reconsideration. In a separate March 8, 2007 letter, the employing establishment stated that neither they nor appellant received a copy of the June 1, 2005 decision.

In a June 6, 2007 nonmerit decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, 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 procedures state 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

[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).

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]

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

Appellant claims that she never received the June 1, 2005 decision. She did not assert that her address changed or that the address used by the Office was otherwise incorrect. The address used by the Office in its June 1, 2005 decision is the same as the address of record and the same as the one appellant used in her July 12, 2005 letter. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.[9] Other than the employer's statement that the June 1, 2005 decision had not been received, appellant submitted no evidence substantiating why the presumption would not apply. Whether or not the employer received the decision on appellant's claim is not relevant to the issue of whether appellant's decision letter was properly addressed and mailed in the due course of business. Therefore the Board finds that appellant is presumed to have received the June 1, 2005 decision.

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[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).

[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] *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

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 of the original Office decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[10] In this case, appellant's March 8, 2007 letter requesting reconsideration was submitted more than one year after the last merit decision of record, June 1, 2005, and thus, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her traumatic injury claim.[11]

Under the clear evidence of error standard it is not enough that evidence could be construed to provide a contrary conclusion but must be of sufficient probative value to shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of the merits of the Office's decision.[12] The weight of the evidence has not been shifted in favor of appellant. On its face the evidence submitted does not establish that appellant sustained a traumatic injury in the performance of duty. The Office accepted that the incident occurred as alleged but found that the medical evidence did not establish that appellant had a diagnosed condition as a result of the incident. In support of her untimely request for reconsideration, appellant submitted an emergency room note wherein a physician stated that appellant had a headache and left shoulder pain. However, a physician's mere diagnosis of pain does not constitute a basis for payment of compensation,[13] and is clearly of insufficient probative value to shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of the merits of the Office's decision. Therefore the Office did not abuse its discretion when it found that appellant had not established clear evidence of error.

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error.

[10] *Supra* note 3.

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

[12] *See supra* note 3.

[13] *Robert Broome*, 55 ECAB 493 (2004).

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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