United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 09-1030**
	)	**Issued: January 27, 2010**
U.S. POSTAL SERVICE, SAN FRANCISCO BULK MAIL CENTER, Richmond, CA, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 9, 2009 appellant filed a timely appeal of a January 26, 2009 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 from the last merit decision dated April 24, 2006 to the filing of this appeal on March 9, 2009, the Board lacks jurisdiction to review the merits of this 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 on the grounds that it was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On October 27, 1981 appellant, then a 33-year-old clerk, was injured when she was struck on the head, face and right eye after pushing books onto a belt. She stopped work on

October 28, 1981 for 30 days and returned to light duty intermittently until May 15, 1988. Appellant has not returned to work since then. The Office accepted her claim for cervical sprain and chronic muscular strain of the right shoulder and neck. It subsequently accepted her claim for dysthymic disorder. The Office paid appellant appropriate compensation benefits.

On June 27, 2005 the Office referred appellant to Dr. John Randall Chu, a Board-certified orthopedic surgeon, and Dr. Robert Hepps, a Board-certified psychiatrist, for second opinion evaluations. On July 14, 2005 Dr. Chu noted appellant's complaint of right shoulder and upper back pain. He diagnosed a history of cervical and shoulder strain. Dr. Chu opined that there were no orthopedic residual disabilities from the October 1981 injury as there was no muscle atrophy or neurological deficits. He also advised that no further medical treatment was necessary. In a report of the same date, Dr. Hepps diagnosed adjustment disorder with depressed mood caused by a struggle to regain compensation benefits. He opined that counseling would not resolve the problems as they were entirely related to a lack of income and perceived unfair treatment from the Office. Dr. Hepps further opined that appellant's present emotional condition was not the result of the 1981 physical injury and depression as those conditions had resolved in 1998. He advised that she could work eight hours per day performing her usual job.

On March 15, 2006 the Office issued a proposed notice of termination of compensation. It found that the weight of the medical evidence, represented by Drs. Chu and Hepps' reports, demonstrated that appellant no longer had any disability or residuals due to her accepted October 27, 1981 work-related injury. The Office allowed 30 days for her to submit additional evidence. Appellant submitted a March 21, 2006 statement requesting a "signed release return to work form" to submit to her surgeon and hospitals that had documented total disability on her behalf.

In an April 24, 2006 decision, the Office terminated appellant's compensation benefits effective that day. It found that her statement was insufficient evidence to overcome the reports of Drs. Chu and Hepps finding that she had no continued disability or residuals from the accepted work-related injury.

In a July 18, 2006 statement, submitted through her congressman, appellant requested compensation for June and July 2006 to pay her rent. On September 29, 2006 the Office informed appellant's congressman that she must follow the appeal rights that accompanied the April 24, 2006 decision if she disagreed with that decision. The record also contains a January 31, 2007 statement to an Office district director in which she indicated that her compensation was terminated in April 2006 because she requested retroactive compensation payment from 2003 through 2005.[1] Appellant noted that she had not recovered from her chronic permanent injury. She further noted that withheld compensation caused her undue hardship and mental anguish. Appellant requested that her compensation be reinstated. In a February 14, 2007 letter, the Office advised her that she must review the appeal rights that accompanied the April 24, 2006 decision if she disagreed with that decision. In a March 9, 2007 statement, appellant noted previously sending her appeal to the district director and the postmaster general.

[1] The record indicates that appellant's compensation was suspended on several occasions from 2001 to 2003 because she either did not attend directed medical examinations or she did not submit documentation requested by the Office.

She indicated that she did not receive any forms for appeal. Appellant noted that her treating physician stated that she had permanent disability and advised that the Office call him to resolve the matter. In a March 21, 2007 letter, the Office referred her to its February 14, 2007 letter and provided her another copy of that letter regarding her denied claim and advised that she must successfully appeal the April 2006 decision if she wanted to have benefits reinstated. It further advised that appellant's treating physician could submit medical reports but the Office would not contact him unless at his request.

In a January 17, 2008 letter, appellant asserted that the claims examiner did not reply after she submitted her appeal information and physician's request for a telephone call. She requested wage compensation. On January 24, 2008 the Office reiterated that it would not contact appellant's treating physician without a request from him. It also advised her to appeal the Office's decision.

In a June 25, 2008 statement, appellant indicated "This is the letter of appeal that was mailed April 2007." She also noted that she was in urgent need of income. Appellant attached another letter, also dated June 25, 2008, stating that her termination of compensation was based on second opinion examinations, which were not valid as the examinations were brief, without x-rays and without knowledge of her medical complications. She subsequently submitted a July 29, 2008 statement to the employing establishment human resources department noting that her new claims examiner had no knowledge of the previous appeal letter she sent. Appellant also noted that her physician did not change his assessment regarding her health and chronic condition and that he requested a call concerning this matter. She asserted that she would not need to be examined further and requested help to correct the situation. In subsequent telephone conversation memoranda, the Office notified appellant that there was no reconsideration request of record.

On September 17, 2008 appellant indicated that she was submitting an "additional letter of appeal." She further indicated that her first appeal letter was sent in April 2007. Appellant noted submitting documentation for many years establishing that her chronic medical condition made her unable to work. She asserted that repetitive fitness-for-duty examinations caused stress and depression. Appellant also questioned the second opinion reports asserting that her examinations were brief and no x-rays were viewed. She requested that the Office contact the employing establishment with a reply.

In an October 6, 2008 letter, the Office advised appellant that her September 17, 2008 letter did not specify the type of appeal she was requesting. On October 29, 2008 appellant submitted an appeal request form requesting reconsideration. In a statement of the same date, she indicated that she might pursue a "malpractice charge." In a November 20, 2008 telephone conversation memorandum, appellant stated that she submitted a reconsideration request the prior year.

In a January 26, 2009 decision, the Office denied appellant reconsideration request finding it was untimely filed and did not establish 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] 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.[3] In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting 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(a), 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. 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. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to raise a substantial question as to the correctness of the Office's decision. 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.[8]

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[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607; *see also D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

[4] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[5] *A.F.*, 59 ECAB ___ (Docket No. 08-977, issued September 12, 2008).

[6] *E.R.*, 60 ECAB ___ (Docket No. 09-599, issued June 3, 2009).

[7] *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008).

[8] *Id.*

ANALYSIS

The Board finds that the Office properly found that appellant filed an untimely request for reconsideration. The one-year period for requesting reconsideration begins on the date of the original decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board, but does not include prerecoupment-hearing decisions.[9] Therefore, appellant had one year from April 24, 2006 to submit a timely request for reconsideration. As her October 29, 2008 reconsideration request form was made more than one year after the April 24, 2006 merit decision, the request was untimely.

In certain instances, the Board has held that a letter may constitute a request for reconsideration even if it does not contain the word "reconsideration."[10] The Office's procedures provide that while no special form is required, the request must be in writing, identify the decision and the specific issues, for which reconsideration is being requested and be accompanied by relevant new evidence or argument not considered previously.[11]

The Board finds that none of appellant's statements submitted within one year from the April 24, 2006 decision constitute a valid request for reconsideration. In a July 18, 2006 letter, appellant requested compensation from June and July 2006 solely for the purpose of allowing her to pay her rent. This letter does not constitute a request for reconsideration as she did not indicate the date of the decision she disagreed with or specify any particular issue she wanted addressed. Appellant also did not submit any new evidence or raise new legal arguments. In a January 31, 2007 letter to an Office district director, she asserted that her compensation was terminated in April 2006, because she had requested retroactive compensation between 2003 and 2005 and that the withheld compensation caused her undue hardship and mental anguish. Appellant requested that the Office reinstate her compensation. Although she requested reinstatement of her compensation, she did not identify the date of any Office decisions she wished to have reconsidered and she did not submit any additional evidence in support of her claim.[12] Additionally, appellant's March 9, 2007 letter noted previously sending an "appeal" to the district director and advised the Office to call her treating physician regarding her permanent disability condition. Although she alluded to submitting a previous "appeal," the context of this letter and the surrounding circumstances do not clearly support that she was attempting to overturn the Office's April 24, 2006 decision. Appellant did not indicate any particular decision or issue she wanted to "appeal." Moreover, the context of the March 9, 2007 letter indicated that

[9] *Leon D. Faidley*, 41 ECAB 104, 111 (1989). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (January 2004).

[10] *See Jack D. Johnson*, 57 ECAB 593 (2006); *Gladys Mercado*, 52 ECAB 255 (2001); *Richard J. Chabot*, 43 ECAB 357 (1991).

[11] Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.1602.2(a) (May 1996); *Vincente P. Taimanglo*, 45 ECAB 504 (1994); *see also* 20 C.F.R. §§ 10.605, 10.606(b).

[12] *See Mercado*, 52 ECAB 255 (2001); *Taimanglo supra* note 11, (where appellant's letter constituted a timely reconsideration request as it identified the decision date or case number and was submitted with new evidence).

her request for resolution of this matter referred to her request to have the Office contact her treating physician to discuss her medical condition. This letter is insufficient to be considered as an attempt to request reconsideration and was not accompanied by any supporting evidence.[13]

Additionally, the Office advised appellant in a February 14, 2007 letter that she must follow the appeal rights accompanying the April 24, 2006 decision if she disagreed with that decision. In a March 21, 2007 letter, it referred her to its February 14, 2007 letter and provided her another copy of the letter which clearly advised her of how to proceed if she disagreed with the Office's April 24, 2006 decision. These letters also provided notice well over a month before her one-year time limitation expired such that she could still submit a timely reconsideration request with supporting evidence or argument.

As noted, 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.[14] The Board finds that appellant did not submit any evidence with her reconsideration request that raises a substantial question concerning the correctness of the Office's April 24, 2006 decision and establishes clear evidence of error. Appellant submitted several statements noting that she was permanently disabled and in need of income. She also advised that her treating physician should be contacted by the Office to discuss her condition. Appellant also questioned the validity of the second opinion evaluations asserting they were brief and did not involve x-rays. However, these are broad and general statements that do not specifically address the relevant issue, which is medical in nature, regarding whether she had any continued disability or residuals as a result of the accepted October 27, 1981 work injury. Moreover, appellant's arguments are not supported by any additional evidence submitted to the record. Therefore, her statements do not raise a substantial question as to the correctness of the Office's decision.

On appeal, appellant asserts that the Office would not contact her treating physician concerning her condition and that her physician indicates that she is still disabled to work. The Board notes that the Office advised her that it would contact her treating physician if he requested to be contacted, but no such request from him was of record. Additionally, as noted, the issue regarding whether appellant is disabled is medical in nature and must be supported by medical evidence. Appellant did not submit any additional medical evidence to support her claim and establish clear evidence of error by the Office. She also asserts that she requested reconsideration on April 2, 2007 but received no response. The record does not contain evidence supporting this assertion.

[13] *Compare Francine Bibbs*, Docket No. 03-416 (issued March 26, 2003) (appellant's letter found not to constitute a reconsideration request where appellant stated that she would like her case reopened and noted her case number but she did not identify the decision being appealed, state the specific issues she was contesting and did not submit any new evidence or raise any legal arguments previously not considered) with *Richard J. Chabot*, 43 ECAB 357 1991 (where appellant's letter referred to reconsideration of his claim and contained new evidence to support his reconsideration request for the Board to deem it a valid request).

[14] *See supra* note 5.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 26, 2009 is affirmed.

Issued: January 27, 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