United States Department of Labor
Employees' Compensation Appeals Board

G.J., Appellant	)	
and	)	**Docket No. 10-150**
	)	**Issued: September 27, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Jonesboro, GA, Employer	)	

Appearances:
Appellant, pro se
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 October 20, 2009 appellant filed a timely appeal from the June 30, 2009 decision of the Office of Workers' Compensation Programs which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. As the most recent merit Office decision was issued on June 13, 2006 the Board lacks jurisdiction to review the merits of this case 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 reconsideration request was not timely filed and failed to present clear evidence of error.

[1] For Office decisions dated November 19, 2008 or later, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e) (2009); 73 Fed. Reg. 62,190 (October 20, 2008). For Office decisions issued before November 19, 2008, a claimant had one year in which to file an appeal. *See* 20 C.F.R. § 501.3(d)(2) (2008).

FACTUAL HISTORY

On December 10, 2005 appellant, then a 43-year-old mail carrier, filed an occupational disease claim alleging that she developed an emotional condition as a result of not being able to perform her work duties due to a work-related elbow injury. She became aware of her condition and realized it was related to her employment on October 13, 2005. Appellant stopped work on October 12, 2005 and did not return.

Appellant submitted an undated statement noting that she sustained a work-related right elbow injury and underwent surgery on May 15, 2005. She returned to a light-duty position and then to full-time duty but she experienced pain such that she was unable to perform her job. Appellant requested a light-duty position and contended that her supervisor did not accommodate her restrictions and could only provide work for two hours per day. She further alleged that she failed a functional capacity evaluation and became depressed and suicidal. Appellant submitted an October 15, 2005 hospital discharge summary prepared by Dr. Iqbal Dhanani, a Board-certified psychiatrist, who diagnosed major depressive disorder and status post elbow injury.

In a December 14, 2005 letter, Robert Thompson, supervisor of customer service, controverted the claim noting that appellant was released to full-time work as a letter carrier by her physician but did not return to full duty. He advised that appropriate light duty was available when indicated.

Appellant submitted an October 21, 2005 verification of treatment from Dr. Seeme V. Ahmad, a Board-certified psychiatrist, who noted appellant was admitted to a psychiatric hospital and was unable to work beginning October 12, 2005. She also submitted documents from therapists and records of her psychiatric treatment.

In a November 24, 2005 discharge summary, Dr. Roy Johnston, a Board-certified psychiatrist, diagnosed major depression, recurrent, with work and health stressors. Appellant reported that, after she underwent right elbow surgery for a work injury, she was unable to return to work. An October 22, 2005 report from Dr. Ravinder Kurl, a Board-certified cardiologist, noted treatment for shortness of breath. He diagnosed atypical chest pain and pain in the elbow. On January 26, 2006 appellant was treated by Dr. Narendra Nagareddy, a Board-certified psychiatrist, who diagnosed major depression, recurrent, tendinitis and moderate to severe work, financial and health stressors. She submitted statements from several coworkers who noted that appellant was a hard working and dependable employee.

In a decision dated June 13, 2006, the Office denied appellant's claim for an emotional condition on the grounds that the evidence was insufficient to establish that her injury occurred in the performance of duty. It found that no compensable employment factors were established.

On December 21, 2006 appellant called the Office to request the status of her appeal. The Office advised her that there was no appeal of record. In correspondence dated December 22 2006, it verified appellant's mailing address and sent a copy of the June 13, 2006 decision. The Office informed her that, if she disagreed with the Office's decision, she could follow the appeal rights included with the decision. In Office telephone logs dated April 18 to

July 20, 2007, appellant inquired as to the status of her appeal and was again advised that no request was of record.

On August 13, 2007 the Office received a letter dated June 29, 2006 from an attorney who requested a hearing and medical documents of record. An August 12, 2006 cover letter from the attorney requested a status of the request for production of documents. These documents were not signed by appellant or counsel.

In an August 23, 2007 telephone call memorandum, the Office noted that appellant inquired as to the status of her claim. It noted that the initial request for a hearing was addressed to the claims examiner but sent to the employer's address. The Office did not receive the request and the Branch of Hearings and Review also did not receive the request.

In a letter dated September 12, 2007, the Office advised the attorney that the record did not contain a signed release from appellant authorizing him to have access to her file. It requested that he forward a signed release from appellant authorizing his representation.

In a March 23, 2009 statement, appellant noted that her lawyer had not responded to the Office's correspondence and, upon further investigation, she learned his license to practice law was recently suspended. She reiterated that her mental breakdown was related to her work-related elbow injury and that she had to work in pain.

In a March 31, 2009 letter, the Office acknowledged receipt of appellant's March 23, 2009 letter and inquired as to which appeal right she was requesting. It resent her a copy of the June 13, 2006 decision and instructed her to indicate which appeal right she wanted to pursue.

In an appeal request form dated April 9, 2009, appellant requested reconsideration. She submitted a December 15, 2006 report from Dr. Ahmad who noted treating appellant since October 12, 2005 for depression. Appellant reported feeling depressed and suicidal after returning to her job following a work-related injury and surgery. Appellant was voluntarily admitted to a psychiatric hospital on October 12, 2005 and discharged on October 15, 2005. On October 21, 2005 Dr. Ahmad noted that appellant reported wanting to shoot to death four people in her workplace and was involuntary committed and released on October 25, 2005. In an August 27, 2007 report, Dr. Jim W. Roderique, a Board-certified orthopedic surgeon, treated her for right elbow pain. He diagnosed status post lateral epicondylitis surgery with no current evidence of pathology and advised that appellant could continue to function normally.

In a June 30, 2009 decision, the Office denied appellant's reconsideration request finding that it 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."[2]

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.[3] However, it 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 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.[4]

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.[5] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] 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.[8] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[9]

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[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

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

[5] *Annie L. Billingsley*, *supra* note 3.

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

[7] *Id.*

[8] *Id.*

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

ANALYSIS

In its June 30, 2009 decision, the Office properly determined that appellant failed to file a timely application for review. The most recent decision was issued June 13, 2006 when the Office denied appellant's claim for an emotional condition. Appellant's April 9, 2009 request for reconsideration was more than one year after June 13, 2006. This reconsideration request was not timely filed.

On appeal appellant contends that she was unaware that the attorney did not submit an appeal request in a timely manner until the Office advised her that he did not respond to correspondence dated September 12, 2007. The Board notes that as of December 21, 2006, appellant was advised that there was no appeal of record when she contacted the Office by telephone. On December 22, 2006 the Office sent appellant a copy of the June 13, 2006 decision with attached appeal rights and informed her to follow the appeal right form if she disagreed with the decision. Although Mr. Kimbrough submitted a June 29, 2006 hearing request, it was not received by the Office until August 13, 2007. Moreover, there is no evidence that Mr. Kimbrough was ever authorized to represent appellant. Section 10.700(a) of the Office's regulations regarding the representation of claimants clearly provides that for a representative to be recognized by the Office, a written notice, signed by the claimant appointing the representative must be submitted to the Office.[10] Pursuant to this regulation and Board case law,[11] the attorney's June 29, 2006 hearing request was not valid as he was not appellant's authorized representative.[12] Appellant did not submit evidence that counsel was authorized to act as her representative. On September 12, 2007 the Office requested that counsel provide authorization but he did not respond. There was no authorization for the attorney to represent appellant or other correspondence from appellant within one year of the merit decision that would qualify as a reconsideration request.[13]

The Board finds that appellant has not established clear evidence of error on the part of the Office in its June 30, 2009 decision denying her emotional condition claim. Her claim was denied because the evidence did not establish a compensable employment factor. The evidence submitted on reconsideration must not only address compensable employment factors but must be so positive, precise and explicit as to shift the weight of the evidence in appellant's favor.

Appellant's reconsideration request was accompanied by the October 21, 2005 and December 15, 2006 reports from Dr. Ahmad who treated her for depression. She also submitted an August 27, 2007 report from Dr. Roderique who treated her for right elbow pain. This evidence is insufficient to raise a substantial question as to the correctness of the Office's decision as these reports address appellant's medical treatment. They do not purport to establish

[10] 20 C.F.R. § 10.700.

[11] *See also Nancy Marcano,* 50 ECAB 110 (1998) (the Board found that the Office's regulations regarding the representation of claimants clearly requires that a written notice, signed by the claimant, appointing a representative be sent to the Office authorizing representation for the purpose of filing a reconsideration request).

[12] *See Ira D. Gray*, 45 ECAB 445, 447 (1994).

[13] *See* 20 C.F.R. § 10.606.

a compensable employment factor. As noted, the underlying deficiency in the claim was her failure to submit factual evidence to establish that her supervisor erred in accommodating her medical restrictions. Evidence that is not relevant to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.[14] The Board notes that clear evidence of error is intended to represent a difficult standard.[15] This evidence is insufficient to establish clear evidence of error.

The Board finds that the evidence submitted by appellant on reconsideration does not raise a substantial question as to the correctness of the Office's prior decision. Appellant has not provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor.

CONCLUSION

The Board finds that appellant's request for reconsideration dated April 9, 2009 was untimely filed and did not demonstrate clear evidence of error.

[14] *F.R.*, 61 ECAB ___ (Docket No. 09-575, issued January 4, 2010).

[15] *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 June 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 27, 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