United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 08-1611**
	)	**Issued: July 2, 2009**
DEPARTMENT OF THE AIR FORCE, AIR FORCE COMMISSARY SERVICE, MAXWELL AIR FORCE BASE, AL, Employer	)	

Appearances:
Winn Faulk, 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 May 19, 2008 appellant filed a timely appeal from a February 12, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying her request for further review of the merits of her claim and a May 29, 2007 decision denying her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these nonmerit decisions. The last merit decisions of record are the Office's March 7, 2006 schedule award for 23 percent impairment to appellant's right arm, and October 11 and December 5, 2001 decisions terminating her compensation benefits. Because more than one year has elapsed between these merit decisions and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for an oral hearing as untimely; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On February 5, 1989 appellant, then a 40-year-old sales store checker, sustained injury to her right shoulder after cleaning her register. The Office accepted her claim for cervical strain, right shoulder strain and a ruptured biceps tendon on the right. Surgery was performed and the Office paid compensation and medical benefits. By decision dated October 11, 2001, the Office terminated appellant's compensation benefits as it found that she had no continuing disability from employment as a result of the injury. On March 7, 2006 it issued a schedule award for 23 percent impairment to her right arm.

By letter dated March 22, 2006, appellant requested that her disability benefits be reinstated as of October 2001 when they were terminated. She argued that she was still under doctor's care. Appellant did not believe that her schedule award adequately compensated her for pain and suffering. By letter dated April 24, 2006, she requested reconsideration and again asked that her disability benefits be reinstated. Appellant indicated that she was advised that she could draw her schedule award and compensation benefits at the same time.

By decision dated April 25, 2006, the Office denied reconsideration of the 2001 termination decision as her request was not filed within one year and failed to establish clear evidence of error.

By letter dated May 17, 2006, appellant requested a hearing as to the April 25, 2006 decision. On July 13, 2006 she again requested an oral hearing. By decision dated August 17, 2006, the Office denied appellant's request for a hearing as she had previously sought reconsideration. It further denied the request, finding that the issue could equally well be addressed through the reconsideration process.

By letter dated April 9, 2007, appellant asked for a disability hearing and indicated that she wanted benefits retroactive to October 2001. By decision dated May 29, 2007, the Office denied appellant's request for a hearing as it was untimely filed. It found that her request was filed more than 30 days following the issuance of the March 7, 2006 schedule award decision. The Office further reviewed appellant's request and determined that the request could be equally well addressed by requesting reconsideration and submitting evidence that shows a greater schedule award.

In a letter dated January 19, 2008, appellant advised the Office that, "I had until May to appeal the letter I received on May of last year, where you said I filed too late." She contended that her benefits were illegally cut off in 2001. Appellant inquired as to why she had not had a hearing.

Appellant submitted a May 25, 2007 note from Dr. Brad P. Katz, a Board-certified anesthesiologist, who gave appellant trigger point injections in her right trapezius, right biceps and right deltoid muscles. On July 10 and October 4, 2007 Dr. Katz administered further injections. Appellant also submitted medical reports from Dr. J. Patrick Couch previously of record.

By decision dated February 12, 2008, the Office denied appellant's request for reconsideration of the March 7, 2006 decision as the request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record.[1] A request for either an oral hearing or review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.[2] If the request is not made within 30 days, a claimant is not entitled to a hearing or review of the written record as a matter of right. Furthermore, Office regulations provide that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[3] Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and it must exercise such discretion.[4]

ANALYSIS -- ISSUE 1

By letter dated April 9, 2007, appellant requested a hearing and indicated that she wanted retroactive benefits from October 2001. The Board finds that her request for a hearing was not timely filed within 30 days of the most recent decision, the March 7, 2006 schedule award decision. Appellant's attorney contends that appellant submitted a letter dated March 22, 2006 asking that her disability benefits be reinstated. However, the letter does not establish that appellant sought an oral hearing or made any reference to the March 7, 2006 schedule award decision. Accordingly, the Board finds that this letter was not a timely request for an oral hearing. The Office also reviewed appellant's request under its discretionary authority and further denied a hearing as the issue could also be addressed by requesting reconsideration and submitting new evidence. The Board finds that the Office properly denied appellant's request for a hearing as untimely filed.

LEGAL PRECEDENT -- ISSUE 2

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.[5] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the

[1] 20 C.F.R. § 10.615 (2008).

[2] *Id.* at § 10.616(a).

[3] *Id.*

[4] *See Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994); *Herbert C. Holley*, 35 ECAB 140 (1981).

[5] 20 C.F.R. § 10.607(a).

discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[6]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[7] Office regulations and procedure provide 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(a), if the claimant's application for review shows clear evidence of error on the part of the Office.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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 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 decision.[14]

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[6] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[7] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[8] *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides 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 that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3c

[9] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[10] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[11] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[12] *See Leona D. Travis*, *supra* note 10.

[13] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[14] *Leon D. Faidley, Jr.*, *supra* note 6.

ANALYSIS -- ISSUE 2

The last merit review of the decision terminating appellant's compensation benefits was issued on December 5, 2001. Appellant filed her request for reconsideration by letter dated January 19, 2008. This letter was clearly not timely filed within one year from the merit decision of the Office. As noted, appellant's attorney contends that appellant requested reconsideration in a March 22, 2006 letter. However, appellant did not state what form of appeal she desired and mentioned that her compensation benefits should be reinstated. This letter was also not timely filed within one year of the December 5, 2001 termination decision.

The Office reviewed appellant's request under the clear evidence of error standard and determined that she had not established clear evidence of error. The Board notes that appellant did not submit any evidence in support of her contention that the Office improperly terminated her benefits in October 2001. Appellant submitted reports from Dr. Couch that had already been considered. Dr. Katz merely noted that she had been given trigger point injections in 2007. The fact that appellant had injections is not relevant to the issue of continuing disability. The Board notes that medical treatment was not terminated. Accordingly, the Board finds that appellant has not shown clear evidence of error.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing as untimely filed. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of the claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 12, 2008 and May 29, 2007 are affirmed.

Issued: July 2, 2009
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