United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 09-2258**
	)	**Issued: June 28, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Riverdale, MD, Employer	)	

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 September 9, 2009 appellant filed a timely appeal of a July 1, 2009 decision of the Office of Workers' Compensation Programs finding that appellant's request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to 20 C.F.R. § 501.3(e), the Board has jurisdiction over the July 1, 2009 decision. The most recent Office merit decision is dated November 13, 1985. For decisions prior to November 19, 2008, appellant had one year to file an appeal before the Board.[1] Accordingly, the Board does not have jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

[1] *See* 20 C.F.R. § 501.3(d)(2) (2007).

FACTUAL HISTORY

There have been six traumatic injuries to appellant's back accepted by the Office: a lumbar strain on December 19, 1981 (File No. xxxxxx669); acute low back strain, cervical strain and psychogenic pain disorder on December 17, 1985 (File No. xxxxxx047); aggravation of degenerative disc disease C5-6 and C6-7 on May 10, 1988 (File No. xxxxxx048); cervical strain, lumbar strain and herniated C6-7 disc on November 28, 1988 (File No. xxxxxx412); lumbar strain on June 19, 1999 (File No. xxxxxx644); and aggravation of preexisting cervical spine conditions on November 23, 2005 (File No. xxxxxx891).[2] In addition, there have been two prior appeals to the Board. In a decision dated April 12, 2002, the Board affirmed an April 19, 2000 Office decision, finding that it properly denied further merit review. The Board noted that the Office had issued a November 13, 1985 decision finding appellant had no residual disability after September 9, 1982 causally related to the December 19, 1981 lumbar strain.[3] In a decision dated November 22, 2006, the Board affirmed Office decisions dated May 27 and January 28, 2005, denying a claimed recurrence of disability commencing April 2004 causally related to appellant's cervical condition. The Board set aside a September 23, 2005 decision denying merit review of the claim.

On February 17, 2009 the Office received an application for reconsideration. Appellant noted the November 13, 1985 decision and addressed some of the medical evidence of record. She referred to a February 11, 1998 report from Dr. Bahman Sadr,[4] and a January 14, 1998 report from Dr. Frank Seinsheimer, an orthopedic surgeon. She contended that the Office's decision was unfair and unjust.

Appellant submitted medical evidence with her request for reconsideration. In a report dated March 19, 1984, Dr. Smoller noted appellant had sustained a lumbosacral strain on December 19, 1981. He stated a back strain should end three to four weeks after the incident and any residuals must be considered a new episode. On December 19, 1983 Dr. Fred Nelson, an orthopedic surgeon, noted that examination results were contradictory and equivocal. He stated that despite these findings, he believed appellant had a chronic low back strain causally related to the December 19, 1981 injury. In an April 1, 1985 report, Dr. Nelson advised that appellant was not disabled for all work and should undergo a thermogram.

In a report dated January 14, 1998, Dr. Seinsheimer, an orthopedic surgeon, stated there was a gap in treatment between August 24, 1982 and October 19, 1983. He stated that appellant reached maximum medical improvement on August 24, 1982 and treatments as of October 19, 1983 were not related to the original injury. By report dated February 11, 1998, Dr. Sadr stated

[2] File No. xxxxxx047 has been designated as a master file.

[3] Docket No. 00-2528 (issued April 12, 2002). The Board referred to the decision as November 15, 1985, but while the cover letter date is difficult to read, the decision was signed and dated November 13, 1985 and the Board will accept this date as the date of the decision. It was also noted that the decision found that further medical treatment was not authorized.

[4] Appellant stated the report was by Dr. Bruce Smoller, a neurologist and psychiatrist, but the February 11, 1998 report is from Dr. Sadr.

that appellant had chronic cervical and lumbar strains from work injuries on December 19, 1981 and April 1985. He found appellant had a five percent whole person impairment.

By letter dated June 20, 2009, appellant asserted there was error in the 1985 decision. She referenced the medical evidence of record.

In a decision dated July 1, 2009, the Office found the application for reconsideration was untimely with respect to the November 13, 1985 Office decision. It denied merit review on the grounds that appellant did not establish clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.[5] The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[6]

Section 8128(a) of the Act[7] does not entitle a claimant to a review of an Office decision as a matter of right.[8] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[9] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Act.[10] As one such limitation, 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 of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[11]

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.[12] To establish clear

[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.605 (1999).

[7] 5 U.S.C. § 8128(a).

[8] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[10] 5 U.S.C. §§ 8101-8193.

[11] 20 C.F.R. § 10.607.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

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.[13] 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.[14]

ANALYSIS

Appellant submitted a request for reconsideration of the November 13, 1985 Office decision finding that residuals of the accepted December 19, 1981 lumbar strain had ceased by September 9, 1982. Her application was dated February 17, 2009. Since this was more than one year after the November 13, 1985 merit decision, it was untimely filed. As noted, appellant is not entitled to a merit review of the claim unless she establishes clear evidence of error by the Office.

Appellant made reference to the medical reports of record which she felt showed error by the Office. The medical evidence of record, however, does not establish clear evidence of error in the November 13, 1985 Office decision. For example, Dr. Nelson acknowledged in his December 19, 1983 report that examination results were contradictory, and his brief opinion that appellant had a chronic back strain related to the 1981 injury was of diminished probative value. Dr. Smoller indicated in a March 19, 1984 report that her back strain should have resolved three to four weeks after the incident. Dr. Seinsheimer did not support a finding of error, as he indicated appellant had reached maximum medical improvement in August 1982 and that her subsequent treatment in October 1983 was not employment related. In a February 11, 1998 report, Dr. Sadr stated that appellant had a chronic lumbar strain related to the December 1981 injury, without providing a complete background or any medical rationale to support the opinion.[15]

As noted, the clear evidence of error standard is a difficult one to meet. Even if a medical report is submitted that was of sufficient probative value to create a conflict in the medical evidence, such evidence is not sufficient to establish clear evidence of error. The Board finds that appellant's application for reconsideration did not establish clear evidence of error in this case.

CONCLUSION

The Board finds that appellant's application for reconsideration was untimely filed and failed to show clear evidence of error by the Office.

[13] *D.O.*, 60 ECAB ___ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

[14] *Gregory Griffin*, 41 ECAB 458 (1990).

[15] Rationalized medical opinion evidence is medical evidence based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 1, 2009 is affirmed.

Issued: June 28, 2010
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