United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 10-412**
	)	**Issued: November 1, 2010**
DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Deerfield Beach, FL, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 30, 2009 appellant filed a timely appeal of a November 12, 2009 decision of the Office of Workers' Compensation Programs denying her request for reconsideration as untimely and failing to establish clear evidence of error. Because more than one year elapsed from the last merit decision dated September 23, 2008 to the filing of this appeal, the Board lacks jurisdiction over 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 as untimely and failing to establish clear evidence of error.

FACTUAL HISTORY

On May 27, 2000 appellant, then a 67-year-old enumerator, was injured in a motor vehicle accident while in the performance of duty. She stopped work on May 27, 2000 and did not return. The Office accepted appellant's claim for lumbar and cervical sprain. It paid her wage-loss compensation. The reports from Dr. Peter Merkle, a Board-certified orthopedic surgeon, dated June 2 and 12, 2000, found cervical and lumbar strain superimposed on cervical

and lumbar degenerative arthritis as well as symptoms consistent with right cervical radiculopathy. On November 17, 2000 Dr. Merkle advised that appellant could work modified duty.

Appellant submitted reports dated May 27, 2000 to October 29, 2001, from Dr. Arnold Lang, a Board-certified neurosurgeon, who diagnosed cervical strain, lumbar strain, stenosis at L5-S1 and lumbar spondylolisthesis. Dr. Lang also recommended light duty and commented that epidural steroids administered by another doctor would not address appellant's physiologic problem.

On December 2, 2002 the Office referred appellant to Dr. Lawrence Blumberg, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a January 14, 2003 report, Dr. Blumberg diagnosed preexisting musculoligamentous-type sprain/strain of the cervical and lumbosacral spine, degenerative disease of the cervical spine and preexisting lumbosacral spondylolisthesis. He advised that appellant's complaints were due to preexisting cervical osteoarthritis and that her accepted cervical and lumbar sprains had resolved. Dr. Blumberg recommended no work restrictions and no further treatment.

On July 31, 2006 the Office referred appellant to Dr. David Lotman, a Board-certified orthopedic surgeon, for a second opinion to determine the extent of remaining injury-related disability. In an August 30, 2006 report, Dr. Lotman diagnosed resolved cervical strain, resolved lumbosacral strain, probable cervical and lumbar spondylosis, bilateral ulnar neuritis and possible right carpal tunnel syndrome. He found that appellant's accepted conditions had resolved and that she was currently symptomatic from the natural progression of underlying cervical and lumbar spondylosis. Dr. Lotman advised that appellant could not return to work as her position required walking, standing and climbing, but that her inability to work was not causally related to her cervical and lumbosacral strains. Appellant could work light duty and that there were no residuals of the work injury. In a work capacity evaluation form of the same date, Dr. Lotman advised that appellant could work eight hours a day with restrictions.

On December 4, 2007 the Office referred appellant, with a statement of accepted facts, to a physician designated as an impartial medical examiner (IME) to resolve a conflict in medical opinion between Dr. Lotman, who found that the injury-related condition had resolved, and Dr. Lang, who found causally related work restrictions. In an August 11, 2008 memoranda, it noted that appellant attended the impartial evaluation on January 2, 2008, but that the IME did not submit a report. An Office memoranda of the same date noted that, upon review of the record, an impartial evaluation was unnecessary as appellant had not been seen by Dr. Lang since October 29, 2001 and that both second opinion physicians found that her work-related conditions had resolved without residuals.

In an August 13, 2008 decision, the Office proposed to terminate compensation benefits finding that the weight of the medical evidence rested with Dr. Lotman's report, which found that appellant did not have any continued residuals or disability due to the accepted work injury.

In an undated statement, appellant disagreed with the proposed termination of benefits. On September 9, 2008 she indicated that she had submitted all prior documents to her doctor and made herself available for examination. Appellant requested 60 days for her doctor to examine the documents and provide an opinion.

In a September 23, 2008 decision, the Office terminated appellant's compensation benefits effective September 28, 2008.

On October 18, 2008 appellant requested reconsideration. She contended that the problems caused by the work injury still existed and that another doctor's opinion would verify this.

In a November 7, 2008 decision, the Office denied appellant's reconsideration request without a merit review finding that she did not raise any new arguments or submit any new relevant evidence.

In a May 7, 2009 statement, appellant requested a copy of her case file. She noted plans to have additional x-rays of her back as her disability was caused by more than a sprain. Appellant was unable to walk or sit and was informed that the disc causing her problems had worsened. She noted that a letter dated March 10, 2008 from the Office informed her that it was waiting to receive a final report from the impartial specialist. Appellant noted contacting the physician who reported that the Office was obtaining another doctor's report. She asserted that the Office stopped her disability payments before obtaining further medical opinion.

In a September 3, 2009 statement, appellant reported that she was informed by the IME that the Office had cancelled its request for his report. She asserted that she was entitled to compensation as she was in constant pain and could not return to work. On September 27, 2009 appellant noted that the impartial specialist had advised her that the Office told him not to submit any report. She requested that the Office explain the basis for discontinuing her disability payments.[1] In an October 17, 2009 statement, appellant indicated that, as the IME was the Office's physician, it should call him to have the necessary report submitted. She asserted that she was wrongfully placed in the middle of a dispute between the Office and the impartial specialist.

In an October 22, 2009 letter, appellant requested reconsideration. She asserted that unsuccessful attempts to obtain a report from the impartial specialist made the Office's decision to terminate her compensation benefits invalid. Appellant also asserted that there was no medical evidence to make this decision. She noted that she had continued back pain and had undergone different x- rays of the back and changed physicians.

In a November 12, 2009 decision, the Office denied appellant's reconsideration request. It found that her request for reconsideration of the Office's September 23, 2008 decision 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] It

[1] In an October 15, 2009 letter, the Office informed appellant that it made several unsuccessful attempts to obtain a report from the IME. It explained that its September 23, 2008 decision terminating her compensation benefits were based on the medical evidence of record that established that her injury-related disability had ceased. The Office noted that appellant was provided with appeal rights.

[2] 5 U.S.C. § 8128(a).

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]

ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration of the Office's September 23, 2008 decision terminating her compensation benefits. 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

[3] 20 C.F.R. § 10.607; *see also D.K.*, 59 ECAB 141 (2007).

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

[5] *A.F.*, 59 ECAB 714 (2008).

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

[7] *D.G.*, 59 ECAB 455 (2008).

[8] *Id.*

action by the Board, but does not include pre-recoupment hearing decisions.[9] Appellant had one year from the September 23, 2008 Office decision to submit a timely request for reconsideration. As her October 22, 2009 reconsideration request letter was made more than one year after the September 23, 2008 merit decision, the request was untimely.

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.[10] 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 September 23, 2008 decision or to establish clear evidence of error. Appellant submitted several statements questioning the Office's decision to terminate her compensation benefits, asserting that it should have obtained a report from an impartial specialist before making its decision. The Office's decision terminating benefits was based on the medical evidence of record. The evidence does not establish a clear procedural error or shift the weight of the evidence in favor of the claimant to raise a fundamental question as to the correctness of the Office's decision.[11] The Office determined that there was no conflict of medical opinion. The term "clear evidence of error" is intended to represent a difficult standard. The Board has held that 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.[12] To the extent that appellant asserted that an impartial report would establish continued disability and entitle her to continued compensation benefits, this premise is insufficient to establish clear evidence of error. It is not enough to simply show a contrary result could have been construed.[13]

Appellant's statements addressed her continued back problems and her inability to work. These broad and general statements do not specifically address the pertinent issue, which is medical in nature, regarding whether appellant had any continued disability or residuals as a result of her accepted injury. 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 September 23, 2008 decision.

On appeal, appellant asserts that she should not be blamed for the Office's failure to obtain a report from an impartial specialist. The record does not support that the Office faulted appellant for the procedural development of the claim. Appellant inquired as to the documentation the Office used to support that she no longer had any continued disability or residuals of her accepted injury. As noted, the Office's September 23, 2008 merit decision was based on the evidence of record, including the opinion of Dr. Lotman who found that appellant's work-related injury had resolved. Appellant asserts that a report from her treating physician,

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

[10] *See supra* note 5.

[11] *See Leon D. Faidley, Jr*., *supra* note 9; *see also Leona N. Travis*, 43 ECAB 227 (1991) (the claimant must present evidence which on its face shows that the Office made an error).

[12] *E.R.*, *supra* note 6.

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

submitted with her appeal request, demonstrates that she continues to suffer from lower back pain. However, the Board may only review evidence that was in the record at the time the Office issued its final decision.[14]

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and failing to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated November 12, 2009 is affirmed.

Issued: November 1, 2010
Washington, DC

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

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

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

[14] 20 C.F.R. § 501.2(c).