United States Department of Labor
Employees' Compensation Appeals Board

B.W., Appellant	)	
and	)	**Docket No. 08-295**
	)	**Issued: September 11, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Rusk, TX, Employer	)	

Appearances:
Edgar R. Jones, Esq., for the appellant
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 November 7, 2007 appellant, through her attorney, filed a timely appeal from a July 23, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration as it was untimely and did not establish clear evidence of error. As more than one year has elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the July 23, 2007 nonmerit decision.

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 for reconsideration was not timely filed and did not demonstrate clear evidence of error.

[1] *See* 5 U.S.C. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

This case is before the Board for the second time. In a decision dated February 3, 2004, the Board set aside a May 28, 2003 decision denying appellant's request for reconsideration as untimely and insufficient to establish clear evidence of error.[2] The Board found that she had timely requested reconsideration and remanded the case for the Office to review the evidence pursuant to 20 C.F.R. § 10.606(b). The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

By decision dated March 24, 2004, the Office denied modification of its April 9, 2002 decision. It found that the medical evidence submitted was insufficient to show that appellant sustained an emotional condition due to the compensable employment factor.

On March 25, 2005 appellant, through her attorney, requested reconsideration of her claim. In a decision dated April 13, 2005, the Office denied modification of its March 24, 2004 decision. It again found that the medical evidence was not sufficiently rationalized to show that she had an employment-related emotional condition. Appellant, through her attorney, requested reconsideration on April 13, 2005. By decision dated June 29, 2006, the Office denied modification of its April 13, 2005 decision on the grounds that the medical evidence did not show that she had an emotional condition due to the compensable work incident.

On June 4, 2007 appellant notified the Office that her attorney anticipated filing a request for reconsideration.[3] By letter dated June 27, 2007 her attorney requested an extension of time to submit additional medical evidence. On July 2, 2007, counsel informed the Office that she was submitting "most relevant and necessary documents." In an attached statement, the attorney requested reconsideration of the claim and asserted that she was submitting additional evidence, including a June 27, 2007 progress report and psychological assessment from Dr. Betty J. Feir, PhD, clinic notes from Dr. Joan Appleyard, an internist, and an April 11, 2007 statement from a coworker, Christine Harper. Accompanying appellant's request for reconsideration were laboratory test results dated September 27, 2006.

By decision dated July 23, 2007, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. The Office mailed the decision to her at an incorrect address. On August 22, 2007 appellant requested information regarding the status of her case. On September 24, 2007 the Office resent a copy of its July 23, 2007 decision to her correct address.

[2] Docket No. 04-90 (issued February 3, 2004). On November 17, 2000 appellant, then a 50-year-old distribution and window clerk, filed an occupational disease claim alleging that she sustained chronic depression and post-traumatic stress disorder due to factors of her federal employment. The Office determined that she had established as a compensable employment factor that she and a supervisor had sexual intercourse inside the employing establishment. At the instruction of a hearing representative, the Office referred appellant for a second opinion examination to determine if she had an emotional condition causally related to the compensable employment factor. In a report dated March 13, 2002, Dr. Theodore Pearlman, a Board-certified psychiatrist, opined that she did not have an emotional condition caused or aggravated by the compensable employment factor.

[3] Appellant also notified the Office of a change of address.

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.[4] It 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] When an application for review is untimely, it undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[6] The Office's procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[7] It will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[8]

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 it committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office decision is insufficient to establish clear evidence of error.[9] 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 it. 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.[10]

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[11] A right to reconsider within

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[4] 5 U.S.C. §§ 8101-8193.

[5] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

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

[7] *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).

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

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

[10] *Id*.

[11] 20 C.F.R. § 10.607(a).

one year also accompanies any subsequent merit decision on the issues.[12] As appellant's request on July 2, 2007 for reconsideration was submitted more than one year after June 29, 2006, the date of the most recent merit decision of record, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her emotional condition claim.[13]

Appellant's attorney argued that appellant had submitted medical and factual evidence with her July 2, 2007 request for reconsideration sufficient to establish that she sustained an emotional condition in the performance of duty. Counsel asserted that she had submitted a June 27, 2007 progress report and psychological assessment from Dr. Feir, clinic notes from Dr. Appleyard and an April 11, 2007 statement from a coworker. None of this evidence, however, is contained in the case record. The only evidence received with appellant's reconsideration request is a copy of test results from a laboratory dated September 2006. As this evidence is not relevant to the issue of whether she sustained an emotional condition arising from a compensable employment factor, it is insufficient to show clear evidence of error.[14]

The evidence submitted in support of appellant's untimely reconsideration request is irrelevant and thus insufficient to establish clear evidence of error. In order to establish clear evidence of error, the evidence submitted 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 Office's decision.[15] The evidence appellant submitted on reconsideration fails to meet this standard.

On appeal, appellant's attorney notes that the Office sent the July 23, 2007 to her incorrect address. The decision, however, was mailed to counsel at her address of record. There is no evidence that he formally notified the Office of a change in her address.[16]

CONCLUSION

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

[12] *Robert F. Stone*, 57 ECAB 292 (2005).

[13] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[14] *Howard Y. Miyashiro*, 51 ECAB 253 (1999). In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.

[15] *See Veletta C. Coleman*, *supra* note 6.

[16] The Office mailed its July 23, 2007 decision to appellant at an incorrect address; however, it subsequently resent the decision to her correct address on September 14, 2007. Thus, any error is harmless as the Office effectively reissued the decision and as her appeal rights were not affected.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 23, 2007 is affirmed.

Issued: September 11, 2008
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