United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 09-553**
	)	**Issued: August 21, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Washington, DC, 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 December 19, 2008 appellant filed a timely appeal of the September 22, 2008 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration. The last merit decision was issued on December 20, 2006. Because appellant filed the current appeal more than a year after the Office's December 20, 2006 decision, the Board does not have jurisdiction over the merits of the claim.[1]

ISSUE

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

[1] 20 C.F.R. §§ 501.2(c), 501.3(d) (2008). The record on appeal includes evidence received after the Office issued its September 22, 2008 decision. The Board cannot consider evidence for the first time on appeal. The review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

This case was previously on appeal. Appellant, a 56-year-old medical supply technician, was struck in the head in the performance of duty on October 29, 1988. She sustained another employment-related head injury (xxxxxx508) on March 31, 1989, which the Office combined with the 1988 claim. Appellant's accepted conditions include scalp contusions, post-traumatic encephalgia, neck sprain and left shoulder sprain. The last time the case was on appeal, the Board set aside a March 10, 2004 decision denying modification of a December 6, 1995 loss of wage-earning capacity (LWEC) determination.[2] In remanding the case, the Board instructed the Office to refer appellant to an impartial medical examiner to resolve a conflict regarding the nature of appellant's impairments and her ability to work.[3]

Dr. William Peterson, a Board-certified neurologist and impartial medical examiner, saw appellant on November 11, 2006. At the time, appellant's complaints included chronic headaches, neck and low back pain, memory impairment and visual impairments. Dr. Peterson found evidence of a mild injury to the cervical and lumbar spines manifested solely by muscle spasm in the left trapezius and cervical and lumbosacral paraspinal muscles. He reported no clinical evidence of radiculopathy or pinched nerves in the cervical or lumbosacral spine. Dr. Peterson advised that his clinical evaluation suggested a hysterical component. As to appellant's complaint of chronic headaches, he indicated that the lack of description and appellant's evasiveness raised some questions and effectively impeded a more accurate diagnosis.[4] However, Dr. Peterson noted that it was unlikely that appellant had migraine headaches "three [to] four times a week ... for many years." He further stated that, while there may be some cognitive impairment, it was difficult to assess and he would defer to the opinion of appellant's neuropsychologist. Lastly, Dr. Peterson noted that he personally believed there was a strong psychiatric component to appellant's problems, which needed to be addressed.

In a decision dated December 20, 2006, the Office found that appellant had not established a basis for modifying the December 6, 1995 LWEC determination. It relied upon the impartial medical examiner's November 11, 2006 report.[5]

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[2] The December 6, 1995 LWEC determination reduced appellant's wage-loss compensation based upon her ability to earn weekly wages of $232.00 in the selected position of telephone order clerk. Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous. *Tamra McCauley,* 51 ECAB 375, 377 (2000). The burden of proof is on the party seeking modification of the wage-earning capacity determination. *Id.*

[3] Docket No. 04-1482 (issued January 12, 2005). The Board's latest decision, dated January 12, 2005, is incorporated herein by reference.

[4] Dr. Peterson noted, among other things, that appellant found it difficult to localize the area of the head where her headaches arose from or where they were most prominent. He also noted that she was unable to describe whether the onset of her headaches was gradual or sudden. Appellant reported that her headaches occurred four to five days a week.

[5] The Office further advised that, because appellant's current psychiatric condition was not an accepted condition, it was not addressed in the decision.

On December 24, 2007 the Office received an undated letter from appellant with the heading "Reconsideration." Appellant noted, among other things, that Dr. Peterson was "unfair." She claimed to have been in and out of his office in 30 minutes. On December 26, 2007 the Office received an unsigned and undated copy of the appeal request form that accompanied the December 20, 2006 decision denying modification. A handwritten "X" appeared on the line next to "RECONSIDERATION." The record also includes a signed copy of the same above-noted appeal request form, which was dated March 21, 2008 and date-stamped as being received by the Office that same day.[6] On September 11, 2008 the Office received another signed copy of the appeal request form. However, this copy was dated March 20, 2007. The document includes the notation "correction date ... sign (sic) wrong date [and] year 'reconsideration' was send (sic) in timely." None of these submissions were accompanied by additional medical evidence and other than appellant's characterization of Dr. Peterson as "unfair," the various filings did not allege any specific error on the part of the Office with respect to either the December 6, 1995 LWEC determination or the December 20, 2006 decision denying modification.

While appellant did not submit any new evidence with her various requests for reconsideration, she did file a claim (Form CA-7) for a schedule award on April 3, 2008, and subsequently submitted a July 15, 2008 impairment rating from Dr. Michael E. Batipps, a Board-certified neurologist, who found 34 percent impairment of brain and brain function, 16 percent bilateral upper extremity impairment and 10 percent bilateral lower extremity impairment. Dr. Batipps' diagnoses included traumatic brain injury with chronic memory loss and cognitive dysfunction, post-traumatic headaches, chronic bilateral C5-6 radiculopathy and chronic lumbosacral radiculopathy, all of which he attributed to appellant's employment-related injuries in 1988 and 1989. He was on one side of the conflict in medical opinion that the Board identified in its January 12, 2005 decision. Even after the impartial medical examiner's November 11, 2006 report, Dr. Batipps continued to diagnose cervical and lumbosacral radiculopathy and found appellant totally disabled. However, his subsequent reports do not specifically address appellant's ability to perform the duties of a telephone order clerk.

By decision dated September 22, 2008, the Office denied appellant's request for reconsideration because it was untimely and she failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.[7] The Office has discretionary authority in this regard and it has imposed certain limitations in exercising its authority.[8] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office

[6] On April 10, 2008 the Office acknowledged receipt of the March 21, 2008 request for reconsideration, but advised appellant that it would not take further action because it was unclear "which decision or issues" appellant was asking the Office to reconsider.

[7] This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a) (2006).

[8] 20 C.F.R. § 10.607.

decision for which review is sought.[9] When a request for reconsideration is untimely, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office in its "most recent merit decision."[10]

ANALYSIS

Appellant's request for reconsideration was dated more than a year after the Office issued its December 20, 2006 decision denying modification. The earliest filing that arguably indicated appellant's desire for reconsideration was received on December 24, 2007. Afterwards the Office received three appeal request forms from the December 20, 2006 decision that indicated a desire for reconsideration. The first form was unsigned and undated, the second was dated March 21, 2008, and the third form, which the Office received on September 11, 2008, was clearly back-dated to March 20, 2007. Because appellant's requests were untimely she must demonstrate "clear evidence of error" on the part of the Office in denying modification of the December 6, 1995 LWEC determination.[11]

To establish clear evidence of error, appellant must submit evidence relevant to the issue that was decided by the Office.[12] The issue was whether appellant established a basis for modifying the Office's December 6, 1995 LWEC determination. Based on Dr. Peterson's November 11, 2006 report, the Office previously found no basis for modification. Dr. Batipps' latest impairment ratings are insufficient to overcome the weight accorded the impartial medical examiner's November 11, 2006 report. Moreover, these reports are insufficient to create a new conflict of medical opinion.[13] Dr. Batipps' latest evidence does not specifically address appellant's ability to perform the duties of a telephone order clerk. Furthermore, appellant has not alleged any specific error on the part of the Office with respect to either the December 6, 1995 LWEC determination or the December 20, 2006 decision denying modification. As such, appellant has not established clear evidence of error. The Board finds that the Office properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

[9] *Id*. at § 10.607(a).

[10] *Id*. at § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[11] 20 C.F.R. § 10.607(b).

[12] *Dean D. Beets*, *supra* note 10.

[13] A subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion. *Richael O'Brien*, 53 ECAB 234, 242 n.6 (2001).

CONCLUSION

Appellant's request for reconsideration was untimely and she failed to demonstrate clear evidence of error. Accordingly, she is not entitled to further merit review.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2009
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