

FACTUAL HISTORY

On July 18, 1991 appellant filed a claim alleging that she developed pain and numbness in the area between her fingertips and elbow emanating from her right wrist. She became aware of her condition and of its relationship to her work on May 5, 1991. The Office accepted right wrist sprain and bilateral myofascial syndrome. Appellant returned to light-duty work and stopped again on August 1, 1993. She was placed on the periodic rolls on December 12, 1993. Thereafter, in the course of developing the claim, the Office referred appellant to a second opinion physician and also to an impartial medical examiner. On June 7, 1995 the Office issued a notice of proposed termination of compensation benefits on the grounds that the referee physician's report of March 21, 1995 established no residuals of the accepted right wrist sprain and bilateral myofascial syndrome.

In a July 19, 1995 decision, the Office terminated appellant's compensation and medical benefits effective July 23, 1995, finding that the weight of the medical evidence established that she had no continuing disability resulting from her accepted employment injuries.

On July 5, 1996 appellant requested reconsideration and in a merit decision dated August 23, 1996, the Office denied modification of the July 19, 1995 decision. On August 20, 1997 she requested reconsideration and in a decision dated June 5, 1998, the Office denied her request as untimely and insufficient to show clear evidence of error. Appellant appealed her claim to the Board. In a January 25, 1999 order, the Board remanded the case to the Office as appellant timely requested reconsideration of the August 23, 1996 decision.¹

In a merit decision dated May 12, 1999, the Office denied modification of the August 23, 1996 decision.

On October 1, 2003 appellant requested reconsideration. On January 2, 2004 the Office denied her reconsideration request on the grounds that her letter neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

On January 21, 2008 appellant requested reconsideration and submitted additional evidence. In statements dated January 21 to August 10, 2008, she asserted that the Office improperly terminated her compensation benefits based on the reports of the referee physician, Dr. Anna Y. Vigil. Appellant alleged that Dr. Vigil's reports should have been excluded because she was a contract employee for the employing establishment and regularly performed fitness-for-duty examinations. She also alleged that she was not allowed to participate in the selection of the referee physician, that the Office had improper telephone contact with Dr. Vigil and discussed substantive issues of her claim and that the Office's questions to Dr. Vigil were misleading. Therefore, Dr. Vigil's opinion could not carry the weight of the evidence and resolve the conflict in her case. She contended that her appeal rights be reinstated because her attorney misled her about his credentials and did a poor job representing her. Dr. Vigil also alleged that the Office did not perform the necessary medical development that was required in her claim.

¹ Docket No. 98-2601 (issued January 25, 1999).

Appellant submitted reports from Dr. John Allen, an Office referral physician, dated February 8, 1994, reports from Dr. Vigil dated March 21 to April 14, 1995, a June 7, 1995 notice of proposed termination of benefits, and the Board's January 25, 1999 order remanding case, all previously of record. Also submitted was a letter from appellant's attorney dated August 20, 1997 requesting reconsideration. Appellant also submitted excerpts from articles on nerve conduction studies, thoracic outlet syndrome, ergonomics at worksites, Dr. Emil F. Pascarelli's guide to repetitive strain injury, center for disease control and the handbook of neurological examination and case recording.

On September 5, 2008 the Office denied appellant's reconsideration request finding that it was not timely filed and did not present clear evidence of error.

In a letter dated December 8, 2008, appellant requested reconsideration. In letters dated December 7 to 9, 2008, she asserted that her attorney at the time of termination of benefits did not adequately represent her. Appellant alleged that the referee physician, Dr. Vigil was incompetent and that the notice of referral was defective and failed to properly explain the conflict to be resolved. She submitted a October 31, 2008 letter from the New Mexico Disability Determination Services which noted Dr. Vigil performed consultative examinations from September 1997 to January 2001.

On February 5, 2009 the Office denied appellant's reconsideration request finding that the request was not timely filed and did not establish clear evidence of error.

On March 3, 2009 appellant requested reconsideration. She requested that the Office accept neck, back and shoulder conditions and submitted a December 16, 1994 note from the Office noting that additional development of the matter might occur. Appellant asserted that Dr. Vigil's report was inadequate to resolve the conflict of opinion and that favorable portions of her report were disregarded. She cited to the case of *April Ann Erickson*,² to support her position.

On April 9, 2009 the Office denied appellant's reconsideration request finding that the request was not timely filed and did not present clear evidence of error.

² 28 ECAB 336 (1977).

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“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, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”³

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(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁴

The Office, however, will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁵

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.⁶

Evidence that 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 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

³ 5 U.S.C. 8128(a).

⁴ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁵ 20 C.F.R. 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁶ *Annie L. Billingsley*, *supra* note 5.

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

⁹ *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of the Office.¹⁰

ANALYSIS

In its September 5, 2008 decision, the Office properly determined that appellant failed to file a timely application for review. The most recent merit decision of record is a May 12, 1999 decision which denied modification of the merit decision issued on July 19, 1995. Appellant's request for reconsideration was dated January 21, 2008, which was more than one year after May 12, 1999. Appellant's December 8, 2008 and March 3, 2009 reconsideration requests were also untimely filed as they were received more than one year after May 12, 1999. As appellant's reconsideration requests were outside the one-year time limit for requesting reconsideration, which began on May 12, 1999, appellant's requests for reconsideration are untimely.

The Board finds that appellant has not established clear evidence of error on the part of the Office. On January 21, 2008 appellant sought reconsideration of a July 19, 1995 Office decision which terminated her compensation benefits. She asserted that the Office improperly terminated her compensation benefits based on the reports of the referee physician, Dr. Vigil. Appellant alleged that her appeal rights should be reinstated because her attorney misled her and failed to adequately represent her. Her contentions, however, do not establish clear evidence of error or raise a substantial question as to the correctness of the Office's decision denying her claim. The Board notes that the underlying issue is medical in nature and appellant did not submit medical evidence sufficient to shift the weight of the evidence in her favor and establish that the Office erred in its most recent merit decision. The Office properly found that appellant's statement and letter of January 21, 2008 did not establish clear evidence of error. It properly denied appellant's reconsideration request.

Appellant's January 21, 2008 request was accompanied by reports from Dr. Allen and Dr. Vigil, the Office's June 7, 1995 notice of proposed termination of benefits, the Board's January 25, 1999 order remanding case, and a letter of reconsideration from her attorney dated August 20, 1997, all previously of record. The Board notes that the Office previously considered the medical evidence prior to issuing its September 5, 2008 decision. Appellant did not explain how this evidence was positive, precise or explicit in manifesting on its face that the Office committed an error. The resubmission of these documents does not raise a substantial question as to the correctness of the Office's decision. The excerpts from medical journals and correspondence to and from her senator regarding her claim, does not establish that the Office committed an error. The issue for purposes of reconsideration is whether appellant established that the Office clearly erred in terminating her compensation benefits in 1995 as she had continuing disability causally related to the accepted injury. The evidence submitted is deficient for the reasons noted.

With regard to appellant's December 8, 2008 reconsideration request she asserted that her claim was prejudiced by inadequate representation by her attorney, that the impartial referee physician was incompetent to perform the examination and that the notice of referral to the

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

referee failed to properly explain the conflict to be resolved. She submitted an October 31, 2008 letter from the New Mexico Disability Determination Services which noted Dr. Vigil performed consultative examinations from September 1997 to January 2001. This letter does not establish that the impartial specialist in appellant's case was biased or disqualified from examining her in 1995. The reconsideration request does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision. Appellant's allegations are insufficient to raise a substantial question as to the correctness of the Office's decision. The Office properly found that appellant's statement and letter of December 8, 2008 did not establish clear evidence of error. It properly denied appellant's reconsideration request.

With regard to the March 3, 2009 reconsideration request, appellant asked the Office to expand her claim to accept her neck, back and shoulder conditions and referenced a note from a claims examiner dated December 16, 1994 which she believed supported her position. However, her request does not raise a substantial question as to the correctness of the Office's most recent merit decision which affirmed the termination of her compensation. There is no evidence appellant's neck, back or shoulder condition were ever accepted as causally related to her work injury. The December 1994 note from the claims examiner merely advised that additional development of the medical evidence might occur and predated the termination of benefits. Appellant repeated her assertions regarding the adequacy of Dr. Vigil's report and that the Office failed to consider these aspects of the report that were favorable to her when terminating her benefits. She cited to Board precedent in, *Erickson*,¹¹ where the Board reversed an Office decision denying benefits because it failed to obtain a supplemental opinion from an impartial medical examiner. In *Erickson* the Board had jurisdiction over the merits of the claim. In the present case, the Board does not have merit jurisdiction. The Board's review is limited to whether the Office properly denied appellant's reconsideration request. Appellant's stated disagreement with the Office's decision to terminate her compensation benefits based on the referee's impartial opinion does not establish clear evidence. The Board has held that the term "clear evidence of error" is intended to represent a difficult standard. Evidence not submitted before the denial, such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinions requiring further development, is not clear evidence of error.¹²

On appeal, appellant reiterated her arguments that the Office failed to meet their burden of proof in terminating her benefits. The issue of whether there is clear evidence of error in the Office's most recent merit decision is the only matter over which the Board has jurisdiction.¹³

CONCLUSION

The Board finds that appellant's requests for reconsideration dated January 21 and December 8, 2008 and March 3, 2009 were untimely filed and did not demonstrate clear evidence of error.

¹¹ *Supra* note 2.

¹² *See D.D.*, 58 ECAB 206 (2006).

¹³ *See* 20 C.F.R. § 501.2(c) (the Board only has jurisdiction over final decisions of the Office).

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2009 and December 8 and January 21, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 13, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board