United States Department of Labor
Employees' Compensation Appeals Board

DEBORAH A. GAMBLE, Appellant	)	
and	)	**Docket No. 05-869**
	)	**Issued: September 9, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Erie, PA, Employer	)	

Appearances:
Deborah A. Gamble, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On March 7, 2005 appellant filed a timely appeal of a nonmerit decision of the Office of Workers' Compensation Programs dated February 15, 2005. As the most recent Office merit decision was issued on March 20, 2002, more than one year before appellant filed this appeal, the Board, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, does not have jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office properly found that appellant's November 11, 2004 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On January 13, 1983 appellant, then a 29-year-old carrier, filed a claim for compensation for a traumatic injury to her back and hip sustained that day when she slipped on icy steps while holding a hand rail. The Office accepted that appellant sustained a herniated disc at T11-12, and surgery was performed for this condition on April 26, 1985. Appellant received continuation of

pay from January 14 to February 27, 1983, compensation for temporary total disability until she returned to limited duty on April 4, 1983, and compensation for recurrences of disability in 1983. On April 17, 1984 appellant stopped work. She filed a claim for a recurrence of disability due to her January 13, 1983 injury, and the Office resumed payment of compensation for temporary total disability.

In June and July 1999 postal inspectors videotaped appellant's activities in caring for horses. The tapes were provided to Dr. Lloyd K. Richless, a family practitioner, who stated that they showed fraud and added that his examination of appellant on July 28, 1999 showed that she could do any normal physical activities including working as a letter carrier. The tapes were also sent to appellant's attending internist, Dr. Rogelio Allanigue, who stated in a February 2, 2000 report that she could probably return to limited duty.

On May 2, 2000 the Office referred appellant to Dr. Daniel C. Carneval, an osteopath Board-certified in orthopedic surgery, for a second opinion on her injury-related residuals and her ability to work. In a June 15, 2000 report, he diagnosed postdiscectomy with apparent minimal residual sequelae, stating that appellant's disability was based on her subjective complaints of pain and limitation of activities. Dr. Carneval indicated that appellant could perform limited duty with lifting 20 to 30 pounds intermittently beginning 4 hours per day, increasing to 8 hours over 8 weeks.

On February 5, 2001 the employing establishment offered appellant a limited-duty position as a modified city carrier beginning four hours per day. The offer listed the work tolerance limitations set forth by Dr. Carneval. Appellant refused the offer, contending that she was totally disabled. On February 20, 2001 the Office advised appellant that it had found the offer suitable, advised her of the penalty provision of the Federal Employees' Compensation Act for refusing an offer of suitable work, and gave her 30 days to accept the offer or provide reasons for refusing it. By decision dated April 17, 2001, the Office terminated appellant's compensation effective April 22, 2001 for refusing an offer of suitable work. Appellant requested a hearing, which was held on November 28, 2001. By decision dated March 28, 2002, an Office hearing representative found that the Office met its burden of proof to terminate appellant's compensation, as she refused suitable work within her restrictions, with no medical evidence indicating otherwise.

Appellant submitted additional medical evidence to the Office. During a May 28, 2002 visit to a hospital emergency room for increased back pain, lumbosacral x-rays showed no significant abnormality and thoracic x-rays showed scoliosis and minor degenerative changes. A report of a June 13, 2002 emergency room visit stated that appellant fell down two to three steps two to three weeks ago, and noted her complaint of severe chronic back and leg pain. A June 28, 2002 report from Dr. Allanigue stated that appellant is suffering from chronic back pain syndrome and is unable to work. In an August 13, 2002 report, Dr. Matvey Bobylev, a Board-certified anesthesiologist specializing in pain management, diagnosed failed laminectomy syndrome and depression.

A discharge summary from appellant's hospitalization from February 6 to 9, 2003, prepared by Dr. Max W. Gottesman, an osteopath, diagnosed pain disorder, personality disorder with borderline narcissistic traits and chronic pain syndrome. Appellant was also seen by

unidentified physicians for low back pain and migraine headaches on March 4, 2003 for low back pain and numbness on May 5, 2003, for fatigue and weight loss on October 24, 2003 and for headaches and low back pain on December 1, 2003. A lumbar magnetic resonance imaging (MRI) scan on July 22, 2003 showed no significant stenosis or definite evidence of direct nerve root impingement and a suggestion of a minimal left lateral protrusion at L5-S1. A lower extremity arterial evaluation on November 12, 2003 was normal, and a computerized tomography (CT) scan of her head on December 18, 2003 was negative. Cervical x-rays on January 5, 2004 showed degenerative disc changes at C5.

Appellant was seen by unidentified physicians and by physicians' assistants for low back pain syndrome and headaches on January 5, 2004, for low back pain syndrome and migraine headaches on March 1, 2004, for low back pain syndrome, fibromyalgia and depression on May 3, 2004, for chronic myofascial pain on June 18, 2004, for low back pain syndrome on July 2, 2004, for bilateral paralysis of her legs when arising from a seated position, for low back pain, migraine headaches and fibromyalgia on September 3 and October 4, 2004 and for low back pain syndrome on November 2, 2004. In an August 23, 2004 report, Dr. William S. Makarowski, a rheumatologist, stated that appellant was seen on July 21, 2004 for pain, severe migraines associated with leg cramping and musculoskeletal discomfort. He stated that appellant's "symptoms were compatible with recurrent low back pain secondary to known accidental injury." In a September 7, 2004 report, Dr. Makarowski noted that appellant continued to be symptomatic from recurrent musculoskeletal discomfort, and that several ecchymoses were evident in her lower extremities on examination. In an October 28, 2004 report, Dr. Makarowski noted moderate to significant restrictions of the trunk with continued diffuse myofascial pain, for which he injected her bilateral sacroiliac region.

By letter dated November 11, 2004, appellant requested reconsideration of the Office's termination of her compensation, contending that she could not work. She submitted a December 17, 2002 report from Michael Stanton-Hicks, M.B., B.S., at the Cleveland Clinic Foundation stating that she had been effectively disabled since a fall following her 1986 surgery, that her symptoms related to the failed laminectomy syndrome over the past 27 years had resulted in significant reactive depression, and that it was medically necessary for her to be managed in a chronic pain rehabilitation unit with prominent behavioral measures. She subsequently submitted two reports from Dr. Makarowski: a December 14, 2004 report describing myofascial injections administered for her ongoing pain complaints, and a January 11, 2005 report diagnosing chronic pain syndrome, mechanical neck, shoulder and low back pain, multi-focal myofascial pain syndrome, failed low back surgery syndrome, major depressive disorder, and generalized anxiety disorder. Dr. Makarowski stated that appellant was "clearly disabled relative to her diffuse chronic pain and chronic migraines as well as significant emotional factors," and that "In view of the chronicity of her disability, it is unlikely she will be able to return to the work force unless she was considered for a long-term intensive comprehensive pain management and rehabilitation program."

By decision dated February 15, 2005, the Office found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the 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."

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 "An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought." The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[1]

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[2] 20 C.F.R. § 607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[3] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[4] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[5] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[6] 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

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[1] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[2] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[3] *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

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

[6] *See Leona N. Travis*, *supra* note 4.

the new evidence demonstrates clear error on the part of the Office.[7] 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 *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.[8] 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.[9]

ANALYSIS

In the present case, the most recent merit decision by the Office was issued on March 20, 2002. Appellant had one year from the date of this decision to request reconsideration, and did not do so until November 11, 2004. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office also properly found that appellant's request for reconsideration did not demonstrate clear evidence of error. Many of the reports appellant submitted following the Office's last merit decision on March 20, 2002 lacked proper identification of the author and for this reason cannot be considered probative medical evidence.[10] The reports from physicians' assistants do not constitute competent medical evidence, as they are not from a "physician" as defined by section 8101(2) of the Act.[11] The report from Mr. Stanton-Hicks also does not constitute competent medical evidence, as he is not a "physician" as defined by the Act. Although this definition includes clinical psychologists, Mr. Stanton-Hicks does not fit within the Office's definition of "clinical psychologist," as he does not possess a doctoral degree in psychology and he is not listed in a national register of health service providers in psychology.[12]

The results of x-rays, CT scans and MRIs, in and of themselves, do not reflect whether appellant could perform the work she refused, nor do her complaints on visits to hospital emergency rooms. The reports of Drs. Bobylev and Gottesman do not contain statements on disability, and therefore have no bearing on whether appellant could have performed the work offered by the employing establishment. The January 11, 2005 report of Dr. Makarowski does state that appellant is disabled, but attributes this disability to diffuse chronic pain, chronic migraines, and significant emotional factors. None of these conditions are accepted as related to appellant's January 13, 1983 employment injury, and Dr. Makarowski's reports do not show

[7] *Nelson T. Thompson*, 43 ECAB 919 (1992).

[8] *Leon D. Faidley*, *supra* note 1.

[9] *Gregory Griffin*, *supra* note 2.

[10] *See Merton J. Sills*, 39 ECAB 572 (1988).

[11] *George H. Clark*, 56 ECAB ___ (Docket No. 04-1572, issued November 30, 2004).

[12] The Office's definition of clinical psychologist is found at Federal (FECA) Procedure Manual, Part 3 -- Medical, *Overview*, Chapter 3.100.3a (October 1990); *see Jacqueline E. Brown*, 54 ECAB ___ (Docket No. 02-284, issued May 16, 2003).

such a relationship. Dr. Makarowski's August 23, 2004 report stated that appellant's symptoms were compatible with recurrent low back pain secondary to known accidental injury, but this report does not describe the work injury, nor does it provide any rationale to support causal relation.[13] None of the evidence appellant submitted after the Office's most recent merit decision establishes that the Office's decision to terminate appellant's compensation on April 22, 2001 for refusing an offer of suitable work was erroneous.

CONCLUSION

The Board finds that appellant's November 11, 2004 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

[13] Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).