United States Department of Labor
Employees' Compensation Appeals Board

FRANK E. RODGERS, JR., Appellant	
and	**Docket No. 05-179**
	Issued: June 3, 2005
U.S. POSTAL SERVICE, POST OFFICE, Detroit, MI, Employer	

Appearances:
Frank E. Rodgers, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 25, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated July 7, 2004, which denied his request for reconsideration of a February 9, 1995 decision on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the merit decision dated February 9, 1995, to the filing of this appeal on October 25, 2004, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error. On appeal, appellant argued that the Office never notified him of his statutory right to have his physician participate in the second opinion examination. He further contended that the Office improperly terminated his benefits by relying on the report of a second opinion physician.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated June 10, 1999, the Board affirmed the Office's decisions dated May 10 and October 24, 1996, which found that appellant forfeited his right to compensation for certain periods based on his failure to report earnings and that he was at fault in the creation of the $60,492.05 overpayment. The Board further found that the Office did not abuse its discretion by refusing to reopen his claim for a merit review.[1] By decision dated April 6, 2004, the Board affirmed the Office's October 16, 2003 decision, finding that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error with regard to the underlying issues of forfeiture and overpayment.[2] The law and the facts as set forth in the Board's prior decisions are incorporated by reference herein.

On November 16, 1972 appellant, then a 23-year-old distribution clerk, filed a claim alleging an injury in the performance of duty. The Office accepted his claim for right mid-trapezius strain and recurrent low back strain. Appellant received compensation for temporary total disability on the periodic rolls.

In a decision dated December 7, 1977, the Office reduced appellant's compensation benefits based on his capacity to earn wages as an office clerk. His attending physician, Dr. Booker T. Wright, Jr., a Board-certified orthopedic surgeon, continued to opine that appellant remained partially disabled due to disc disease.

In an effort to determine whether appellant's wage-earning capacity should be modified, the Office referred him to Dr. Roy C. Ponder, a Board-certified orthopedic surgeon, for a second opinion examination. He was provided with a statement of accepted facts, the medical record and a series of questions. Appellant was advised of his rights under section 8123 of the Federal Employees' Compensation Act to have a physician, designated and paid by him, present to participate in the second opinion examination.

In a report dated August 31, 1994, Dr. Ponder stated that appellant was examined on August 30, 1994. He found no intrinsic abnormality of appellant's lumbar spine and no symptoms to the upper thoracic or trapezial muscular region of his spine. Dr. Ponder recommended a further magnetic resonance imagining (MRI) scan to determine what physiologic signs of aging were present, but opined that this was not a sequelae of the accepted work injury. He further opined that appellant would be able to function in any job environment with reasonable precautions with regards to any physical demands.

On January 9, 1995 the Office issued a notice of proposed termination. The Office found that Dr. Ponder's report represented the weight of the medical opinion evidence and established that appellant had no continuing disability or medical condition as a result of the November 16, 1972 work injury. Appellant was provided 30 days in which to provide additional evidence or argument; however, the Office did not receive any additional evidence from him.

---

[1] Docket No. 97-1139 (issued June 10, 1999).

[2] Docket No. 04-311 (issued April 6, 2004), *petition for recon. denied* (issued June 18, 2004).

By decision dated February 9, 1995, the Office terminated appellant's compensation effective March 5, 1995 on the grounds that the weight of the medical evidence established that his injury-related disability and medical condition had ceased.

On April 26, 2004 appellant requested reconsideration of the Office's February 9, 1995 decision. He advised that he became overwhelmed with the Office's decision regarding an overpayment issue and, thus, could not timely file an appeal. Appellant expressed his disagreement with the Office's reliance on Dr. Ponder's second opinion report and presented arguments with regard to his loss in wage-earning capacity. He did not submit any evidence in support of his reconsideration request.

In a decision dated July 7, 2004, the Office denied a review of the merits of appellant's claim. The Office found that his April 26, 2004 request for reconsideration was untimely and failed to present clear evidence of error in the Office's February 9, 1995 termination decision.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.[3] The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[4] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[5] The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[6] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence which 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. To show clear

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[5] *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[6] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

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

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. 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.[8]

ANALYSIS

The Board finds that appellant failed to file a timely application for review. In implementing regulations, the Office's procedures provide a one-year time limitation period for requesting reconsideration. The right to reconsideration within one year accompanies any subsequent merit decision on the issues.[9] The most recent merit decision concerning the underlying issue in this case was the Office's February 9, 1995 decision which terminated appellant's compensation benefits effective March 5, 1995. As his April 6, 2004 letter requesting reconsideration of the issue was submitted more than one year after the February 9, 1995 decision, it was untimely.

Despite the untimely nature of the request the Office must consider whether appellant demonstrated "clear evidence of error" on the issue which was decided in the 1995 decision. In support of his request for reconsideration, appellant argued that he was denied the right under section 8123 of the Act to have a physician, designated and paid by him, present to participate in the second opinion examination.[10] His assertion, however, is without merit. The Office's letter of August 10, 1994 clearly advised him of his statutory right under section 8123 of the Act. Moreover, there is no evidence of record to establish that appellant ever attempted to invoke his statutory right under section 8123 prior to undergoing the second opinion examination. The Board finds that appellant's argument does not establish clear evidence of error.

Additionally, appellant argued that the Office erroneously relied upon Dr. Ponder's report to terminate his benefits. The Board finds that this contention is insufficient to *prima facie* shift the weight or raise fundamental question as to the correctness of the February 9, 1995 decision. He did not describe any specific deficiencies in Dr. Ponder's examination or report. Instead, he disagreed with Dr. Ponder's conclusions and asserted that the opinions of his treating physician should be accorded the weight of the medical evidence. Appellant's argument failed to establish clear evidence of error on the part of the Office in termination of his benefits based on the opinion of Dr. Ponder. He has submitted no medical evidence sufficient to *prima facie* shift the

[8] *John Crawford*, 52 ECAB 395 (2001); *Pete F. Dorso*, 52 ECAB 424 (2001).

[9] *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

[10] Office procedures provide that, among the information to be sent to a claimant in a referral for a second opinion examination is notification of the claimant's right, under 5 U.S.C. § 8123, to have a physician paid by him or her present during a second opinion examination. The procedures state that the law does not provide for participation of a claimant's physician in a referee examination to resolve a medical conflict. *See Ester Velasquez*, 45 ECAB 249 (1993).

weight of the evidence in his favor and raise a substantial question as to the correctness of the Office's February 9, 1995 decision.

Accordingly, the Board finds that the arguments submitted by appellant in support of his application for review do not raise a substantial question as to the correctness of the Office's February 9, 1995 decision and, thus, are insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration on 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 July 7, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member