United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 10-1811**
	)	**Issued: March 4, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, 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 July 1, 2010 appellant filed a timely appeal from a January 11, 2010 decision of the Office of Workers' Compensation Programs which denied her request for reconsideration. Because more than one year elapsed between the most recent merit decision dated October 6, 2008 and the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.[1] The only decision properly before the Board is the Office's January 11, 2010 decision denying appellant's request for reconsideration of the merits of her claim.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

[1] For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On September 4, 1987 appellant, then a 40-year-old letter carrier, filed a traumatic injury claim alleging that she sustained an injury to her left knee after tripping over the roots of a tree. The Office accepted her claim for internal derangement of the left knee and a depression condition.[2] Appellant stopped work on February 20, 1990 and did not return. She received compensation benefits.[3]

The Office referred appellant for second opinion to determine the extent of work-related residuals and disability. On October 29, 2007 it advised her that a modified clerk position offered by the employing establishment was suitable to her work capabilities and that she had 30 days in which to accept the position. Appellant rejected the job offer on November 20, 2007. The Office, on December 6, 2007, informed her that her reasons for refusal of the offered position were not valid and that she had 15 days to accept the offered position or her entitlement to wage-loss and schedule award compensation would be terminated. On December 19, 2007 appellant declined to accept the offered employment.

In a January 2, 2008 decision, the Office terminated appellant's monetary compensation, effective that date finding that she refused suitable work. It determined that the reports of Dr. William Dinenberg, a Board-certified orthopedic surgeon and Dr. James Edgar, a Board-certified psychiatrist, represented the weight of the medical evidence.[4] The Office noted that appellant's argument regarding the offered position was that it was not in her commuting area. It explained that the offered position was within 50 miles from her current residence. The Office also noted appellant's argument regarding childcare and explained that this was not a reason to refuse suitable employment.

On January 11, 2008 appellant requested a hearing, which was held on July 23, 2008. In an April 15, 2008 report, Dr. Matthew Edlund, a Board-certified psychiatrist, noted that he saw her in the "early 90's for about a month" for severe depression following an accident at work and that he had not seen her in 14 years. Appellant was not presently seeing a psychiatrist or taking any psychiatric medication. Dr. Edlund advised that he had treated her for depression and concerns regarding bipolar type II illness. Appellant showed signs of bipolar type II illness, rapidly changing moods and "probably long-standing ADD [attention deficit disorder] in terms of distractibility, lack of organization and inability to finish things. She is very distrustful of people at this point." Dr. Edlund opined that appellant's ability to work even briefly was compromised.

[2] The Office accepted major depression in relation to the September 4, 1987 work-related injury. It also accepted that on November 6, 1989 appellant sustained a torn medial meniscus to the right knee when she tripped at work.

[3] The record reflects that appellant has nonwork-related conditions to include a tonsillectomy and left knee injury which was sustained in 1975 and advanced degenerative arthritis of the left knee.

[4] In an August 21, 2007 report, Dr. Dinenberg diagnosed severe degenerative change of the left knee. He found that, while appellant could not return to work as a letter carrier, she could work within restrictions. In a September 27, 2007 report, Dr. Edgar noted findings on mental status examination and found no current psychiatric diagnosis. On a psychiatric basis, he opined that appellant could return to her usual work.

In an October 6, 2008 decision, an Office hearing representative affirmed the January 2, 2008 decision. She found that appellant's reasons for not accepting suitable work were personal and not due to her medical condition.

On December 23, 2009 counsel requested reconsideration. He submitted a new report from Dr. Edlund, contending that the Office based its January 2, 2008 decision to terminate benefits upon the report of its second opinion psychiatrist, Dr. Edgar, who opined that appellant was ready, willing and able to go back to work. Appellant informed Dr. Edlund that she had lied to Dr. Edgar when he examined her in 2007. Counsel contended that such bizarre behavior was consistent with the diagnoses of bipolar disorder with mood swings. He argued that Dr. Edlund expressed his opinion that such disorder was in existence prior to Dr. Edgar's 2007 report. Counsel also contended that a conflict was created and presented question of material fact as to appellant's competency and state of mind when she was found to have refused suitable work; therefore, she could not have knowingly refused a suitable job offer or timely requested reconsideration.

In a December 11, 2009 report, Dr. Edlund noted that he saw appellant on October 6, 2009. Appellant had bipolar disorder that was due to the injuries she suffered in 1987 and 1989. Dr. Edlund advised that she had paranoia such that "any kind of job at this point appears out of the question." He was now treating appellant and that she remained paranoid and unable to work.

In an October 28, 2009 report, Dr. William G. Carson, a Board-certified orthopedic surgeon, advised that appellant presented with worsening knee pain. He diagnosed degenerative arthritis of the left knee and prescribed a brace. In noting appellant's history, Dr. Carson related that appellant felt that the job offered by her employer in 2007 was too far away from her home.

In a January 11, 2010 decision, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[5] 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."[6]

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse

[5] 5 U.S.C. §§ 8101-8193.

[6] *Id*. at § 8128(a).

of discretionary authority granted the Office under section 8128(a).[7] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the 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.[8]

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.[9]

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 manifest on its face that the Office committed an error. Evidence that 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.[10] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. 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.[11]

ANALYSIS

In its January 11, 2010 decision, the Office properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on October 6, 2008. Appellant's December 23, 2009 letter requesting reconsideration was submitted more than one year after the October 6, 2008 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with the Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening her case for merit review under section

[7] *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[8] 20 C.F.R. § 10.607(a).

[9] *Id*. at § 10.607(b).

[10] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

[11] *Id.*

8128(a) of the Act, notwithstanding the untimeliness of her application. It reviewed the evidence submitted by her in support of her application for review, but found that it did not clearly show that the Office's most recent merit decision was in error.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's most recent merit decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether appellant has shown clear evidence of error in the Office's October 6, 2008 decision that terminated her compensation benefits on the grounds that she refused suitable work.

Counsel contented that the Office's decision to terminate monetary benefits was in error because it relied upon the report of its second opinion psychiatrist, Dr. Edgar, who opined that appellant was ready, willing and able to go back to work. Appellant informed Dr. Edlund that she had lied to Dr. Edgar when he examined her in 2007. Counsel contended that there was a conflict in medical opinion between Dr. Edlund and Dr. Edgar. He also argued that appellant was not under the care of a psychiatrist at the time of Dr. Edgar's 2007 examination and she was mentally incompetent such that she could not have knowingly refused a suitable job offer or timely requested reconsideration. The Board notes that these arguments do not raise a substantial question concerning the correctness of the Office's October 6, 2008 decision. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Dr. Edlund addressed appellant's condition in 2008 and 2009. He did not advise that she was incompetent or unable to file a timely reconsideration request. Dr. Edlund noted that appellant was distrustful but did not address whether she was unable to communicate or otherwise mentally incompetent.[12]

Regarding appellant's assertion that Dr. Edlund's December 11, 2009 report created a conflict in the medical evidence, the Board notes that "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized 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 and would not require a review of a case.[13] Dr. Edlund questioned whether appellant was able to work. His report does not raise a substantial question as to the correctness of the Office's decision and it is insufficient to show clear evidence of error. Other medical evidence, such as Dr. Carson's October 28, 2009 report, is also insufficient to establish clear evidence of error as it did not specifically address appellant's ability to perform the offered position.[14]

[12] *See A.F.*, 59 ECAB 714 (2008). Office regulations provide that the one-year time limit to file a reconsideration request does not include any time following the decision that the claimant can establish (through medical evidence) an inability to communicate in any way and that her testimony would be necessary. *See* 20 C.F.R. § 10.607(c). The Board notes that appellant has not provided any probative medical evidence establishing that she was unable to communicate in any way during the period in question.

[13] *Annie L. Billingsley*, 50 ECAB 210 (1998).

[14] *See F.R.*, 61 ECAB ___ (Docket No. 09-575, issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

The Board finds that the evidence submitted on reconsideration is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred by terminating her monetary compensation benefits on the grounds that she refused to accept suitable work. The Board finds that she has not presented clear evidence of error.

On appeal, appellant reiterated that there was a conflict in the medical evidence. As noted evidence such as a detailed, well-rationalized 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 and would not require a review of a case.[15]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 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

[15] *Id.*