

ISSUE

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

FACTUAL HISTORY

On October 20, 1989 appellant, then a 36-year-old letter carrier, filed a traumatic injury claim alleging that on October 16, 1989 she fell after her foot became entangled in a strap on the floor. The Office accepted the claim for right knee strain and low back strain. Appellant stopped work on February 21, 1990 and returned briefly to work before stopping again on July 3, 1990. She returned to a light-duty job for two hours per day on October 5, 1992 which increased to six hours per day, but subsequently was reduced to four hours per day. The Office accepted appellant's claim for a recurrence of disability beginning October 12, 1999 and was placed on the periodic rolls for temporary total disability by letter dated April 17, 2000.

On May 22, 2003 Dr. William Krapin, a treating physician, diagnosed degenerative discogenic disease with low back syndrome, depression, anxiety and hypertension. He opined that appellant was totally disabled due to her accepted employment injury and the recurrences and exacerbations she sustained. Dr. Krapin noted that appellant has suffered a series of falls due to her legs giving out which is a direct result of her employment injury. He also diagnosed depression and anxiety due to appellant's repetitive lumbar injuries which occurred as a result of her falls.

In a July 20, 2005 report, Dr. John H. Buckner, a second opinion Board-certified orthopedic surgeon, diagnosed right knee strain with minimum residuals and lumbar spondylosis. He opined that appellant had a slight disability due to her right knee and back conditions. Dr. Buckner concluded that appellant was capable of returning to light-duty work and recommended a functional capacity evaluation be performed.

In a September 8, 2005 addendum, Dr. Buckner noted that he reviewed additional medical evidence including an August 4, 2005 functional capacity evaluation and addendum to a functional capacity evaluation. He noted the objective evidence supports a finding that appellant has thoracic and lumbar spondylosis, which is a degenerative condition. Dr. Buckner stated that "[t]here is reasonable medical probability that" appellant's employment injury caused a temporary exacerbation of these degenerative conditions. Lastly, he noted that he found "no documentation of an aggravation of the degenerative conditions in the reports." As to appellant's work capability, he indicated that she would be able to "do simple work such as mail sorting with breaks." In a second addendum dated October 13, 2005, Dr. Buckner reiterated his opinion regarding appellant's work capability and "reasonable medical probability" that appellant's employment injury temporarily aggravated her preexisting degenerative spinal condition.

On May 3, 2006 the Office found a conflict of medical opinion between Dr. Krapin, for appellant, and Dr. Bruckner, for the government, regarding whether appellant continued to have any disability or residuals due to her accepted right knee and low back strains. To resolve the conflict, it selected Dr. Menachem Y. Epstein, a Board-certified orthopedic surgeon, as impartial

medical examiner. A copy of the medical record and a statement of accepted facts were provided for the physician's review.

In a May 29, 2006 report, Dr. Epstein provided a history of injury as well as detailed findings on examination. He reviewed the entire medical record and advised that there were no objective findings to support residuals from the accepted injury. Dr. Epstein opined that the accepted conditions, namely the right knee strain and low back strain, had resolved. He indicated that his examination of appellant contained no evidence that she sustained a permanent aggravation of her preexisting arthritic condition. Specifically, Dr. Epstein noted that appellant's "physical examination was unimpressive and was not consistent with permanent injuries." He found that appellant was not disabled as a result of the October 20, 1989 work injury and that she was capable of working an eight-hour day with no restrictions. Dr. Epstein also concluded that no further medical treatment was required for her accepted employment injuries as they had resolved.

On September 13, 2006 the Office proposed to terminate appellant's compensation and medical benefits. Based on Dr. Epstein's May 29, 2006 impartial medical examiner's report, it concluded that appellant no longer had any disability or residuals causally related to her accepted injury.

By decision dated November 20, 2006, the Office finalized the termination of appellant's medical and compensation benefits effective November 26, 2006.

Subsequent to the November 20, 2006 decision, the Office received evidence which had previously been submitted by appellant. This evidence included an August 15, 2005 magnetic resonance imaging (MRI) scan; a November 28, 2005 progress note and a December 23, 2005 telephone call note by Dr. Rudolph F. Taddonio, a treating Board-certified orthopedic surgeon; a December 5, 2005 report by Dr. T.V. Seshan, an examining Board-certified physiatrist; and an August 8, 2005 lumbar spine x-ray interpretation.

In a February 22, 2007 memorandum to file, the Office noted that appellant's congressional representative had called and requested the Office contact appellant to explain "her choice between O[ffice of] P[ersonnel] M[anagement] and D[eartment] o[f] L[abor] retirement." In the same memorandum to file, it noted a message had been left on appellant's answering machine stating that if she disagreed with the decision terminating her benefits that she should file an appeal. The Office also gave her the number to call OPM regarding its benefits. In a second memorandum to the file dated February 22, 2007, it noted that during a phone conversation with appellant that she had been provided with information on how to appeal the decision terminating her compensation benefits.

On February 25, 2008 appellant, through her congressional representative, requested reconsideration of the denial of her claim.

By decision dated May 29, 2008, the Office denied appellant's request for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act² provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁴ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁵

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. 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.⁶ 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.⁷

ANALYSIS

On appeal appellant's counsel argues that appellant filed a timely appeal of the November 20, 2006 decision. Her counsel contends that the submission of evidence in inquiry by appellant's congressional representative constituted a timely request for reconsideration. We disagree. The record reflects that on February 22, 2007 appellant's congressional representative requested that the Office provide appellant with information regarding OPM and DOL benefits. In a February 22, 2007 memorandum to file, the Office provided appellant with information on appeal rights. Appellant did not request a reconsideration of the November 20, 2006 decision until the Office received a February 28, 2008 letter from her congressional representative

² 5 U.S.C. § 8101 *et seq.*

³ 20 C.F.R. § 10.605.

⁴ *Id.* at § 10.607(a).

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

⁶ *See Alberta Dukes*, 56 ECAB 247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

⁷ *See Alberta Dukes*, *supra* note 6.

requesting reconsideration. Based upon the circumstances of this case, the Board finds that the Office properly determined that appellant failed to file a timely application for review. Office procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.⁸ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹ As appellant's request for reconsideration, dated February 28, 2008, was submitted more than one year after the most recent merit decision of record on November 20, 2006, it was untimely. Consequently, she must demonstrate clear evidence of error on the part of the Office in terminating her benefits.¹⁰ The Board finds that the evidence submitted is insufficient to establish clear evidence of error.

Medical evidence submitted subsequent to the November 20, 2006 decision consists of an August 15, 2005 MRI scan, a November 28, 2005 progress note and a December 23, 2005 telephone call note by Dr. Taddonio, a December 5, 2005 report by Dr. Seshan and an August 8, 2005 lumbar spine x-ray interpretation. This evidence was previously considered by the Office and does not raise a substantial question as to the correctness of the November 20, 2006 merit decision or demonstrate clear evidence of error.

The term clear evidence of error is intended to represent a difficult standard.¹¹ The submission of 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.¹² The Board finds that none of the medical reports submitted manifests on its face that the Office committed an error in terminating appellant's compensation and medical benefits effective November 26, 2006. Thus, the reports are insufficient to establish clear evidence of error.

As the evidence submitted does not raise a substantial question as to the correctness of the Office's last merit decision, he has not established clear evidence of error.¹³

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration dated February 28, 2008 was untimely filed and did not demonstrate clear evidence of error.

⁸ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB ____ (Docket No. 08-977, issued September 12, 2008).

⁹ *D.G.*, 59 ECAB ____ (Docket No. 08-137, issued April 14, 2008); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ 20 C.F.R. § 10.607(b); *see R.C.*, 59 ECAB ____ (Docket No. 07-2042, issued June 3, 2008); *Debra McDavid*, 57 ECAB 149 (2005).

¹¹ *A.F.*, *supra* note 8.

¹² *Joseph R. Santos*, 57 ECAB 554 (2006).

¹³ *See R.C.*, *supra* note 10; *Veletta C. Coleman*, 48 ECAB 367 (1997).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 29, 2008 is affirmed.

Issued: June 18, 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