United States Department of Labor
Employees' Compensation Appeals Board

V.H., Appellant	)	
and	)	**Docket No. 08-1946**
	)	**Issued: January 22, 2009**
DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH, Baltimore, MD, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument December 9, 2008

DECISION AND ORDER

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

JURISDICTION

On July 7, 2008, appellant timely appealed the April 7, 2008 nonmerit decision of the Office of Workers' Compensation Programs, which denied her December 14, 2007 request for reconsideration. The most recent merit decision issued by the Office is dated March 27, 1996. Because appellant filed the current appeal more than a year after the latest merit decision, the Board does not have jurisdiction over the merits of the claim.[1] Therefore, the only decision properly before the Board is the Office's April 7, 2008 denial of reconsideration.

ISSUE

The issue is whether the Office properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

[1] 20 C.F.R. §§ 501.2(c), 501.3(d) (2008).

FACTUAL HISTORY

Appellant, a 72-year-old former psychologist, filed an occupational disease claim for allergies, rhinitis and chemical sensitivities, which reportedly arose on or about March 15, 1989. She also claimed to have experienced a severe respiratory attack with spasms, which she later identified as hyperactive airways disease. Appellant attributed her condition to exposure to dust, mold, fungi, mercury and animal dander in her laboratory. She also alleged there was a stress-related component to her physical ailments. Appellant last worked on February 14, 1990, and she voluntarily resigned effective May 15, 1990.[2] She filed her occupational disease claim more than a year later on June 17, 1991.

The Office denied appellant's claim on January 16, 1992 because she failed to establish fact of injury.[3] Appellant requested an oral hearing and she submitted additional factual information and medical evidence. By decision dated April 12, 1993, the Branch of Hearings & Review affirmed the previous denial, albeit for a different reason. The hearing representative found that appellant was exposed to mercury vapors in the workplace. Additionally, there was evidence of occupational exposure to both dog and monkey feces, hair and dander. Appellant, however, did not substantiate her alleged exposure to mold. As to the alleged stress-related component of her claimed injuries, the hearing representative found that appellant established at least one compensable employment factor.[4] But while appellant had established most of her alleged employment exposure, her claim was denied because the medical evidence did not adequately demonstrate a causal relationship between the accepted employment exposure and appellant's claimed conditions.[5] Due to an incorrect address provided by appellant, she did not

[2] Coincidentally, in the months preceding her work stoppage appellant had performance issues and was rated unsatisfactory by her employer. A performance improvement plan had been implemented, and in February 1990 the employing establishment proposed to remove appellant from her position because of poor performance.

[3] A claimant seeking benefits under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193 (2000), has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury. 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996). To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[4] The hearing representative found that appellant was obliged to work in the monkey laboratory on January 31 and February 2, 1990 despite her physician's recommendation to the contrary.

[5] According to the hearing representative, appellant failed to "supply medical evidence in which a physician displays knowledge of the employment factors to which the claimant was exposed, and provides a definitive diagnosis and opinion on causal relationship supported by medical rationale between such diagnosis and the employment factors described."

receive a copy of the hearing representative's April 12, 1993 decision until approximately 18 months after it was initially issued.[6]

Appellant requested reconsideration on January 2, 1996. The Office reviewed appellant's claim on the merits and denied modification by decision dated March 27, 1996.[7] Within a year's time, appellant again requested reconsideration; however, she did not submit any additional medical evidence with her March 26, 1997 request for reconsideration. In a decision dated August 17, 1998, the Office found that appellant's March 26, 1997 request for reconsideration was insufficient to warrant modification of the March 27, 1996 decision. It indicated that the evidence submitted in support of the application was of a "repetitious and cumulative nature...."[8]

Over the next several years appellant contacted the Office on numerous occasions either directly or through various congressional representatives. On more than one occasion the Office advised appellant of her appeal rights. In several of her letters appellant claimed not to have received the Office's August 17, 1998 decision, which the Office purportedly sent to appellant's old address on Park Avenue, Baltimore, MD.[9] Despite the frequent exchange of correspondence with the Office, appellant did not formally request reconsideration until December 14, 2007. Her latest request for reconsideration did not include any new medical evidence.

By decision dated April 7, 2008, the Office denied appellant's December 14, 2007 request for reconsideration. The Office indicated, among other things, that the last merit decision was issued March 27, 1996, and therefore, appellant's December 14, 2007 request was untimely.[10]

---

[6] The April 12, 1993 decision was returned to the Branch of Hearing & Review because of an incorrect street address. When appellant filed her claim in June 1991 she claimed she resided at a specific address on W. 47th Street, Norfolk, VA. In a letter dated April 9, 1992, appellant advised the Branch of Hearings & Review of her "change of home address, effective immediately." She listed her then-current address." However, at her January 15, 1993 hearing appellant testified that she resided at "West 49th Street." The April 12, 1993 decision was mailed to the "West 49th Street" address. On October 2, 1995 another copy of the decision was dispatched to appellant's address at West 47th Street, which she later acknowledged receiving.

[7] The Office acknowledged that because of a mailing error appellant did not receive the April 12, 1993 decision until early October 1995. Consequently, the Office considered "October 2, 1995" as the date of the Office decision that was the subject of appellant's January 2, 1996 request for reconsideration. The Office reviewed the merits of appellant's claim and concluded that the additional information she submitted was "both cumulative and immaterial in nature." The March 27, 1996 merit decision was sent to appellant's address of record: at West 47th Street, Norfolk, VA 23508.

[8] The August 17, 1998 decision purports to be a review of the merits, however, the Office's 1-page decision did not include any type of analysis that even arguably resembles a review of the merits of appellant's claim. The Office mailed the August 17, 1998 nonmerit decision to appellant's then-current address of record: at West 47th Street, Norfolk, VA 23508.

[9] She apparently believed the August 17, 1998 decision was misdirected because of a February 21, 2001 letter the Office sent to her previous address on Park Avenue, Baltimore, MD 21201.

[10] The Office also acknowledged that the August 17, 1998 decision was a denial of reconsideration, and appellant's only avenue of review for that decision was an appeal to the Board.

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.[11] The Office has discretionary authority in this regard and it has imposed certain limitations in exercising its authority.[12] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[13] 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."[14]

ANALYSIS

Appellant's latest request for reconsideration was dated December 14, 2007, which is more than a year after the Office's March 27, 1996 merit decision. Appellant had previously requested reconsideration on March 26, 1997, however, her request was denied on August 17, 1998.[15] As this was a nonmerit decision, it did not extend the one-year timeframe for requesting reconsideration.[16] Because appellant's December 14, 2007 request was untimely she must demonstrate "clear evidence of error" on the part of the Office in denying her occupational disease claim.[17]

---

[11] 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).

[12] 20 C.F.R. § 10.607.

[13] 20 C.F.R. § 10.607(a).

[14] 20 C.F.R. § 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). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[15] Appellant claimed not to have received this decision. However, the record indicates that the August 17, 1998 decision was properly mailed to appellant's then-current address of record: at West 47th Street, Norfolk, VA 23508. In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient. *Kenneth E. Harris*, 54 ECAB 502, 505 (2003). This presumption is commonly referred to as the "mailbox rule." *Id.* It arises when the record reflects that the notice was properly addressed and duly mailed. *Id.* There is nothing in the record to support appellant's contention that the August 17, 1998 decision was sent to her former address at Park Avenue, Baltimore, MD.

[16] As the Office correctly advised in its February 21, 2001 correspondence and in the April 7, 2008 decision, appellant's only avenue of review for the August 17, 1998 nonmerit decision was an appeal before the Board. 20 C.F.R. § 10.608(b).

[17] 20 C.F.R. § 10.607(b).

The relevant issue is whether a medical condition arose from appellant's accepted employment exposure. To establish clear evidence of error, appellant must submit evidence relevant to the issue that was decided by the Office.[18] But rather than address the noted deficiencies in the medical evidence, she continues to raise decades-old allegations of fraud, coercion and lack of cooperation on the part of her former employer. At oral argument appellant claimed her employer was less than forthright in its disclosures about mercury exposure in the primate laboratory where she worked. She also indicated that she was coerced into working in the laboratory despite her physician's recommendation to avoid further exposure. Lastly, appellant indicated that her former employer would not permit a full battery of pulmonary testing as requested by her treating physician. She believes that the employing establishment's actions somehow impeded her ability to meet her burden of proof. This is essentially the same litany of arguments appellant has raised since the inception of her claim. The hearing representative was privy to these arguments in 1993 and appellant reiterated her concerns in subsequent reconsideration requests. While these particular matters are clearly important to appellant, they are not at all relevant to the current posture of her occupational disease claim. The Office did not deny appellant's claim for any reasons associated with the above-mentioned allegations.

More than 15 years ago the hearing representative reviewed the relevant medical evidence of record and found it insufficient to establish a causal relationship between appellant's claimed conditions and her accepted employment exposure. Since that time appellant has not submitted any additional medical evidence to overcome the noted deficiencies in the record. Moreover, appellant has not presented any additional facts or legal argument indicating or even suggesting that the Office's review of the medical evidence was faulty. Again, the issue is not the employing establishment's purported malfeasance towards appellant. The issue is causal relationship, which in this instance can only be resolved by submitting competent medical evidence.[19] But instead of supplementing the medical record, appellant continues to rehash issues of little or no consequence to the adjudication of her workers' compensation claim. The Board finds that appellant has not demonstrated clear evidence of error. As such, there is no justification for further merit review. Accordingly, the Office properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

Appellant's December 14, 2007 request for reconsideration was untimely and she failed to demonstrate clear evidence of error. Accordingly, she is not entitled to further merit review.

[18] *Dean D. Beets, supra* note 14.

[19] Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, *supra* note 3. Additionally, in order to be considered rationalized; the opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 22, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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