United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
and	)	**Docket No. 10-313**
	)	**Issued: February 24, 2010**
DEPARTMENT OF VETERANS AFFAIRS, SAN JUAN VETERANS MEDICAL CENTER, San Juan, PR, Employer	)	

Appearances:
Emilio F. Soler, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 16, 2009 appellant filed a timely appeal from an October 16, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated May 22, 2000 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, the Board has jurisdiction to review the October 16, 2008 nonmerit decision.[1]

[1] The Board notes that on appeal, appellant's counsel requested an oral argument before the Board. In an order dated February 22, 2010, the Board denied the request on the grounds that oral argument in this appeal would further delay issuance of a Board decision and would not serve a useful purpose, and that her contentions on appeal could adequately be addressed in a decision based on the case record as submitted. (Docket No. 10-313, issued February 22, 2010).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely and failed to establish clear evidence of error.

FACTUAL HISTORY

The Office accepted appellant's April 22, 1991 traumatic injury claim for thoracic sprain, acute myositis and herniated disc. Appellant returned to light duty on November 9, 1997.

Appellant filed a CA-2a alleging that she experienced a recurrence of total disability on December 9, 1997. The Office denied the recurrence claim by decision dated December 29, 1998, finding that any aggravation of her back condition was due to pregnancy, which was not work related. By decision dated May 22, 2000, an Office hearing representative affirmed the December 29, 1998 decision, finding that the medical evidence failed to show a change in the injury-related condition, or in the nature of the light-duty assignment. The Office denied appellant's request for reconsideration in a nonmerit decision dated February 12, 2002.

On July 18, 2008 appellant, through her representative, requested reconsideration, contending that new medical evidence from her treating physician established that her recurrence of disability was causally related to the April 22, 1991 injury. She submitted a December 10, 2007 report from Dr. Boris Rojas, a treating physician, who opined that her current disabling condition was causally related to the accepted employment-related injury. Dr. Rojas provided examination findings and diagnosed C6-7 herniated disc with radiculopathy on the right; cervico-dorsal fibromyositis and major depression. He stated that appellant had been disabled since December 9, 1997 and that any effect of her 1997 pregnancy ceased to act on the employment condition after delivery. Dr. Rojas opined that "the transient recrudescence of the back pain suffered by the claimant during her pregnancy was an exacerbation (transient reversible aggravation) of the previous chronic back pain syndrome" and, therefore, could not be considered "an intervening injury."

In an October 16, 2008 nonmerit decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to present clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[2] It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[3] In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[4]

When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[5] Its procedures state 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, if the claimant's application for review shows clear evidence of error on the part of the Office.[6] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[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. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] 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.[9] 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.[10]

ANALYSIS

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

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.[11] A right to reconsideration

[4] *Veletta C. Colem*an, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

[5] *Id.*

[6] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: [The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b).

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

[8] *Leon J. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

[9] *Id.*

[10] *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

[11] 20 C.F.R. § 10.607(a).

within one year also accompanies any subsequent merit decision on the issues.[12] As appellant's July 18, 2008 request for reconsideration was submitted more than one year after May 22, 2000, the date of the last merit decision of record, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim.[13]

The Office found that appellant had not established that she sustained a recurrence of disability as of December 9, 1997. Appellant has not demonstrated clear evidence on the part of the Office in issuing its May 22, 2000 decision. She did not submit the type of positive, precise and explicit evidence that manifests on its face that the Office committed an error.

In connection with the untimely reconsideration request, counsel submitted a summary of the Office's decisions and chronology of events. He contended that new medical evidence was sufficient to establish that appellant had sustained a recurrence of disability on December 9, 1997 causally related to the April 22, 1991 accepted injury. However, counsel did not allege that the Office committed error at the time it issued its decision on May 22, 2000.

In support of her reconsideration request, appellant submitted a December 10, 2007 report from Dr. Rojas, who provided examination findings, a diagnosis and an opinion that appellant had been disabled since December 9, 1997 due to her accepted employment-related injury. Dr. Rojas characterized appellant's pregnancy as a "transient reversible aggravation," rather than an intervening injury, and stated that any effect of her 1997 pregnancy ceased to act on the employment condition after delivery. The Board finds that his report is insufficient to establish that the Office erred when it rendered its May 22, 2000 decision.

The term clear evidence of error is intended to represent a difficult standard. The submission of evidence which, if submitted before the denial was issued, would have required further development, is not clear evidence of error.[14] Had appellant's request for reconsideration been made in a timely fashion, Dr. Rojas' report, which contained an opinion as to causal relationship and the effect of appellant's pregnancy on her accepted condition, might have constituted new and relevant evidence warranting additional development. However, in light of the untimeliness of the request, his report must be analyzed under the clear evidence of error

[12] *Robert F. Stone*, 57 ECAB 292 (2005).

[13] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[14] *Joseph R. Santos*, 57 ECAB 554 (2006).

standard. As his report does not manifest on its face that the Office abused its discretion in denying appellant's claim, it is insufficient to establish clear evidence of error.[15]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 24, 2010
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

[15] On appeal, counsel argues that the Office abused its discretion in denying the reconsideration request. For reasons stated above, the Board finds counsel's argument to be without merit.

The Board notes that counsel incorrectly cited the case of *James R. Mirra*, 56 ECAB 738 (2005) for the proposition that a detailed, well-rationalized report creating a conflict in medical conclusions may constitute clear evidence of error. Rather, *Mirra* cites to the Office's procedure manual, which provides, "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 note 10, *citing* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602.3d (January 2004).