United States Department of Labor
Employees' Compensation Appeals Board

JODYNA M. HARTMAN, Appellant	)	
and	)	**Docket No. 05-377**
	)	**Issued: September 7, 2005**
U.S. POSTAL SERVICE, POST OFFICE, San Diego, CA, Employer	)	

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 1, 2004 appellant, through her representative, filed a timely appeal of the September 3, 2004 decision of the Office of Workers' Compensation Programs, which denied further merit review on the basis that her request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated June 11, 2003 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The only decision before the Board is the September 3, 2004 decision.

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. On appeal, appellant argues that her June 8, 2004 request for reconsideration was timely filed.

FACTUAL HISTORY

On July 20, 1990 appellant, then a 37-year-old letter carrier, sustained an injury when the chair in which she sat slipped as she was starting to sit and caused her to fall down. The Office accepted that she sustained a low back strain and dysthymia. Appellant returned to light duty on the basis of four hours daily in 1996. The Office subsequently accepted that she had an injury-related psychiatric condition.[1]

On April 15, 1999 the employing establishment offered modified employment as a letter carrier with appellant's work hours gradually increasing to full time. Also by letter dated April 15, 1999, the Office found that the offer was suitable based on second opinion evaluations.

On April 26, 1999 appellant refused the full-time light-duty offer and submitted additional medical evidence. The Office found a conflict in the medical opinion evidence and referred appellant to Dr. Louis Towne, a Board-certified orthopedic specialist, for an impartial medical evaluation. He found that appellant had radicular pain symptoms in all extremities, no neuromuscular deficits in both the upper and lower extremities and normal nerve conduction and electromagnetic (EMG) studies. Accordingly, he opined that orthopedically, appellant could work at her original customary job as a letter carrier for eight hours a day.

On March 17, 2000 the Office advised appellant that the April 15, 1999 job offer constituted suitable employment based on Dr. Towne's report. Appellant was accorded 15 days in which to accept the job.

On March 30, 2000 the employing establishment reoffered the April 15, 1999 job. It gradually increased her hours effective April 1, 1999 beginning five hours daily and adding one additional hour each week until full-time status was reached. On March 30, 2000 appellant signed the acceptance of the job. She stopped work on or about April 22, 2000. In a duty status slip, Dr. Richard Seigle, a Board-certified psychiatrist, indicated that appellant was totally disabled effective April 20, 2000.

On April 25, 2000 the Office accorded appellant 15 days to return to her position and advised her of the provisions of 5 U.S.C. § 8106(c) for failure to do so.

By decision dated May 2, 2001, the Office terminated compensation on the basis that appellant abandoned suitable light-duty employment.

On May 3, 2001 the Office proposed termination of compensation as the weight of the medical evidence, as represented by Dr. Towne, established that appellant was capable of

[1] The record reveals that appellant also had two prior claims which the Office had accepted and which have been subsequently closed. On January 28, 1996 appellant filed a claim alleging that her pains concerning her neck, shoulder, left arm, chest and throat were caused or aggravated by her federal employment. The Office accepted the claim for chronic cervical pain with myofascial symptom complex for a limited period of time from September 21, 1995 to February 1, 1996. This claim was closed on February 8, 1996. Appellant filed another claim for injuries sustained on April 3, 1989 when she was running from a medium to large dog. The Office accepted the claim for a lumbar strain and paid appropriate benefits for all periods of disability. That claim was closed on January 20, 1993.

performing the job held when injured. By decision dated June 5, 2001, the Office finalized its termination of compensation.

In a letter dated May 9, 2001, appellant disagreed with the Office's May 2 and June 5, 2001 decisions and requested an oral hearing, which was held on January 30, 2002. Additional medical reports were also submitted.

By decision dated May 29, 2002, an Office hearing representative affirmed the May 2, 2001 decision that appellant abandoned suitable work pursuant to 5 U.S.C. § 8106(c) as she failed to establish that she was medically unable to perform the light-duty job offered to her. The Office hearing representative reversed the June 5, 2001 termination decision, but noted that this issue was moot since appellant rejected suitable employment under 5 U.S.C. § 8106(c).[2]

Appellant requested reconsideration and submitted additional medical evidence. In a decision dated June 11, 2003, the Office reviewed the merits and denied modification of the May 29, 2002 decision.[3]

In a letter dated June 8, 2004, which the Office received on June 14, 2004, appellant requested reconsideration.[4] She submitted copies of evidence previously of record and new medical evidence. In a June 18, 2003 report, Dr. Kristi A. Dove, a Board-certified neurologist, opined that no conclusion could be drawn from the nerve conduction study and EMG performed in November 1999. In a June 2, 2004 report, Dr. Hans J. Anderson, a Board-certified orthopedic surgeon, opined that appellant's fibromyalgia chronic pain syndrome and history of depression were the cause of her disability as opposed to the anatomic structural diagnoses.

In a letter dated June 11, 2004 and received by the Office on June 15, 2004, appellant stated that she had sent an express mail on June 10, 2004 requesting reconsideration. She provided the express mail number and advised that she wanted the attached appeal request form associated with the express mail envelope.

In a decision dated September 3, 2004, the Office denied appellant's request for reconsideration. It found that appellant's June 8, 2004 letter requesting reconsideration was not received until June 14, 2004 and, therefore, was not considered timely. The Office also found that appellant failed to establish clear evidence of error on the part of the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with

[2] In a September 19, 2002 decision, the Office approved appellant's attorney fees in the amount of $5,500.00. Appellant requested reconsideration and, in a November 19, 2003 decision, the Office denied modification of its prior decision.

[3] The Board notes that the Office apparently recopied the June 11, 2003 memorandum on October 8, 2003.

[4] The record does not contain the envelope in which appellant's reconsideration request was sent.

[5] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

discretionary authority to determine whether it will review an award for or against payment of compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[7] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[8] In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents clear evidence of error on the part of the Office in its most recent merit decision.[9]

ANALYSIS

The one-year time limitation began to run upon the issuance of the June 11, 2003 merit decision.[10] Therefore, appellant had until June 11, 2004 to submit a timely request for reconsideration. The Office received appellant's June 8, 2004 request for reconsideration on June 14, 2004. Because the request was received more than one year after the June 11, 2003 merit decision, the Office found the request to be untimely. The Board notes that Chapter 2.1602.3(b)(1) of the Office's procedure manual provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope.[11] The Board notes that the envelope containing the request was not retained in the record. The Office procedural manual states that when there is no evidence to establish the mailing date, the date of the letter should be used.[12] The Board finds that appellant's reconsideration request was dated June 8, 2004 and her request for reconsideration was timely filed.

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[6] Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.607 (1999).

[8] 20 C.F.R. § 10.607(a) (1999).

[9] 20 C.F.R. § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 *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 decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

[11] The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark, or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. *Id.*

[12] *Id.*, *see also Donna M. Campbell*, 55 ECAB ___ (Docket No. 03-2223, issued January 9, 2004).

As appellant timely filed her request for reconsideration within one year of the June 11, 2003 merit decision, the Office improperly denied her reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. The Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard. The Board will remand the case to the Office for review of this evidence under the proper standard of review for a timely reconsideration request.[13]

CONCLUSION

The Board finds that appellant's June 8, 2004 request for reconsideration was timely filed.

ORDER

IT IS HEREBY ORDERED THAT the September 3, 2004 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development.

Issued: September 7, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[13] *See Donna M. Campbell, supra* note 12.