United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 07-2415**
	)	**Issued: March 24, 2008**
DEPARTEMENT OF COMMERCE, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, NATIONAL WEATHER SERVICE, Sterling, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 26, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated July 12, 2007 which denied her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated June 9, 2006 to the filing of this appeal on September 26, 2007, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

Whether the Office properly refused to reopen appellant's claim for reconsideration of the merits of her claim on the grounds that it was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

This case has previously been on appeal before the Board. On March 1, 2001 appellant, then a 53-year-old hydrometeorological technician, filed a traumatic injury claim alleging that she initially injured her low back on February 7, 2000. She stated that she was relocating weather equipment including a Cotton Region Shelter and experienced localized pain in her low back. Appellant alleged that she sustained a second injury on June 30, 2000 again attempting to move a Cotton Region Shelter. The employing establishment disputed her claim and alleged that the injuries could not have occurred on the dates stated. On March 20, 2001 the Office informed appellant that her claim would be processed as an occupational disease claim. The Office denied her claim by decision dated August 2, 2001 finding that she failed to submit the necessary medical opinion evidence to establish a causal relationship between the employment duties implicated and her diagnosed condition. By decision dated November 7, 2002,[1] the Board reviewed the Office's August 2, 2001 decision and found that the medical evidence submitted by appellant in support of her claim was not sufficient to meet her burden of proof. The Board found that she had not submitted the necessary rationalized medical opinion evidence to establish a causal relationship between her implicated employment duties and her diagnosed back condition. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Appellant requested reconsideration on November 14, 2003 and submitted an additional report from Dr. Norman L. Mauroner, Jr., a Board-certified internist. In a May 14, 2001 report, Dr. Mauroner described appellant's job duty of moving a heavy weather station. He stated that appellant's diagnosed disc herniation at L5-S1 was compatible with physical strain from heavy lifting. Dr. Mauroner opined that appellant's injury was job related and stated, "I feel it could very easily be causally related." Appellant also resubmitted Dr. Mauroner's February 28, 2001 report previously reviewed by the Office and the Board. In a report dated October 29, 2003, Dr. Mauroner provided a detailed history of injury including rising from a couch on February 2, 2001. He opined that appellant's intense pain on February 2, 2001 was due to cumulative trauma from the employment activities of moving cotton shelters. Dr. Mauroner stated that appellant's back condition was due to her employment lifting and required light duty. The Office denied appellant's claim by decision dated November 28, 2003 finding that she failed to submit sufficient rationalized medical opinion evidence to meet her burden of proof.

Appellant requested reconsideration on May 14, 2004 and submitted additional medical evidence. On March 10, 2004 Dr. John W. Ellis, a Board-certified family practitioner of professorial rank, noted appellant's history of injury and diagnosed muscle strain of the lumbosacral spine, disc derangement at L2-3 and L5-S1 and bilateral lower extremity radicular nerve root impingement as well as psychological overlay with chronic pain and depression. He stated, "In my opinion, this injury and impairment arose out of and in the course of employee's employment with the above employer and is causally connected to the above-described accident." Dr. Ellis found that appellant was totally disabled and provided an impairment rating for schedule award purposes. Dr. Mauroner completed a report on January 26, 2004 and noted appellant's history of injury. He described her current condition and opined that her back

[1] Docket No. 01-2071 (issued November 7, 2002).

condition resulted from her accepted employment activities. Dr. Mauroner stated that appellant's current work restrictions and back condition was due to lifting in the course of her employment. By decision dated June 1, 2004, the Office reviewed the merits of appellant's claim and denied modification of its prior decisions finding that she failed to submit sufficient rationalized medical opinion evidence.

Appellant, through her attorney requested reconsideration on May 16, 2005. He alleged that Dr. Mauroner treated appellant beginning March 15, 2000 and not January 2001 as implied by the June 1, 2004 Office decision. Appellant's attorney stated that appellant saw Dr. Mauroner within a month of the alleged February 7, 2000 lifting injury and was under treatment at the time of the June 30, 2000 injury. He alleged that medical treatment was given within a reasonable time after the work-related incident. Appellant also submitted a report dated December 21, 2004 from Donald Soeken, a licensed clinical social worker, disagreeing with the Office's processing of appellant's claim and decisions issued. By decision dated June 9, 2006, the Office reviewed appellant's claim on the merits and found that appellant had not submitted the necessary detailed and supportive medical evidence in support of her occupational disease claim.

Appellant completed a form dated "June 2007" and indicated with a checkmark that she wished reconsideration of a "June 2006" decision. This form was received by the Office on June 28, 2007 and there is no envelope associated with this document in the record before the Board. Appellant also submitted a letter with the date of "June 2007" alleging that the employing establishment falsified documentation pertaining to her alleged injuries of February 7 and June 30, 2000. By decision dated July 12, 2007, the Office found that appellant's request for reconsideration was untimely as there was no specific date and as it was not received until June 28, 2007. The Office further found that appellant did not present clear evidence of error in the Office's most recent merit decision on June 9, 2006.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] 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.[5] 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,

[2] 5 U.S.C. § 8128(a).

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

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

[5] 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).

and affidavits, may be used to establish the mailing date.[6] In the absence of this evidence, the Office procedures state that date of the reconsideration request letter should be used to determine timeliness.[7] 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).[8]

The Office's regulations require that an application for reconsideration must be submitted in writing[9] and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."[10] The regulations provide:

> "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face that such decision was erroneous."[11]

In those cases where requests for reconsideration are not timely filed, 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 in accordance with section 10.607(b) of its regulations.[12]

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

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[6] 20 C.F.R. §§ 10.607; 10.608(b).

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

[8] 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

[9] 20 C.F.R. § 10.606.

[10] 20 C.F.R. § 10.605.

[11] 20 C.F.R. § 10.607(b).

[12] *Thankamma Mathews*, *supra* note 3 at 770.

[13] *Id.*

[14] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[15] *Jesus D. Sanchez*, *supra* note 4 at 968.

[16] *Leona N. Travis*, *supra* note 14.

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

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.[18] The Board must make 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.[19]

ANALYSIS

The Board finds that appellant's request for reconsideration was untimely. As noted, above, a request for reconsideration must be filed within one year from the date of the Office's decision for which review is sought. The one-year time limitation began to run the day following the issuance of the last merit decision, dated June 9, 2006.[20] The regulations provide that, if the request is submitted by mail, the application will be deemed timely if postmarked within the time period allowed.[21] The Office received appellant's June 2007 request for reconsideration on June 28, 2007. The record does not include a copy of the envelope in which appellant's request was delivered or any other evidence of mail or receipt that would establish a timely filing. As the request was not fully dated and the record is devoid of any additional information that would render appellant's request timely, the Board finds that the Office properly relied on the June 28, 2007 date of receipt, rendering the request untimely.[22] Consequently, to have her claim reopened on the merits, appellant must show clear evidence of error by the Office in the June 9, 2006 decision.

The Board finds that appellant did not present evidence establishing that the Office's decision was erroneous or raising a substantial question as to the correctness of the Office's decision. The Board finds that appellant's allegation that the employing establishment falsified factual documentation pertaining to her alleged injuries of February 7 and June 30, 2000, is not relevant to the issue for which the Office denied appellant's claim. The Office has accepted as factual appellant's statements regarding the events of February 7 and June 30, 2000 which she felt caused or contributed to her back condition. The Office denied appellant's claim on the grounds that the medical evidence submitted in support of her claim was not sufficient to meet her burden of proof. Any assertion of wrongdoing or even actual wrongdoing on the part of the employing establishment regarding the presentation of the factual aspect of appellant's claim is not pertinent to the reason her claim was denied and would not further her claim before the Office. Appellant's request for reconsideration did not establish clear evidence of error on the

[18] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[19] *Gregory Griffin*, *supra* note 5.

[20] *See Angel M. Lebron, Jr.*, 51 ECAB 488, 490 (2000) (explaining that the date the decision is issued is not included in the year limit).

[21] 20 C.F.R. § 10.607(a).

[22] *See J.J.*, Docket No. 07-1693 (issued December 26, 2007).

part of the Office and was not sufficient to require the Office to reopen her claim for consideration of the merits.

CONCLUSION

The Board finds that appellant's June 2007 request for reconsideration was not timely filed. The Board further finds that appellant failed to submit clear evidence of error on the part of the Office in her reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 24, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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