United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 09-1990**
	)	**Issued: May 14, 2010**
U.S. POSTAL SERVICE, POST OFFICE, North Reading, MA, Employer	)	

Appearances:
Joe Bisceglia, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 28, 2009 appellant filed a timely appeal from a July 2, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration of an October 19, 2006 nonmerit decision. As over one year has passed since the last merit decision in this case, dated November 21, 2005 and the filing of this appeal, dated July 28, 2009, the Board lacks jurisdiction over the merits of this case.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerits of this case.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

[1] For decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On September 16, 2005 appellant, a 47-year-old rural carrier, filed an occupational disease claim (Form CA-2) for left shoulder and neck muscle spasms that she attributed to reaching activities performed while casing mail at her modified workstation. She first became aware of her condition and that it was caused by her employment on September 6, 2005.

Appellant submitted evidence in support of her claim and by decision dated November 21, 2005, the Office denied the claim, finding that the evidence of record did not demonstrate that the identified employment factors caused a medically-diagnosed compensable injury.

On September 4, 2006 appellant requested reconsideration. By decision dated October 19, 2006, the Office denied the request.

On May 13, 2009 appellant requested reconsideration. She stated:

> "I have evidence that was not available for submission at the original claim. I am including ALL [*sic*] evidence pertaining to the injury I received at work on September 6, 2005 and all the medical events from said injury. I would greatly appreciate your time and consideration in this matter of great importance to me. Please feel free to contact me with any regards [*sic*] to this matter."

Appellant submitted a July 18, 2006 note in which Dr. Robert D. Chiulli, a radiologist, diagnosed cervical spasm and other conditions following radiological examination.

Appellant submitted a September 1, 2006 note in which Dr. Jerome Philbin, an orthopedist, acknowledged treating her and requested that her workstation be adjusted.

Appellant submitted a February 18, 2007 report in which Dr. Savatore Viscomi, a Board-certified radiologist, diagnosed cervical spondylosis and other conditions following magnetic resonance imaging (MRI) scans of her cervical spine.

Appellant submitted medical notes containing an illegible signature.

Appellant submitted a March 15, 2007 report in which Dr. Anthony Lapinsky, a Board-certified orthopedic surgeon, reported findings on examination and diagnosed cervical spondylosis as well as left upper extremity radiculopathy and underlying myelopathy. On July 26, 2007 Dr. Lapinsky opined that appellant was totally disabled from work "because she has a rural route and drives and cases mail." In subsequent notes dated October 12, November 1 and December 11, 2007 as well as March 4, 2008, he diagnosed neck and shoulder pain and other conditions. Dr. Lapinsky opined that appellant's work activities were "contributory in a major way to her condition." Appellant submitted an October 20, 2008 note in which Dr. Lapinsky, after diagnosing neck and shoulder pain, opined that her work injury caused her symptoms.

By decision dated July 2, 2009, the Office denied the request, finding that it was untimely filed and failed to demonstrate clear evidence of error on the part of the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle an employee to a review of an Office decision as a matter of right.[3] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--
>
> (1) end, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.[4]

The term "clear evidence of error" is intended to represent a difficult standard. To establish clear evidence of error, an appellant must submit evidence relevant to the issue, which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] 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 an appellant has submitted clear evidence of

---

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

[4] 20 C.F.R. § 10.607.

[5] *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

[7] *See Jesus D. Sanchez*, *supra* at note 3.

[8] *See Leona N. Travis*, *supra* at note 6.

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

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 Office properly determined that appellant's application for review was untimely. The last merit decision in this case was November 21, 2005. Appellant requested reconsideration May 13, 2009 and thus the reconsideration request is untimely as it was filed outside the one-year time limit.[11] Because she filed her request more than one year after the Office's November 21, 2005 merit decision, she must demonstrate clear evidence of error on the part of the Office in denying her claim.

In accordance with internal guidelines and Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error which would warrant reopening the case for further merit review under section 8128(a). It reviewed the evidence submitted by her in support of her application for review, but found that it did not clearly establish that the Office's prior decision was in error.

In her May 13, 2009 request, appellant notes that she was submitting "ALL evidence" pertaining to her injury, some of which was not available when she first filed her claim. These statements do not establish clear evidence of error because they do not raise a substantial question as to the correctness of the Office's most recent merit decision.[12]

The Board has carefully reviewed the record and finds that there is no medical evidence to establish clear evidence of error in the Office decision.

As noted earlier, the evidence submitted must be relevant to the issue which was decided by the Office and be so persuasive that it shifts the weight of the evidence in appellant's favor and raises a substantial question as to the correctness of the Office's decision.

Dr. Philbin's note merely acknowledges treating appellant and thus contributes no relevant information. Although he requested that her workstation be adjusted, he provided no medical rationale to support this work restriction.

Dr. Chiulli diagnosed cervical spasm and other conditions following radiological examination but provides no rationale explaining how these diagnosed conditions were caused by the identified employment factors.[13] Dr. Viscomi diagnosed cervical spondylosis and other conditions following MRI scans of appellant's cervical spine but also provided no rationale

[10] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

[11] *Supra* note 4.

[12] *See Jesus D. Sanchez, supra* note 3.

[13] *See Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value). *See also*, *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

explaining how these diagnosed conditions were caused by the identified employment factors. Therefore, this new medical evidence does not establish clear evidence of error in that it does not pertain to the relevant issue in this case.[14] Accordingly, due to the afore-mentioned deficiencies, these physicians' reports and notes do not shift the weight of the evidence in appellant's favor and raise a substantial question as to the correctness of the Office's prior decision and, therefore, do not establish clear evidence of error.

Dr. Lapinsky's is the only physician of record to approach the issue of causal relationship. He diagnosed cervical spondylosis, left upper extremity radiculopathy and underlying myelopathy, neck and shoulder pain as well as other conditions. On November 1, 2007 Dr. Lapinsky opined that appellant's work activities were "contributory in a major way to her condition." On July 31, 2008 he opined that she was totally disabled from work "because she has a rural route and drives and cases mail." However, Dr. Lapinsky's opinion is not sufficiently rationalized as he did not explain specifically how the identified employment factor, casing mail, caused the conditions he diagnosed. Thus, while his reports and notes offer a diagnosis, they lack the requisite detailed discussion of appellant's employment work duties and any semblance of medical reasoning in support of a finding of causal relationship between her diagnosed condition and the identified employment factors. Appellant submitted no other evidence sufficient to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office's decision.

Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that it abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear evidence of error on the part of the Office in her reconsideration request dated May 13, 2009. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review in its July 2, 2009 decision.

[14] *See Hazelee K. Anderson*, 37 ECAB 277 (1986) (holding that submission of evidence which does not address the particular issue involved is of little probative value).

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 14, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board