United States Department of Labor
Employees' Compensation Appeals Board

C.J., Appellant	)	
and	)	**Docket No. 10-409**
	)	**Issued: October 12, 2010**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Chicago, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 30, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 26, 2009 which denied her reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year elapsed since the most recent merit decision dated April 14, 2008 to the filing of this appeal on November 30, 2009, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.[1]

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

[1] For Office 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) (2008).

FACTUAL HISTORY

On October 30, 2007 appellant, then a 50-year-old systems coordinator, filed a traumatic injury claim alleging that on October 29, 2007 she sat in a chair at work which collapsed and caused injury to her neck and back. She did not stop work but returned to a limited-duty part-time position.

Appellant came under the treatment of Donna G. Ficaro, a chiropractor, from October 31 to December 13, 2007, for a neck and back injury sustained at work. In a prescription note dated October 31, 2007, Dr. Ficaro advised that appellant sustained an injury to her neck and back at work on October 29, 2007 and could return to work part-time, limited duty. In a November 28, 2007 prescription note, she recommended an ergonomic workstation and opined that appellant could return to work four hours per day on November 28, 2007. On December 13, 2007 Dr. Ficaro noted that x-rays of appellant's cervical spine revealed instability in flexion and extension views with no flexion movement in the upper cervical segments. On physical examination, she found motor weakness of the cervical spinal muscles and fixation at facets of C2, C3, C5 and C6.

By letter dated January 4, 2008, the Office advised appellant of the factual and medical evidence needed to establish her claim. It noted that she was treated by a chiropractor and advised her that, pursuant to section 8101(2) of the Federal Employees' Compensation Act, chiropractors were considered physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary."[2] The Office requested that appellant submit copies of any x-rays taken which demonstrated that a subluxation occurred due to her injury. Appellant did not respond.

In a decision dated February 12, 2008, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that appellant's condition was caused by the accepted work incident.

On March 10, 2008 appellant requested reconsideration and submitted reports from Dr. Ficaro dated December 19, 2007 to January 28, 2008. On January 8, 2008 Dr. Ficaro noted moderate improvement in motor strength of the upper and lower extremities; however, appellant had persistent motor strength deficits in the neck. On January 15, 2008 she noted treating appellant on January 8, 2008 for neck and back stiffness after working at a makeshift ergonomic workstation. Examination showed a normal range of motion of the cervical, thoracic and lumbar spine with a marked lack of motor strength in the cervical spine flexors, extensors, lateral support, biceps, pectorals muscles, quadriceps and gluteus maximus. Dr. Ficaro further noted segmental joint dysfunction at C2-3, C5-6, T5-6, T11-12 and L4-5. She increased appellant's work hours to six per day. On January 28, 2008 Dr. Ficaro summarized appellant's treatment. She noted that motor weakness of the cervical spine and radiculopathy did not resolve and that

[2] 5 U.S.C. § 8101(2); *see also* section 10.311(c) of the implementing federal regulations provide: "A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. [The Office] will not necessarily require submittal of the x-ray, or a report of the x- ray but the report must be available for submittal on request."

cervical x-rays revealed instability of the cervical spine. A December 6, 2007 cervical spine x-ray revealed C5-6 retrolisthesis at C5-6 and C3-4 anterolisthesis.

On April 14, 2008 the Office denied modification of the February 12, 2008 decision.

On February 5, 2009 appellant requested reconsideration. She resubmitted reports from Dr. Ficaro dated October 31, 2007 to January 28, 2008. On February 3, 2008 Dr. Ficaro returned appellant to work full time starting on February 4, 2008. Appellant submitted an x-ray dated December 6, 2007 previously of record. She was treated by Dr. Greg Daly, an osteopath, from January 16 to March 10, 2008, for peripheral neuropathy. Dr. Daly opined that the fall of October 25, 2007 resulted in her neck injury. A May 7, 2008 magnetic resonance imaging (MRI) scan of the cervical spine revealed mild to moderate spondylosis of the cervical spine with small disc protrusions and disc osteophyte complexes at multiple cervical levels, at the C3-4 and C5-6 levels.

In an April 24, 2009 decision, the Office denied appellant's reconsideration request finding that the evidence submitted was insufficient to warrant further merit review.

On October 12, 2009 appellant's attorney requested reconsideration. Counsel indicated that the Office had jurisdiction to reconsider the denial of appellant's claim if she demonstrated clear evidence of error. He submitted reports from Dr. Ficaro dated October 31, 2007 to January 28, 2008, all previously of record. Counsel asserted that the January 28, 2008 report demonstrated clear evidence of error.

In an October 26, 2009 decision, the Office denied appellant's reconsideration request finding that the request was not timely filed and did not present clear evidence of error.

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 --
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> (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] However, the Office will reopen a claimant's case

[3] 5 U.S.C. § 8128(a).

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

for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. 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 manifest 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 *prima facie* 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 determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[10]

ANALYSIS

In its October 26, 2009 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on April 14, 2008. Appellant's request for reconsideration was dated October 12, 2009, more than one year after April 14, 2008. Thus, her reconsideration request was not timely filed.

The Board also finds that appellant has not established clear evidence of error on the part of the Office. Appellant's October 12, 2009 request indicated that the last merit decision was April 14, 2008 and that the Office had jurisdiction to reconsider an untimely denial of her claim if it demonstrated clear evidence of error. She asserted that Dr. Ficaro's January 28, 2008 report demonstrated clear evidence of error and that the April 14, 2008 merit decision should be vacated. While appellant addressed her disagreement with the Office's decision to deny her claim for traumatic injury, her general allegations do not raise a substantial question as to the correctness of the Office's decision. The Office properly found that appellant's statement of October 12, 2009 did not establish clear evidence of error.

The Board notes that the underlying issue is medical in nature and that appellant submitted no new medical evidence and she did not explain how the previously submitted

[5] *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[6] *Annie L. Billingsley*, *supra* note 4.

[7] *Jimmy L. Day*, 48 ECAB 652 (1997).

[8] *Id.*

[9] *Id.*

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

evidence was sufficient to shift the weight of the evidence in her favor and establish that the Office erred in denying her for a traumatic injury on October 29, 2007. Appellant submitted reports from Dr. Ficaro previously of record. In her reconsideration request, she relied on Dr. Ficaro's January 28, 2008 report as establishing clear evidence of error. Dr. Ficaro, however, is not a physician as defined under the Act as she did not diagnose a spinal subluxation based on x-ray. Rather, she noted only that x-rays showed instability in the cervical spine.[11] Appellant did not explain how this previously considered evidence was positive, precise and explicit in manifesting on its face that the Office erred by denying her claim for a traumatic injury on October 29, 2007. The resubmission of these documents is not sufficient to raise a substantial question as to the correctness of the Office's decision. Even if Dr. Ficaro's report could be considered medical evidence,[12] clear evidence of error is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.[13]

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office's decision.

CONCLUSION

The Board finds that appellant's request for reconsideration dated October 12, 2009 was untimely filed and did not demonstrate clear evidence of error.

[11] 5 U.S.C. § 8101(2). Section 8101(2) of the Act provides that the term "'physician' ... includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist." *See also Mary A. Ceglia*, 55 ECAB 626 (2004) (in assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician as defined under 5 U.S.C. § 8101(2); a chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist).

[12] Neither appellant nor Dr. Ficaro asserted that Dr. Ficaro's finding of cervical spine instability or retrolisthesis based on x-ray was consistent with the Office's definition of spinal subluxation. *See* 20 C.F.R. § 10.5(bb) (defines spinal subluxation as incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film).

[13] *D.G.*, 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

ORDER

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

Issued: October 12, 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