United States Department of Labor
Employees' Compensation Appeals Board

F.R., Appellant	)	
and	)	**Docket No. 09-575**
	)	**Issued: January 4, 2010**
DEPARTMENT OF THE ARMY, HUMAN RESOURCES COMMAND, Alexandria, VA, Employer	)	

Appearances:
Dean E. Wanderer, 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 December 29, 2008 appellant filed a timely appeal from an October 7, 2008 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error. There is no merit decision within one year of the filing of this appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's April 8, 2008 request for reconsideration on the grounds that it was not timely filed and did not establish clear evidence of error.

On appeal, counsel asserts that on October 17 and December 17, 2007 he timely requested reconsideration of a January 23, 2007 merit decision denying appellant's claim. He

contends that the Office erred by refusing to act on his correspondence until appellant authorized his representation.[1]

FACTUAL HISTORY

On October 20, 2006 appellant, then a 48-year-old human resources specialist, filed a traumatic injury claim (Form CA-1) alleging that she fractured her left ankle and right foot at 10:00 a.m. on October 19, 2006 when she fell on a sidewalk in front of a restaurant next to the office building where she worked.[2] Her scheduled shift began at 7:00 a.m. Appellant stopped work on October 19, 2006. It is not clear from the record whether she returned to work.

In a December 12, 2006 telephone memorandum, the Office noted that the employing establishment did not own or control the sidewalk where appellant fell. The employing establishment advised that she "may have been on a smoke break."

In a December 21, 2006 letter, the Office advised appellant that the evidence did not establish that she was in the performance of duty at the time of the October 19, 2006 incident. It requested that she describe what she was doing at the time and place of the injury. Appellant submitted a January 17, 2007 statement, asserting that, as she walked out of the building with two coworkers, she turned and fell on an uneven sidewalk in front of a restaurant.

By decision dated January 23, 2007, the Office denied appellant's claim on the grounds that she was not in the performance of duty at the time of the October 19, 2006 incident. It found that the claimed injury did not occur on the employing establishment's premises. Appellant did not submit evidence establishing that her fall arose out of and in the course of her federal employment.

In an April 2, 2008 letter received by the Office on April 8, 2008, counsel claimed to represent appellant. He requested reconsideration of the January 23, 2007 decision, asserting that she was on an authorized smoking break at the time of the injury. Counsel enclosed an appeal form dated and signed by appellant on September 24, 2007, requesting reconsideration of the January 23, 2007 decision. He enclosed a sketch of the accident site.

In an April 18, 2008 letter, the Office advised that counsel's April 8, 2008 letter was not a valid request for reconsideration as there was no notice of representation of record. Therefore, it would take no action on his correspondence. The Office advised appellant that to request reconsideration, she or a properly appointed representative, must make such request within one year of the date of the decision she was asking the Office to reconsider.

[1] On appeal, counsel submitted documents not previously of record at the time the Office issued the final merit decision in the case on January 23, 2007. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final merit decision in the case. 20 C.F.R. § 501.2(c).

[2] On October 19, 2006 appellant underwent open reduction and internal fixation of a displaced left bimalleolar ankle fracture. Dr. David A. Kavjian, an attending Board-certified orthopedic surgeon, also diagnosed a right fifth metatarsal fracture. Appellant submitted periodic progress notes.

In an April 24, 2008 letter, counsel asserted that he submitted October 17 and December 17, 2007 requests for reconsideration and a notice of representation. He contended that his paralegal spoke to Office personnel about appellant's claim, thus indicating the Office's awareness of his representation. Counsel enclosed copies of the October 17 and December 17, 2007 letters, medical reports, leave forms and legal extracts.

In a July 11, 2008 letter, the Office advised appellant that it would take no action on counsel's April 24, 2008 correspondence until it received her signed and dated authorization of representation. On July 22, 2008 appellant authorized counsel to represent her for purposes of her compensation claim.

In a September 18, 2008 letter received by the Office on October 2, 2008, appellant, through her attorney, requested reconsideration of the Office's April 18, 2008 letter. It was contended that she was on an authorized smoking break at the time of the October 19, 2006 injury.

By decision dated October 7, 2008, the Office denied appellant's April 8, 2008 request for reconsideration as it was not timely filed within one year of the Office's January 23, 2007 decision. Regarding appellant's September 18, 2008 request for reconsideration, it noted that its April 18, 2008 letter was not a final decision and there was no provision for reconsideration from such correspondence.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.[6] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[8]

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[3] 5 U.S.C. § 8128(a).

[4] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[5] *Thankamma Mathews*, *id.*; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[6] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

[7] 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 4, *Jesus D. Sanchez, supra* note 5.

[8] *Thankamma Mathews, supra* note 4.

Office regulations state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14]

Section 20 C.F.R. § 10.701 provides in pertinent part that a claimant "may authorize any individual to represent him or her in regard to a claim under the FECA [Federal Employee's Compensation Act]."[15] Under definitions, 20 C.F.R. § 10.5(z) states: "Representative means an individual properly authorized by a claimant in writing to act for the claimant in connection with a claim or proceeding under the FECA or this part."[16] Section 20 C.F.R. § 10.700(c) provides that "[a] properly appointed representative who is recognized by [the Office] may make a request or give direction to [the Office] regarding the claims process, including a hearing." Section 20 C.F.R. § 10.606 provides in pertinent part that "[a]n employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by [the Office] in the final decision."

The Board has held that there is no requirement that the Office actually have the authorization in hand at the time an authorized representative acts on behalf of a claimant. The representative only need to show that he (or she) was authorized at the time such action was undertaken."[17]

[9] 20 C.F.R. § 10.607(b).

[10] *Thankamma Mathews, supra* note 4.

[11] *Leona N. Travis*, 43 ECAB 227 (1991).

[12] *Jesus D. Sanchez, supra* note 5.

[13] *Leona N. Travis, supra* note 11.

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

[15] 5 U.S.C. § 8101 *et seq*.

[16] *See David M. Ibarra*, 48 ECAB 218 (1996).

[17] *Ira D. Gray*, 45 EAB 445 (1994).

ANALYSIS

In its October 7, 2008 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on January 23, 2007. Appellant requested reconsideration on April 8, 2008 more than one year after January 3, 2007. Accordingly, her request for reconsideration was not timely filed.

On appeal, counsel contends that he filed timely requests for reconsideration on November 17 and December 17, 2007. He argued that the Office must have received these letters as its personnel discussed appellant's case by telephone with his paralegal. However, counsel did not submit any postmarks, certified return receipts, certificates of mailing or other evidence that he mailed these letters or to establish that the Office received them. There is no evidence corroborating the alleged telephone conversations.

Counsel also asserts that the Office erred by failing to act on his correspondence submitted prior to July 22, 2008, when appellant authorized his representation. As noted, the Office's implementing regulations regarding the representation of claimants clearly state that for a representative to be recognized by the Office, the claimant must submit a signed written notice to the Office appointing the representative.[18] Appellant did not submit a signed, written notice to the Office authorizing counsel's representation until July 22, 2008. Therefore, the Office properly refused to act on his correspondence until she filed a proper notice authorizing him to act on her behalf for the purposes of her compensation claim.[19] The Board notes that after appellant authorized counsel's representation, the Office acted on his April 8, 2008 request for reconsideration, his first letter of record.

The Board finds that appellant's April 8, 2008 letter does not raise a substantial question as to whether the Office's January 23, 2007 decision was in error or shift the weight of the evidence in her favor. Therefore, it is insufficient to establish clear evidence of error. The medical evidence, leave forms and legal extracts submitted in support of the request are insufficient to establish clear evidence of error by the Office. These documents do not address the issue of performance of duty, the critical issue in the January 23, 2007 merit decision. Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.[20] Therefore, the evidence accompanying the April 8, 2008 letter is insufficient to raise a substantial question as to the correctness of the Office's January 23, 2007 decision.

Appellant has not submitted argument or evidence of sufficient probative value to shift the weight of the evidence in her favor or raise a substantial question as to the correctness of the Office's decision denying her claim. Consequently, the Office properly denied appellant's reconsideration request as her request does not establish clear evidence of error.

[18] 20 C.F.R. § 10.5(z).

[19] *Shirley Rhynes*, 55 ECAB 703 (2004).

[20] *Thankamma Mathews*, *supra* note 4.

CONCLUSION

The Board finds that appellant's April 8, 2008 request for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 7, 2008 is affirmed.

Issued: January 4, 2010
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