United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 09-778**
	)	**Issued: February 1, 2010**
DEPARTMENT OF THE ARMY, FORT SAM, Houston, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 27, 2009 appellant filed a timely appeal from a December 23, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration as untimely and insufficient to show clear evidence of error. As there is no merit decision within one year of the last merit decision, the Board lacks jurisdiction to review the merits of the case, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

The Office accepted that on March 15, 1997 appellant, then a 39-year-old facility maintenance clerk, sustained contusions of the elbow and knee and lumbar sprain in the

performance of duty. Appellant stopped work on March 25, 1997 and resumed limited-duty employment on August 1, 1997.[1] She worked 10 hours per day, 4 days per week.

On October 17, 2000 appellant filed a recurrence of disability claim on July 19, 2000 due to her March 15, 1997 work injury. She related that the employing establishment reassigned her to new duties beginning June 28, 2000 which she believed aggravated her condition. Appellant asserted that beginning July 20, 2000 she could only work 5 hours per day 4 days per week instead of her usual schedule of 10 hours per day, 4 days per week.

By decision dated April 4, 2001, the Office found that appellant failed to establish a recurrence of disability beginning July 19, 2000. In a decision dated January 28, 2002, an Office hearing representative set aside the April 4, 2001 decision and remanded the case for further development. He noted that the Office found a conflict between Dr. Angel Roman, an attending Board-certified physiatrist, and Dr. Govindasmy Durairaji, an orthopedic surgeon, who provided a second opinion examination. The hearing representative instructed the Office to obtain appellant's specific job requirements beginning June 2000 and refer her to a new referee physician "concerning whether effective July 20, 2000 [she] had an increase in her work-related disability such that she could no longer do her June 2000 job 10 hours a day, 4 days a week."

On July 1, 2002 the Office referred appellant, together with a statement of accepted facts, to Dr. Robert L. Jones, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated July 16, 2002, Dr. Jones discussed appellant's history and noted that she experienced a motor vehicle accident in 1989. He diagnosed mild carpal tunnel syndrome and lumbar disc degeneration caused by the 1989 automobile accident and by history aggravated by the 1997 incident. Dr. Jones noted that appellant's position was abolished in June 2000 and she was reassigned to a more sedentary position which she contended aggravated her back pain. He concluded that appellant had no increase in disability such that she could not perform her June 2000 position and noted that she believed it better suited her condition.

In a decision dated August 13, 2002, the Office found that appellant did not establish an employment-related recurrence of disability due to her March 15, 1997 work injury. The Office determined that the July 16, 2002 opinion of Dr. Jones established that appellant did not have an increase in disability preventing her from working in her limited-duty position full time. In a decision dated July 29, 2003, a hearing representative affirmed the August 13, 2002 decision.

On November 31, 2003 appellant requested reconsideration. She contended that Dr. Jones did not have an accurate medical history and factual background. Appellant related that Dr. Jones concluded that she had no increase in disability such that she could not perform her job prior to June 2000. She maintained that her disability arose when she began new work duties after June 2000. Appellant noted that Dr. Roman, her attending physician, had treated her since 1990.

[1] On August 6, 1999 the Office accepted that appellant sustained bilateral wrist tenosynovitis causally related to factors of her federal employment.

By decision dated December 30, 2003, the Office denied modification of its July 29, 2003 decision.[2]

On December 6, 2006 the Office noted that appellant had filed a claim for compensation from July 20, 2000 to August 17, 2005 for intermittent wage loss. It advised her to follow her appeal rights accompanying the December 30, 2003 decision.

On March 2, 2007 appellant requested reconsideration of the December 30, 2003 decision. In an accompanying February 26, 2007 statement, she questioned the accuracy of her medical history as related by Dr. Jones and asserted that he did not have her complete medical documentation from 1989 to 2003. Appellant argued that Dr. Jones did not provide an opinion on whether she could perform the duties of her new position assigned in 2000, the basis of her claim. She stated, "In the report it seems that Dr. Jones focused on my capabilities prior to the year of 2000 rather than the results and capabilities of my job of the year of 2000." Appellant asserted that her attending physician's opinion should constitute the weight of the evidence. She also submitted a report dated February 12, 2007 from Dr. Roman, who noted that appellant had a job reassignment in July 2000 that she was unable to perform because it caused increased low back pain. Dr. Roman asserted that her condition was ongoing since 1989 and that her job reassignment in 2000 "actually caused her condition to worsen, which then led to her wage-loss claim."

By decision dated July 13, 2007, the Office denied appellant's request for reconsideration as it was untimely and insufficient to warrant review of the prior decision.[3] Appellant appealed to the Board. In an order dated August 19, 2008, the Board remanded the case for the Office to issue an appropriate decision containing findings of fact and conclusions of law.[4] By decision dated December 23, 2008, the Office denied appellant's request for reconsideration as it was untimely and did not demonstrate clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act.[5] As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence

[2] By decision dated November 10, 2005, the Office denied appellant's claim for a schedule award. On November 29, 2005 appellant requested reconsideration of the November 10, 2005 decision. In a decision dated April 17, 2006, the Office denied modification of its schedule award decision.

[3] In a decision dated June 18, 2007, the Office granted appellant a schedule award for a 32 percent permanent impairment of the right upper extremity and a 3 percent impairment of the left upper extremity.

[4] Order Remanding Case, Docket No. 07-2051 (issued August 19, 2008).

[5] 5 U.S.C. §§ 8101-8193.

on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[6]

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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.[7] 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.[8]

ANALYSIS

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.[9] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[10] As appellant's March 2, 2007 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim for compensation.[11]

In her request for reconsideration, appellant argued that Dr. Jones, the impartial medical examiner, did not address the relevant issue of whether she could perform the full duties of her position assigned in 2000. She further asserted that he did not have all of her medical records. Appellant's contentions, however, are similar to those she previously raised in her November 31, 2003 request for reconsideration. Under the clear evidence of error standard, it is not enough to merely show that the evidence could be construed to produce a different conclusion. The evidence presented must manifest on its face that the Office committed an error in finding in its last merit decision that appellant failed to establish a recurrence of disability.[12] Appellant arguments in her 2007 request for reconsideration reiterate those previously considered by the Office in 2003 and fail to show that the Office erred in its previous decision. Consequently, she has not raised contentions sufficient to establish clear evidence of error.

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[6] 20 C.F.R. § 10.607.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

[8] *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

[9] 20 C.F.R. § 10.607(a).

[10] *Robert F. Stone, supra* note 8.

[11] 20 C.F.R. § 10.607(b); *see G.H.*, 58 ECAB 183 (2006).

[12] *W.G.*, 60 ECAB ___ (Docket No. 08-2340, issued June 22, 2009).

Appellant maintained that the opinion of her attending physician should constitute the weight of the evidence. The relevant issue, however, is whether the medical evidence establishes that she sustained an employment-related recurrence of disability. As this issue is medical in nature, it can only be resolved through the submission of medical evidence.[13] Appellant's lay opinion regarding the weight of the medical evidence is not relevant as the Board has held that lay individuals are not competent to render a medical opinion.[14] Consequently, her contention is insufficient to establish clear evidence of error by the Office.

In a report dated February 12, 2007, Dr. Roman related that appellant's reassignment beginning in July 2000 caused increased low back pain and resulted in her claim for wage loss. However, he was on one side of the conflict resolved by Dr. Jones. A subsequently submitted report from a physician on one side of a resolved conflict which generally repeats an earlier opinion is insufficient to overcome the weight of the impartial medical specialist or to create a new conflict in medical opinion.[15] Further, the term "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 evidence of error.[16] Dr. Roman's report does not manifest on its face that the Office committed an error in finding that appellant did not establish a recurrence of disability and is thus insufficient to establish clear evidence of error.[17]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim as her request was untimely and did not establish clear evidence of error.

[13] *George C. Vernon*, 54 ECAB 319 (2003).

[14] *Gloria J. McPherson*, 51 ECAB 441 (2000).

[15] *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

[16] *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008); *Joseph R. Santos*, 57 ECAB 554 (2006).

[17] *See D.O.*, 60 ECAB ___ (Docket No. 08-1057, issued June 23, 2009).

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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