United States Department of Labor
Employees' Compensation Appeals Board

Y.L., Appellant	)	
and	)	**Docket No. 08-1952**
	)	**Issued: August 13, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Long Beach, CA, Employer	)	

Appearances:
Appellant, pro se,
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 July 7, 2008 appellant filed a timely appeal of a May 6, 2008 decision of the Office of Workers' Compensation Programs that denied her request for reconsideration because it was untimely and did not demonstrate clear evidence of error. She also appealed a November 29, 2007 decision that denied her request for reconsideration without further merit review. Because more than one year has elapsed between the most recent merit a decision dated August 15, 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).

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a); and (2) whether the Office properly refused to reopen appellant's claim for reconsideration on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On March 13, 2000 appellant, then a 39-year-old program support assistant, filed an occupational disease claim alleging that she sustained right shoulder pain, hand and finger numbness and tingling in the performance of duty. The Office accepted her claim for right shoulder impingement and authorized a subacromial decompression on October 19, 2000. It also accepted fibromyalgia.[1]

On January 19, 2005 the Office granted appellant a schedule award for three percent permanent impairment of the right arm. The award covered a period of 9.36 weeks for the period September 27 to December 1, 2004. After appellant requested reconsideration, the Office on February 1, 2006 denied modification of the January 19, 2005 decision. On March 15, 2006 appellant filed another claim for a schedule award.

On April 12, 2006 the Office advised appellant that she must exercise her appeal rights if she disagreed with the Office's schedule award decision. It also indicated that appellant would be referred for a second opinion.

In a report dated May 4, 2006, Dr. Joseph P. Conaty, a Board-certified orthopedic surgeon and an Office referral physician, reviewed appellant's history of injury and treatment and provided findings for range of motion. He noted that she reached maximum improvement for the right shoulder on May 1, 2006 and on April 1, 2003 for the left shoulder. Dr. Conaty did not report any permanent impairment.

On June 1, 2006 appellant requested reconsideration, contending that she was entitled to a greater schedule award. In a February 8, 2006 report, Dr. Philip Hill, a Board-certified orthopedic surgeon and treating physician, noted her work restrictions. In reports dated February 13 to July 16, 2004, Dr. Rodney Bluestone, a treating physician Board-certified in internal medicine, advised that appellant was permanent and stationary. In an April 11, 2006 report, Dr. Stuart Silverman, Board-certified in internal medicine and rheumatology, noted that she had bilateral shoulder impingement and secondary fibromyalgia, with a history of low back problems and piriformis syndrome, that were not accepted as industrial.

In an August 3, 2006 report, the Office medical adviser noted appellant's history of injury and treatment. He found that the medical evidence did not establish any increased impairment of her right shoulder condition.

By decision dated August 15, 2006, the Office denied modification of its February 1, 2006 decision. It determined that the medical evidence did not support an increase in her impairment.

[1] Appellant also has several other claims. On August 24, 2000 she filed occupational disease claim, File No. xxxxxx099, that was accepted for left shoulder impingement. The Office authorized arthroscopic decompression, bursectomy and acromioplasty on December 24, 2002. An occupational disease claim for lower back pain was denied under claim File No. xxxxxx482. Claim File No. xxxxxx450, filed on August 18, 2005, was accepted for right shoulder subacromial bursitis, subdeltoid bursitis, temporary aggravation of her preexisting right shoulder impingement syndrome and rotator cuff tendinitis. Appellant had right shoulder revision surgery on November 17, 2005 and returned to light duty on February 15, 2006.

On July 31, 2007 appellant requested reconsideration. She submitted additional evidence, including reports from Dr. Silverman dated April 1, 2006 to June 6, 2007. Dr. Silverman diagnosed bilateral shoulder impingement, secondary fibromyalgia and chest wall syndrome with pectoralis tenderness. In reports dated January 30 to February 16, 2004, Dr. Bluestone noted treatment of appellant but did not provide any impairment rating for the right upper extremity.

Appellant also submitted several physical therapy reports, statements pertaining to the use of her headphone and her job duties and an October 15, 2007 report from Dr. G.B. Ha Eri, a Board-certified orthopedic surgeon, who did not provide an impairment rating for the right arm.

In a November 29, 2007 decision, the Office denied appellant's reconsideration request on the grounds that the evidence was insufficient to warrant further merit review. It found that no relevant medical evidence pertaining to permanent impairment, was submitted.

On January 28, 2008 appellant requested reconsideration and submitted a July 23, 2007 report from Dr. H. Leon Brooks, a Board-certified orthopedic surgeon, who had treated her since February 14, 2007 and determined that she would require surgery to her left shoulder. Dr. Brooks advised that under the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.M.A., *Guides*) appellant's range of motion in the right shoulder represented 28 percent impairment. He opined that this represent 17 percent whole person impairment pursuant to Table 16-3.[2]

In a decision dated May 6, 2008, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[4]

[2] A.M.A., *Guides* 439 (5th ed. 2001).

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[5]

ANALYSIS -- ISSUE 1

On July 31, 2007 appellant filed a timely request for reconsideration of the Office's decision dated August 15, 2006, denying her claim for an increased schedule award.

The Board initially notes that appellant's statements dated April 10 and July 10, 2007, pertaining to the use of her headphone and her job duties are not relevant to her claim for an increased schedule award, as this issue is medical in nature.

The medical evidence in support of appellant's request for reconsideration was comprised of several reports from Dr. Silverman, Dr. Bluestone, Dr. Hill and Dr. Ha Eri. However, these reports are not relevant to the issue of her entitlement to an increased schedule award. None of the physicians made any findings or addressed the issue of permanent impairment of her right shoulder. These reports are not relevant to that issue. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[6]

The Office also received several physical therapy reports. Section 8101(2) of the Act provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law. Health care providers such as nurses, acupuncturists, physician's assistants and physical therapists are not physicians under the Act.[7] Appellant did not provide any new medical evidence relevant and pertinent to the issue of impairment.

The evidence submitted by appellant on reconsideration does not satisfy the third criterion for reopening a claim for merit review. She has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously submitted. Therefore, the Office properly denied her request for reconsideration.

[5] *Id*. at § 10.608(b).

[6] *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward,* 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[7] *See Jane A. White,* 34 ECAB 515, 518 (1983). *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[8] vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at anytime on his own motion or on application. The Secretary, in accordance with the facts found on review may--
>
> > (1) end, decrease, or increase the compensation awarded; or
> >
> > (2) award compensation previously refused or discontinued."[9]

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[10] This section does not mandate that it review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[11]

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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 that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. 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.[13] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

---

[8] 5 U.S.C. §§ 8101-93.

[9] *Id*. at § 8128(a).

[10] *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.,* 41 ECAB 104, 111 (1989).

[11] 20 C.F.R. § 10.607(a).

[12] *Id*. at § 10.607(b).

[13] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

a conflict in the 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. 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.[14]

ANALYSIS -- ISSUE 2

In its May 6, 2008 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on August 15, 2006. Appellant's January 28, 2008 letter requesting reconsideration was submitted more than one year after the August 15, 2006 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that appellant's January 28, 2008 request for reconsideration failed to show clear evidence of error. In support of her untimely request for reconsideration, she submitted Dr. Brooks' July 23, 2007 report in which he recommended 28 percent right arm or 17 percent whole person impairment. This report is insufficient, however, as Dr. Brooks provides no findings or measurements to support his impairment rating and he does not correlate any such findings to the Office's standard for evaluating schedule impairment, the A.M.A., *Guides*.[15] Additionally, the Act does not provide a schedule award based on whole person impairments.[16] This report does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of 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.[17]

---

[14] *Id.*

[15] *See* 20 C.F.R. § 10.404.

[16] *See Tania R. Keka*, 55 ECAB 354 (2004); *James E. Mills*, 43 ECAB 215 (1991) (neither the Act, nor its implementing regulations provide for a schedule award for impairment to the body as a whole).

[17] *Annie L. Billingsley,* 50 ECAB 210 (1998).

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. On appeal, she disputed that her reconsideration request was untimely. However, as noted above, the request dated January 28, 2008, was received more than one year from the last merit decision dated August 15, 2006 and was untimely. Appellant also contends that she should receive a greater award. However, she has not submitted evidence that raises a substantial question as to the correctness of the Office's August 15, 2006 decision. Appellant has not established clear evidence of error.[18]

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a). The Board further finds that the Office properly refused to reopen her claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2008 and November 29, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

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

[18] The Board notes that appellant retains the right to file a claim for an increased schedule award based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).