United States Department of Labor
Employees' Compensation Appeals Board

GARY ULLENES, Appellant	)	
and	)	**Docket No. 04-1929**
	)	**Issued: March 17, 2005**
DEPARTMENT OF TRANSPORTATION, UNITED STATES COAST GUARD, Governors Island, NY, Employer	)	

Appearances:
Thomas Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On July 27, 2004 appellant filed a timely appeal of a May 7, 2004 decision of the Office of Workers' Compensation Programs which denied appellant's request for reconsideration without conducting a merit review. Because more than one year has elapsed between the most recent merit decision dated January 3, 1997, 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 properly before the Board is the Office's May 7, 2004 decision denying appellant's request for reconsideration of the merits of his claim.

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 was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On December 21, 1989 appellant, then a 34-year-old deck hand, filed a traumatic injury claim alleging that he sustained an injury to his left shoulder, low back and right knee when he fell backwards in the performance of duty on December 20, 1989.[1] Appellant stopped work on December 20, 1989. The Office accepted appellant's claim for a left shoulder injury, lumbar strain and synovitis of the left knee.

The Office continued to develop the claim and in 1993 referred appellant for vocational rehabilitation services.[2] On July 26, 1995 the Office reduced appellant's compensation based on his wage-earning capacity. The Office noted that the medical evidence established that appellant was no longer totally disabled but rather partially disabled. The Office determined that appellant had the capacity to earn wages as a credit card clerk for 20 hours a week.

Appellant was referred to Dr. Daniel J. Feuer, Board-certified in neurology and internal medicine and a second opinion physician.[3] In a report dated July 30, 1996, he noted appellant's history of injury and treatment and conducted a physical examination. He determined that appellant did not demonstrate any objective or neurological disability which was causally related to the accident of December 20, 1989, and advised that appellant was neurologically stable to resume full active employment as a deck hand without restrictions.

On August 7, 1996 the Office granted retroactive authorization for a lumbar laminectomy that was performed in February 1996.

On October 10, 1996 Dr. Stephen Kulick, a Board-certified neurologist and appellant's treating physician, opined that appellant "had an excellent result from his laminectomy" and discharged appellant from neurological care.

On November 26, 1996 the Office issued a notice of proposed termination of compensation.

In a December 10, 1996 report, Dr. Ashok Anant, a Board-certified neurological surgeon, noted that appellant underwent lumbar disc surgery on February 22, 1996 and had a large herniated disc which was extruded and removed after a hemilaminectomy of L5 was performed. He noted that appellant did well postoperatively with good relief of pain. Dr. Anant indicated that appellant was discharged from neurological care because he was doing well and advised that appellant could participate in a retraining program for another job position.

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[1] Appellant had a separate nonwork-related condition of diabetes.

[2] The record reflects that vocational rehabilitation services were not successful and the file was closed due to appellant's lack of motivation. A labor market survey was performed to implement a rating, and a claims examiner questioned the suitability. The rehabilitation specialist offered his explanations for the selection of the positions that were chosen and advised that they were within his functional limitations.

[3] He was also a diplomat of the American Board of psychiatry and neurology.

By decision dated January 3, 1997, the Office terminated appellant's compensation and medical benefits on the grounds that appellant no longer had a continuing employment-related disability entitling him to continued compensation.

On December 30, 2003 appellant's representative requested reconsideration of the Office's July 26, 1995 and January 3, 1997 decisions, and alleged recurrences of disability commencing on July 1999, September 2000 and May 2001 and submitted evidence and arguments.[4] In his request, appellant's representative alleged that, at the time the Office reduced appellant's wage loss, in its July 26, 1995 decision, appellant was not capable of performing the duties of a credit card clerk. He further alleged that the Office improperly terminated appellant's benefits exclusively on the opinion of the second opinion physician. Appellant's representative also alleged that appellant had sustained additional injuries in addition to those which were accepted by the Office, and requested expansion of appellant's claim. Regarding the July 26, 1995 decision, he alleged that appellant had good cause not to participate in the vocational rehabilitation because he was not capable of performing the duties of a credit card clerk, as represented by the supporting medical evidence. Appellant's representative also questioned how the positions were selected by appellant's representative and referred to a September 21, 1993 psychological report previously of record from Dr. Richard Schuster, a psychologist, in which he questioned appellant's capacity to enter the labor market and a May 22, 1995 memorandum from a claims representative. Regarding the termination of appellant's compensation, appellant's representative alleged that there remained an unresolved conflict in medical opinions, for which appellant should have been referred for an impartial medical examination. Appellant's representative also included a January 17, 2002 electromyogram (EMG) and nerve conduction studies and a January 22, 2002 magnetic resonance imaging (MRI) scan. In addition, he submitted several reports from Dr. Anant.

In a March 11, 2003 report, Dr. Anant advised that appellant was unemployed and stopped working two years earlier. He also noted that appellant stopped smoking, gained 80 pounds and was significantly overweight. Dr. Anant reviewed the MRI scan of January 21, 2002 and noted that appellant had a central disc herniation with slight extrusion along the inferior endplate of L3 and opined that it was difficult to be sure whether appellant's radicular discomfort originated from the L3-4 disc space pathology.

In an August 27, 2003 report, Dr. Anant noted appellant's history of injury and treatment and advised that appellant had degeneration of his spine which led to the development of spondylolisthesis, which would require surgical correction. He explained that appellant was cleared to return to sedentary duties, following his 1995 surgery. However, Dr. Anant advised that appellant's pain worsened once again on January 12, 2000 to the present and that he was continuously disabled and unable to work. He indicated that appellant was "totally and permanently disabled at present." Dr. Anant also indicated that surgical correction of appellant's degenerating lumbar spine, spondylolisthesis and spinal stenosis was warranted.

On March 8 and April 26, 2004 appellant's representative requested that the Office render a decision.

[4] The Office did not issue a decision on the recurrence aspect.

In a decision dated May 7, 2004, 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 --
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> (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 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 regulation provides 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

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8128(a).

[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] 20 C.F.R. § 10.607(b).

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 *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'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 May 7, 2004 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on January 3, 1997. Appellant's December 30, 2003 letter requesting reconsideration was submitted more than one year after the January 3, 1997 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office reviewed the evidence submitted by appellant in support of his 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 his 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 January 3, 1997 decision that terminated appellant's compensation benefits.

With his December 30, 2003 request for reconsideration, appellant's representative submitted a September 21, 1993 psychological report from Dr. Schuster, a psychologist, who questioned appellant's ability to enter the labor market and which was already included in the record. This report is insufficient to establish clear evidence of error as it predates the period in question and does not address the issue of whether appellant had any disability after January 3, 1997 causally related to appellant's employment injury.

Appellant's representative also submitted diagnostic reports, and several reports from Dr. Anant, however, these reports did not address the issue of whether appellant had any disability on or after January 3, 1997 causally related to appellant's employment injury. Although Dr. Anant opined that appellant was totally and permanently disabled at present, he did not address the period of termination, or explain how appellant's disability would be related to the accepted employment injury as opposed to his 80-pound weight gain or other nonwork factors since 1996, when appellant was discharged from care.

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

[11] *Id.*

As noted above, none of the aforementioned reports addressed whether appellant had any disability after January 3, 1997 causally related to appellant's employment injury, and thus they are insufficient to show that the Office's denial of the claim was erroneous or raise a substantial question as to the correctness of the Office's determination that appellant no longer had any disability after January 3, 1997 causally related to appellant's employment injury.

Office procedures provide that 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 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.[12]

The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in terminating appellant's compensation benefits on the grounds that he no longer had a continuing employment-related disability on January 3, 1997.[13] Therefore, the Board finds that appellant has not presented clear evidence of error.[14]

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.

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

[13] In his untimely reconsideration request, appellant also questioned the Office's July 26, 1995 wage-earning capacity decision. However, as noted in the text, for an untimely reconsideration request, the analysis of clear evidence of error relates to the Office's most recent merit decision. *See* 20 C.F.R. § 10.607(b). In this case, the most recent merit decision is the Office's January 3, 1997 decision that terminated all compensation benefits. Thus, the Board's analysis is restricted to examining whether appellant established clear evidence of error with regard to the January 3, 1997 decision.

[14] Appellant's representative also made several arguments regarding a recurrence and expansion of appellant's claim; however, since the Office has not rendered a final decision addressing these issues, the Board, has no jurisdiction to consider them. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 17, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member