

**United States Department of Labor
Employees' Compensation Appeals Board**

C.J., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION & SAFETY)
ADMINISTRATION, HOUSTON HOBBY)
AIRPORT, Houston, TX, Employer)

**Docket No. 09-495
Issued: September 10, 2009**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 10, 2008 appellant filed a timely appeal from the September 17, 2008 decision of the Office of Workers' Compensation Programs which denied his reconsideration requests as untimely filed and failing to establish clear evidence of error. Because more than one year has elapsed between the most recent Office merit decision of May 9, 2007 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.

ISSUE

The issue on appeal is whether the Office properly determined that appellant's reconsideration request was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On August 20, 2005 appellant, then a 21-year-old transportation security screener was lifting heavy bags and injured her low back. The Office accepted her claim for sprain/strain of

the lumbar region and sprain/strain of the thoracic region and a herniated lumbar disc at L5-S1 with lumbar radiculitis.

Appellant came under the treatment of Dr. Jeffrey D. Reuben, a Board-certified orthopedic surgeon, from October 17, 2005 to February 23, 2007. Dr. Reuben treated appellant conservatively and opined that she was totally disabled due to her work-related injury of August 20, 2005.

The Office referred appellant to a second opinion physician and also to an impartial medical examiner. The referee physician diagnosed chronic lumbar strain syndrome and opined that appellant could return to work full time, light duty with occasional lifting limited to 20 pounds, frequent lifting limited to 10 pounds, twisting, bending, stooping, squatting and climbing occasionally and pushing, pulling and lifting limited to 20 pounds. On October 23, 2006 appellant underwent a functional capacity evaluation which revealed that she could work in the light physical demand level.

On February 15, 2007 the employing establishment offered appellant a light-duty job effective February 16, 2007 with duties including monitoring exit points, operating a walk through metal detector and x-ray screen monitor, wandng with hand held metal detector and monitoring the declaration monitor, subject to the restrictions set forth by the referee physician. On February 20, 2007 appellant contended that she was unable to return to work.

In a March 5, 2007 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that she had 30 days to accept the position or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits.

Appellant submitted a February 8, 2007 operative report from Dr. Vidal Omar, a Board-certified orthopedic surgeon, who performed an intradiscal steroid injection at L4-5. Dr. Omar diagnosed lumbar back pain, lumbar radiculopathy and herniated disc. Appellant submitted physical therapy notes from February 13 to 22, 2007.

On April 5, 2007 the Office advised appellant that the offered position was suitable work. It considered that the reasons given by appellant for refusing the position were unacceptable. The Office afforded appellant 15 additional days to accept the job offer.

Appellant submitted a physical therapy report dated February 7, 2007. Also submitted were reports from Dr. Reuben dated April 9 to 16, 2007. Dr. Reuben treated appellant for low back pain radiating into her left leg and opined that she was totally disabled from work.

In a decision dated May 9, 2007, the Office terminated appellant's monetary compensation, effective May 13, 2007, on the grounds that she refused an offer of suitable work.

Appellant submitted reports from Priscilla Alaniz, a chiropractor, dated April 24 to November 13, 2007. Dr. Alaniz diagnosed lumbar disc syndrome, sciatic neuritis and myospasm. She summarized a history of appellant's medical treatment and opined that appellant had 14 percent whole person impairment. Dr. Reuben treated appellant from May 30, 2007 to July 21, 2008 for low back pain radiating into her left leg. He recommended a course of physical

therapy and opined that appellant was totally disabled due to constant lumbar pain. Appellant submitted physical therapy notes October 30, 2007 to July 21, 2008.

In an appeal request form dated August 20, 2008, appellant requested reconsideration of the May 9, 2007 Office decision.

On September 17, 2008 the Office denied appellant's reconsideration request finding that the request was not timely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”¹

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.²

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.³

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁵ This entails a limited review by the Office of the evidence previously of record and whether the new evidence

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

³ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁴ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁵ *Id.*

demonstrates clear error on the part of the Office.⁶ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.⁷

ANALYSIS

In its September 17, 2008 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on May 9, 2007. Appellant's request for reconsideration was dated August 20, 2008, more than one year after May 9, 2007. Thus, her request was not timely filed.

The Board also finds that appellant has not established clear evidence of error on the part of the Office. Appellant's August 20, 2008 request was accompanied by reports from Dr. Alaniz, who diagnosed lumbar disc syndrome, sciatic neuritis and myospasm and opined that appellant had 14 percent whole person impairment.⁸ Dr. Alaniz, a chiropractor, did not diagnose a spinal subluxation based on x-ray. She is not considered a physician as defined under the Act and her reports are of no medical value. A chiropractor is considered to be a physician under the Act only to the extent that she treats a spinal subluxation as demonstrated by x-ray.⁹ Similarly, the physical therapist reports are of no probative medical value as a physical therapist is not a physician under the Act.¹⁰ This evidence is of no medical value with regard to whether the job offer of February 12, 2007 was suitable.

Dr. Reuben noted appellant's complaints of low back pain radiating into her left leg. He recommended a course of physical therapy and opined that appellant was totally disabled due to constant lumbar pain. However, Dr. Reuben did not review the job offer or provide any opinion relevant to appellant's capacity for work at the time the job was offered. As noted, clear evidence of error is intended to represent a difficult standard.¹¹ These reports do not raise a substantial question as to the correctness of the Office's prior decision. Furthermore, the Board notes that clear evidence of error is intended to represent a difficult standard. 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

⁶ *Id.*

⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁸ On May 21, 2007 appellant filed a claim for a schedule award. On June 3, 2008 the medical adviser opined that appellant had 17 percent impairment of the left lower extremity. The Office has not issued a final decision with regard to the schedule award claim.

⁹ *See* 5 U.S.C. § 8101(2); *Mary A. Ceglia*, 55 ECAB 626 (2004) (in assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician as defined under 5 U.S.C. § 8101(2); a chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist).

¹⁰ *See* 5 U.S.C. § 8101(2); *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physical therapists are not competent to render a medical opinion under the Act).

¹¹ *Id.*

evidence of error.¹² The reports of Dr. Reuben are not relevant to the underlying issue in this case.

On appeal, appellant contended that she received the May 9, 2007 decision terminating her compensation for refusal of suitable work on June 19, 2008, over a year after issuance; therefore, she could not timely respond. The record supports that the Office's May 9, 2007 decision was sent to appellant at her address of record and does not indicate that it was returned as undeliverable. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.¹³ The presumption arises after it appears from the record that the notice was duly mailed and the notice was properly addressed."¹⁴

Appellant also alleged that she received inconsistent information from the Office regarding her right to a schedule award when her compensation was terminated due to refusal of suitable work. However, the Board notes that it does not have jurisdiction over any matter pertaining to a schedule award as the Office's September 17, 2008 decision did not adjudicate appellant's entitlement to a schedule award.¹⁵

Appellant has not provided any argument or evidence sufficient to shift the weight of the evidence in her favor or raise a substantial question as to the correctness of the Office's decision.¹⁶

CONCLUSION

The Board finds that appellant's request for reconsideration dated August 20, 2008 was untimely filed and did not demonstrate clear evidence of error.

¹² *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

¹³ *A.C. Clyburn*, 47 ECAB 153 (1995).

¹⁴ *Id.*

¹⁵ See 20 C.F.R. § 501.2(c) (the Board only has jurisdiction over final decisions of the Office).

¹⁶ On appeal, appellant submitted new evidence. However, the Board's jurisdiction is limited to the evidence that was before the Office at the time of its final decision. See *id.*

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 10, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board