United States Department of Labor
Employees' Compensation Appeals Board

A.G., Appellant	)	
and	)	**Docket No. 10-1861**
	)	**Issued: March 21, 2011**
DEPARTMENT OF THE ARMY, FORT JACKSON MEDDAC, Columbia, SC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 7, 2010 appellant filed a timely appeal from an April 14, 2010 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. The most recent merit review in this case was the Office's March 3, 2009 decision denying her occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision.[1]

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish 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 (2008).

FACTUAL HISTORY

On December 31, 2008 appellant, a 60-year-old information technologist specialist, filed an occupational disease claim alleging that she contracted a herpes virus from a coworker, who had frequent outbreaks over the course of a year. The employing establishment controverted the claim stating that there was no way to prove how she contracted the claimed disease.

Appellant submitted a December 4, 2008 report from Dr. Greta C. Zimmerman, a Board-certified internist, who diagnosed "left index finger changes of herpes virus infection."

By decision dated March 3, 2009, the Office denied appellant's claim on the grounds that appellant had failed to establish the fact of injury. It found that the evidence was insufficient to establish that the event had occurred as alleged, and there was no medical evidence that could be connected to the claimed event.

On March 22, 2010 appellant requested reconsideration, asking that the Office make an exception to its policy. She contended that someone should have ensured her safety in the workplace and her supervisor should have investigated the situation. Appellant noted that her doctor was unable to provide an opinion as to the cause of her condition because he was unable to examine her infected coworker.

In a March 11, 2010 report, Dr. Zimmerman stated that the report of appellant's biopsy showed changes of a herpes virus infection. Clinically, she suspected the infection was due to herpetic whitlow, a term used to indicate the infection is simply a solitary lesion, like a cold sore and not the product of shingles. Dr. Zimmerman was unable, however, to state with certainty that appellant had not experienced an outbreak of shingles. She stated: "Whether you got [the herpes virus] from a coworker, infection from your own lip, or another person at any other period in time, I cannot state."

Appellant also submitted December 4, 2010 notes from Dr. Zimmerman reflecting irritation of appellant's left index finger on that date.

The record contains a November 11, 2009 letter from appellant's representative informing her that she had one year from the March 3, 2009 decision in which to file a request for reconsideration. Counsel also advised her to submit new evidence, including a medical report clearly stating that her diagnosed condition was caused by a coworker.

Appellant submitted an undated publication from the U.S. Army Center for Health Promotion and Preventive Medicine. The article addressed the symptoms of herpetic whitlow and how it is contracted.

In an April 14, 2010 decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on

application.[2] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). To be entitled to a merit review of the Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.[3] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[4]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[5] The Office regulations and procedure provide that it 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]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[7] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] 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.[11] The Board makes an independent determination of whether a claimant has submitted clear evidence of error

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(a).

[4] *Supra* note 3; *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[5] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[6] *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). The term 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 that a schedule award was miscalculated). Evidence such as 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. *Id.* at Chapter 2.1602.3c.

[7] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[8] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[9] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[10] *See M.L.*, Docket No. 09-956 (issued April 15, 2010). *See Leona N. Travis*, *supra* note 8.

[11] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.[12]

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The one-year time limitation period for requesting reconsideration begins on the date of the original Office decision and upon any subsequent merit decision.[13] As appellant's March 22, 2010 request for reconsideration was submitted more than one year after the Office's March 3, 2009 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by the Office in the denial of her claim.[14]

Appellant asked the Office to make an exception to its policy. She contended that someone should have ensured her safety in the workplace and her supervisor should have investigated the situation. Appellant noted that her doctor was unable to provide an opinion as to the cause of her condition because he was unable to examine her infected coworker. These contentions do not establish error on the part of the Office, but merely repeat arguments previously raised and considered by the Office. The Board finds that appellant's contentions are not persuasive and are insufficient to raise a substantial question concerning the correctness of the Office's denial of his claim or to shift the weight of the evidence in her favor.

Moreover, the medical reports submitted by appellant are insufficient to establish clear error by the Office in denying her claim. Dr. Zimmerman's December 4, 2008 report does not address the underlying issue of causal relationship which renders it irrelevant. Her March 11, 2010 report reflects her uncertainty as to the cause of appellant's diagnosed condition. The term clear evidence of error is intended to represent a difficult standard. The submission of a detailed, well-rationalized medical report which, if submitted prior to when the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.[15] Dr. Zimmerman's report does not raise a substantial question as to the correctness of the Office's decision, nor does it even support appellant's claim.

The November 4, 2009 letter from appellant's counsel is irrelevant to the issue at hand and merely provides evidence that appellant was aware of the medical evidence required to establish his claim. This evidence does not establish clear error by the Office. Finally, the article on herpetic whitlow is of no evidentiary value in establishing whether appellant contracted the herpes condition as a result of the claimed exposure, as the Board has held that such materials are of general application and are not determinative of whether the specifically

[12] *Pete F. Dorso*, 52 ECAB 424 (2001).

[13] 20 C.F.R. § 10.607(a); *see Robert F. Stone*, 57 ECAB 292 (2005).

[14] *Id*. at § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[15] *Joseph R. Santos*, 57 ECAB 554 (2006).

claimed condition is related to the particular employment factors alleged by the employee.[16] Therefore, appellant has not submitted evidence of clear error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[16] *See Kathy Marshall (Dennis Marshall)*, 45 ECAB 827 (1994); *Dominic E. Coppo*, 44 ECAB 484 (1993).