

ISSUE

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

On appeal, appellant contends that the Office's decision is contrary to fact and law.

FACTUAL HISTORY

This case has previously been before the Board. In a February 15, 2006 decision, the Board affirmed the Office's August 30, 2005 decision which terminated appellant's compensation effective June 21, 2004 on the grounds that she no longer had any residuals or disability causally related to her February 19, 2001 employment injury. The Board accorded weight to the March 18, 2004 medical opinion of Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon and Office referral physician, who found that appellant had no continuing residuals of the accepted condition and could work eight hours a day with restrictions. The facts of the case as set forth in the prior decision are incorporated herein by reference.³ The facts relevant to the present appeal are hereafter set forth.

By letter dated June 19, 2009, appellant requested reconsideration of the termination of her compensation benefits. In a May 18, 2005 medical report, Dr. James P. Dambrogio, an osteopath, listed a history of appellant's February 19, 2001 employment injury, medical treatment, personal background and employment. He provided findings on physical examination and diagnosed lumbosacral degenerative disc disease. Dr. Dambrogio stated that the diagnosed condition was caused by the February 19, 2001 injury. He advised that appellant had severe loss of efficiency and mobility, which limited her ability to perform daily activities due to the injury. Dr. Dambrogio concluded that she was permanently and totally disabled as a result of the February 19, 2001 employment injury.

In reports dated April 18, 2006 and July 24, 2007, Dr. Dambrogio reviewed a description of appellant's priority mail processing clerk position. He advised that the mechanics of the February 19, 2001 injury resulted in increased intervertebral pressure and microhemorrhages to the soft tissue which resulted in acute trauma to both the soft and hard tissue of the lumbar spine. The increased tissue damage resulted in increased inflammation which caused further degeneration of the interarticular spaces and boney structure of the lumbar spine that preceded the February 19, 2001 injury. Dr. Dambrogio advised that appellant had lost strength and flexibility of these structures due to these injuries. He noted that on March 14, 2006 she experienced severe low back pain due to pushing, pulling, twisting and turning motions while vacuuming floors in her home. Appellant had to drop to the floor until the overwhelming pain subsided enough for her to get to her bed. Dr. Dambrogio advised that her daily activities caused an aggravation of the February 19, 2001 lumbosacral degenerative disc disease injury. He further advised that appellant had a total loss of endurance and her pain index was moderate to

³ The Office accepted that on February 19, 2001 appellant, then a 40-year-old priority mail processing clerk, sustained a lumbar strain and authorized physical therapy through March 19, 2001. On May 31, 2001 it accepted that appellant sustained a recurrence of disability commencing April 11, 2001 due to the February 19, 2001 employment injury and paid her appropriate compensation for temporary total disability.

severe. Appellant's job description required that all of the stated mechanisms work. Dr. Dambrogio opined that appellant was unable to perform her work duties due to aggravated lumbosacral degenerative disc disease. He reiterated that she was totally disabled.

In reports dated May 2, 2008 and March 23, 2009, Dr. Dambrogio stated that appellant continued to have moderate-to-severe pain in her low back radiating down her right leg and occasionally, her left leg. Appellant was unable to walk without the assistance of a cane or walker. Sitting was painful after 10 minutes without a change of position. She could not operate a motor vehicle. Appellant could not lift anything over 5 pounds frequently or 10 pounds occasionally. Bending, stooping, twisting or any repetitive motions increased her pain. Appellant's pain was rated as 8 out of 10 with 10 being the most painful. Dr. Dambrogio advised that she was totally disabled for work due to her physical, psychological and emotional impairments, age, educational background and physical limitations.

In an April 27, 2006 report, Stanley J. Palumbo, Ph.D., a clinical psychologist, reviewed a history of appellant's February 19, 2001 employment injury and medical treatment. He listed his findings on psychological examination and diagnosed a single episode major depressive disorder and moderate chronic pain disorder associated with psychological factors and a general medical condition on Axis I. Dr. Palumbo diagnosed low back pain on Axis III. Appellant had moderate psychological stressor of unemployment on Axis IV and a global assessment functioning (GAF) score of 45 on Axis V. Dr. Palumbo advised that there was no mental disorder on Axis II. He opined that appellant had an emotional condition causally related to the February 19, 2001 injury. Regarding appellant's ability to relate to coworkers, supervisors and the public, understand and follow instructions, maintain attention, perform simple repetitive tasks and withstand the stress and pressures associated with day-to-day work activity, she would have moderate to marked impairment due to pain, sad mood, low energy, strong anhedonia, moderately impaired concentration and frequent fleeting suicidal ideation.

In a February 13, 2008 report, Dr. Brian S. Sullivan, a psychiatrist, listed a history of appellant's February 19, 2001 employment injury, medical treatment, social background and development of her emotional condition. He listed his findings on physical and psychological examination. Dr. Sullivan diagnosed Axis I single episode of major depressive disorder and moderate chronic pain disorder associated with psychological factors and a general medical condition. He diagnosed Axis III lower back pain. Appellant had no Axis II diagnosis. On Axis IV, Dr. Sullivan advised that she was unemployed with primary and financial support. Appellant had a GAF score of 45 on Axis V. Dr. Sullivan opined that her emotional condition was a direct result of the February 19, 2001 injury. In progress notes dated February 9 and May 11, 2009, he addressed a treatment plan for appellant's anxiety condition which was secondary to her pain.

In reports dated May 11 and June 15, 2009, John J. Allan, a licensed professional clinical counselor, advised that appellant had major depression and panic symptoms.

In a September 22, 2009 decision, the Office denied appellant's June 19, 2009 request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provide that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

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 shift the weight of the evidence in favor of the claimant

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Leona N. Travis*, *supra* note 10.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

and raise a substantial question as to the correctness of the Office decision.¹³ 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.¹⁴

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁵ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶

The most recent merit decision in this case was the Board's February 15, 2006 decision. As appellant's June 19, 2009 letter requesting reconsideration of the merits of her claim by the Office was made more than one year after the February 15, 2006 merit decision,¹⁷ the Board finds that it was not timely filed.

The Board further finds that the evidence submitted by appellant in support of her June 19, 2009 request for reconsideration does not raise a substantial question as to the correctness of the Office's termination of her compensation benefits effective June 21, 2004 or shift the weight of the evidence of record in her favor. Dr. Dambrogio's May 18, 2005 report listed his findings on physical examination and diagnosed lumbosacral degenerative disc disease. He opined that the diagnosed lumbar condition and appellant's resultant permanent and total disability were causally related to the February 19, 2001 injury. Dr. Dambrogio failed to address how the diagnosed lumbar condition and resultant disability were caused by the accepted condition. The Board finds that his report is insufficient to show that the termination of appellant's compensation benefits was erroneous or raise a substantial question as to the correctness of the termination decision. Dr. Dambrogio's May 2, 2008 and March 23, 2009 reports listed appellant's physical restrictions. He opined that she was totally disabled for work due to her physical limitations and physical, psychological and emotional impairments, age and educational background. Dr. Dambrogio did not provide an opinion on causal relationship between the claimed disability and the accepted condition. The Board has held that a physician's opinion, which does not address causal relationship is of diminished probative value.¹⁸ The Board finds that Dr. Dambrogio's reports are insufficient to establish clear evidence of error in the Board's termination decision. Dr. Dambrogio's April 18, 2006 and July 24, 2007 reports

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁵ *Supra* note 7; *see A.F.*, 59 ECAB 714 (2008).

¹⁶ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁷ Appellant had one year to request reconsideration by the Office of the Board's February 15, 2006 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

¹⁸ *See A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

attributed appellant's lumbosacral degenerative disc disease to the February 19, 2001 injury. The Board notes that the Office has not accepted the condition of lumbosacral degenerative disc disease. For conditions not accepted by the Office as being employment related, it is appellant's burden to provide rationalized medical evidence sufficient to establish causal relation.¹⁹ While Dr. Dambrogio explained the causal relationship between appellant's lumbosacral degenerative disc disease and the February 19, 2001 injury, he attributed the aggravation of the diagnosed condition and her resultant permanent and total disability for work as a priority mail processing clerk to a cleaning incident in her home on March 14, 2006. He stated that on that date, she experienced severe low back pain due to pushing, pulling, twisting and turning motions while vacuuming floors. Dr. Dambrogio further stated that appellant fell to the floor until the overwhelming pain subsided enough for her to get to her bed. As he did not opine that her total disability for work was causally related to the accepted condition, the Board finds that his report is insufficient to establish clear evidence of error in the Board's termination decision.

The reports from Dr. Palumbo and Dr. Sullivan found that appellant had, among other things, a single episode of major depressive disorder causally related to the February 19, 2001 injury. However, neither physician provided any medical rationale explaining how the diagnosed emotional condition was caused by the accepted condition.²⁰ The Board finds that the reports of Dr. Palumbo and Dr. Sullivan are insufficient to raise a substantial question as to the correctness of the termination of appellant's compensation benefits. Dr. Sullivan's progress notes do not provide any opinion addressing the causal relationship between appellant's anxiety condition and the February 19, 2001 injury. The Board finds that this evidence is insufficient to show that the termination of her compensation benefits was erroneous or raise a substantial question as to the correctness of the termination decision.

The reports from Mr. Allan, a licensed professional clinical counselor, are of no probative medical value as a professional licensed clinical counselor is not considered a "physician" under the Act.²¹

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 Board's decision and order. Consequently, the Office properly denied her reconsideration request as her request does not establish clear evidence of error.

CONCLUSION

The Board finds that appellant's June 19, 2009 request for reconsideration was untimely filed and failed to show clear evidence of error.

¹⁹ *Alice J. Tysinger*, 51 ECAB 638 (2000).

²⁰ *See A.D.*, *supra* note 19.

²¹ *See* 5 U.S.C. § 8101(2); *see also Jeannine E. Swanson*, 45 ECAB 325, 336 (1993); *Arnold A. Alley*, 44 ECAB 912 (1993); *Ceferino L. Gonzales*, 32 ECAB 1591, 1594 (1981).

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 20, 2011
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