United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 09-1086**
	)	**Issued: December 16, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 16, 2009 appellant filed a timely appeal from a March 2, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated June 15, 2001 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, the Board has jurisdiction to review the March 2, 2009 nonmerit decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

FACTUAL HISTORY

On July 20, 2000 appellant filed an occupational disease claim alleging that she was "reinjured" on June 22, 1996 when her supervisor ordered her to lift parcels weighing more than 70 pounds, which exceeded her 5-pound restriction. As a result of increased pain associated with this incident, she allegedly experienced stress and depression, which resulted in hospitalization.[1]

The Office initially denied appellant's claim on September 20, 2000 on the grounds that she had failed to establish a compensable factor of employment. Appellant disagreed with the decision and filed a request for reconsideration

Appellant submitted medical reports dated June 21, 1996 to October 4, 2000 from Dr. William M. Craven, a Board-certified orthopedist, who treated her for right wrist tendinitis, shoulder impingement, rotator cuff tendinitis and carpal tunnel syndrome (CTS). On June 26, 1996 Dr. Craven related appellant's report that she had recently injured her wrist because her supervisor had required her to lift 70 pounds. He diagnosed right hand tendinitis and CTS. On July 3, 1996 Dr. Craven stated that appellant had developed a new problem with right wrist sprain due to "work over-demand."

The record contains a hospital outpatient record reflecting that appellant was treated on June 23, 1996 at the Southwest Hospital and Medical Center. The history of injury reflects that appellant's supervisor "made her" pull a 70-pound sack "against her will and judgment," resulting in pain in her right wrist and hand.

In a decision dated June 15, 2001, the Office affirmed its denial of appellant's claim. However, it modified the grounds for denial to reflect that the claim was time-barred, as it was filed more than three years after the claimed June 22, 1996 incident and there was no evidence establishing that her immediate supervisor had actual knowledge within 30 days of the alleged injury.

On January 12, 2009 appellant requested reconsideration of the June 15, 2001 decision. In support of the request, she submitted a December 23, 2008 statement entitled "Emotional Condition Claim." Appellant contended that her supervisor was aware that she would be hospitalized because she had hand-delivered the order to the supervisor from Dr. James Blevins, her treating psychiatrist. She alleged that her hostile work environment and her reinjury on June 22, 1996 created stress and led to her hospitalization. In an undated statement, appellant indicated that her claim was filed by her supervisor because she was hospitalized. She alleged that she had been betrayed by the union representative and her supervisor. Appellant submitted a

[1] Appellant's December 14, 2006 traumatic injury claim (File No. xxxxxx847) was denied by the Office on February 14, 2007 as untimely. After the Board remanded the case to the Office for further development on July 25, 2007 Docket No. 07-950 (issued July 25, 2007), the Office denied the claim as time-barred on September 21, 2007. On appeal, the Board affirmed the Office's denial by decision dated April 23, 2008 Docket No. 08-28 (issued April 23, 2008). Appellant's November 4, 2008 occupational disease claim (File No. xxxxxx362) alleged that she developed an emotional condition as a result of a December 4, 1993 incident. In a decision dated January 5, 2009, the Office denied her claim as untimely filed. Appellant disagreed with the Office's decision and her appeal is currently before the Board. Her claim for a December 4, 1993 injury (File No. xxxxxx417) was accepted for left fracture of the metacarpal bones and bilateral CTS.

copy of Form CA-2 dated January 12, 2009; a copy of a letter from the employing establishment regarding a limited-duty job offer (page 3 only); a copy of Notice of Assignment of Hearing and Memorandum of Law (US Bankruptcy Court) dated September 27, 2001; a copy of Request for Hearing (Superior Court of Fulton County, GA) dated May 2, 2001; an undated work capacity certificate; copies of previously submitted letters from Dr. Bruce E. Atkinson, a clinical psychologist, dated May 26 and October 4, 2000; a letter from Dr. Atkinson dated February 3, 2002; letters dated June 16 and October 11, 1999 from Zuwena Gatson, a licensed clinical social worker; a disclosure authorization dated March 18, 2002; copies of previously submitted medical records from Southwest Hospital and Medical Center dated June 23, 1996; a statement of grievance dated May 2, 2001; February 13, 2002 and February 2, 2004 letters from appellant's representative; a statement of report dated December 20, 2001; USPS order form dated March 4, 2002; and a memorandum from Rory G. Spencer, Manager of Distribution Operations, dated September 11, 2000, regarding the employing establishment's inability to accommodate appellant's restrictions. The record also contains a Form CA-20a, attending physician's supplemental report dated April 17, 1997 from Dr. Blevins, a Board-certified psychiatrist, who diagnosed depressive disorder. Dr. Blevins described the nature of appellant's impairment as "accident on the job followed by recent depression," and noted that the date-of-appellant's injury was December 4, 1993.

In a decision dated March 2, 2009, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.[2]

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.[3] 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.[4] In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[5]

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.[6] It 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

[2] Appellant submitted additional evidence after the Office's March 2, 2009 decision; however, the Board cannot consider such evidence for the first time on appeal. The Board's 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. § 10.501.2(c) (2007).

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[5] *Veletta C. Colem*an, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

[6] *Id.*

application for review shows clear evidence of error on the part of the Office.[7] 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.[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 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.[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 the Office. 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.[10]

ANALYSIS

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

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 reconsideration within one year also accompanies any subsequent merit decision on the issues.[12] As appellant's January 12, 2009 request for reconsideration was submitted more than one year after June 15, 2001, the date of the last merit decision of record, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim.[13]

The Office found that appellant's claim was time-barred, as it was filed more than three years after the claimed June 22, 1996 incident and there was no evidence establishing that her immediate supervisor had actual knowledge within 30 days of the alleged injury. Appellant has

[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); *Darletha Coleman*, 55 ECAB 143 (2003).

[10] *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

[11] 20 C.F.R. § 10.607(a).

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

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

not demonstrated clear evidence on the part of the Office in issuing its June 15, 2001 decision. She did not submit the type of positive, precise and explicit evidence that manifests on its face that the Office committed an error.

In connection with her untimely reconsideration request, appellant contended that her supervisor was aware that she would be hospitalized in 1996, because she had hand-delivered Dr. Blevins' order to her supervisor. She indicated that her claim was filed by her supervisor because she was hospitalized.[14] However, there is no evidence of record to corroborate her allegations. Moreover, the supervisor's awareness that appellant would be hospitalized would not constitute evidence that he had actual knowledge of a June 22, 1996 injury.

The record also contains a CA-20a form, attending physician's supplemental report, dated April 17, 1997 from Dr. Blevins, who diagnosed depressive disorder and described the nature of appellant's impairment as "accident on the job followed by recent depression." This report does not address the issues decided by the Office in its June 15, 2001 decision, namely whether her claim was filed within the prescribed time limitation and whether her supervisor had actual notice of the alleged June 22, 1996 incident within 30 days. The Board notes that Dr. Blevins indicated that the date of appellant's injury was December 4, 1993. Therefore, this form did not provide notice to the Office of a June 22, 1996 injury and is insufficient to establish that the Office erred when it rendered its March 2, 2009 decision.

The remaining evidence submitted by appellant in support of her January 12, 2009 request for reconsideration is either irrelevant or duplicative and is therefore insufficient to establish clear evidence of error. The term clear evidence of error is intended to represent a difficult standard. The submission of evidence which, if submitted before the denial was issued, would have required further development, is not clear evidence of error.[15] None of the evidence submitted manifests on its face that the Office committed an error in denying appellant's claim. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal, appellant contends that her claim was timely filed, but that the wrong claim number was used by the Office. She asserts that the correct claim file number is xxxxxx417. However, File No. xxxxxx417 pertains to appellant's November 7, 2008 claim for injuries alleged to have occurred on December 4, 2003. The Office's March 2, 2009 decision in that case denied her request for an additional schedule award. The Board finds appellant's argument to be without merit.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely and failed to demonstrate clear evidence of error.

[14] Time limitations for filing claims for compensation under the Act do not run against an incompetent individual while he is incompetent and has no duly appointed legal representative. 5 U.S.C. § 8122(d)(2). However, there is no medical evidence of record that contains an opinion that appellant was mentally incompetent during the period in question.

[15] *Joseph R. Santos*, 57 ECAB 554 (2006).

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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