United States Department of Labor
Employees' Compensation Appeals Board

G.G., Appellant	)	
and	)	**Docket No. 06-1100**
	)	**Issued: August 8, 2006**
U.S. POSTAL SERVICE, POST OFFICE, San Antonio, TX, Employer	)	

Appearances:
G.G., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 11, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decisions dated October 31, 2005 and April 5, 2006, denying his requests for reconsideration. Because more than one year has elapsed between the most recent merit decision dated January 10, 2005 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.

ISSUES

The issues are whether: (1) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a); and (2) 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.

FACTUAL HISTORY

On December 26, 2003 appellant, then a 32-year-old rural carrier, filed a traumatic injury claim alleging that he injured his lower back while retrieving mail from the back seat of his mail vehicle.

On January 6, 2004 the Office informed appellant that the information submitted was insufficient to establish his claim and advised him to submit, within 30 days, additional factual information and a narrative statement from a physician, with a diagnosis and rationalized opinion as to the cause of his diagnosed condition.

Appellant submitted numerous duty status reports from Dr. Ron Fielder, a chiropractor, from December 29, 2003 through February 4, 2004. He indicated that appellant had injured his back at work on December 26, 2003 and was "off work pending MRI [magnetic resonance imaging] [scan.]" A Form CA-17 bearing an illegible signature reflected a diagnosis of lumbar and thoracic sprain due to a December 26, 2003 work-related injury. In Texas Workers' Compensation work status reports dated January 16 and 23, 2004, Dr. Fielder stated that appellant was unable to work due to his December 26, 2003 job injury.

By decision dated February 11, 2004, the Office denied appellant's claim, finding that he failed to establish that his claimed medical condition was related to the established work-related event.

Appellant submitted numerous duty status reports from Dr. Fielder. In a February 9, 2004 Texas Workers' Compensation work status report, Dr. Fielder diagnosed a herniated disc at L5 and indicated that appellant could only work light duty due to a December 26, 2003 work injury. In a return to work clearance form, Dr. Frank J. Garcia, a Board-certified orthopedic surgeon, stated that appellant could return to work without restrictions on February 28, 2004. Appellant submitted documents relating to a July 2000 claim for a back injury, including a copy of a July 11, 2000 CA-1 form; a June 20, 2000 report from Dr. Robert G. Rolfini, a Board-certified physiatrist, describing low back pain; and a September 29, 2000 report from Dr. Garcia, describing back pain due to a work-related injury.

On March 15, 2004 appellant requested an oral hearing. Appellant submitted a report of a February 4, 2004 MRI scan of the lumbar spine. The record contains largely illegible notes from Dr. Raymond Brewer, a Board-certified anesthesiologist. On August 19, 2004 Dr. Brewer provided a diagnosis of lumbar spondylosis. On December 30, 2003 he noted that appellant was experiencing pain that radiated bilaterally to his legs and feet and that the date of injury was December 26, 2003.

At the October 26, 2004 hearing, the hearing representative advised appellant to submit a signed physician's report with a diagnosis and an explanation as to the cause of the diagnosed condition within 30 days.

The record contains an investigative memorandum dated November 17, 2004, which reflects that, during May 2004, appellant was performing electrical work on a new residence, which involved loading and unloading equipment from a truck and installing wiring and outlets.

A November 12, 2004 patient follow-up form from the Rose Medical Group, bearing an illegible signature, reflects that appellant was experiencing low back pain at that time.

By decision dated January 10, 2005, the Office hearing representative affirmed the February 11, 2004 decision denying appellant's traumatic injury claim. The hearing representative found that appellant had failed to submit a rationalized medical opinion explaining the causal relationship between his diagnosed condition and the alleged work injury.[1]

On July 28, 2005 appellant requested reconsideration of the January 10, 2005 decision. He submitted a July 21, 2005 report from Dr. Brewer, who stated that on December 26, 2003 appellant felt excruciating pain on December 26, 2003 when he twisted to pick up a bundle of mail from the back seat of his mail truck. He opined that this event caused or contributed to the lumbar herniated disc at L5, S1 shown by the February 2, 2004 MRI scan.

On October 31, 2005 the Office denied appellant's reconsideration request without reviewing the merits of the claim, finding that appellant had provided no new relevant evidence or legal argument to support his claim for injury.

On March 14, 2006 appellant again requested reconsideration. He stated that he had been hounding his doctor for a letter supporting his injury for approximately two years, but that the long-awaited narrative report was just drafted the week before. He claimed that he was not capable of working due to his December 26, 2003 injury and asked that his case be reviewed on its merits.

In a February 21, 2006 report, Dr. Brewer stated that appellant had been referred to him in January 2004 for "lumbar pain with myelopathy associated with low back trauma which was caused by his employment." He indicated that he had examined appellant two weeks after his work-related injury, which reportedly occurred while he was lifting mail in a "POV [post office vehicle]" and caused an immediate stabbing low back pain. Dr. Brewer stated that appellant's ultrasound demonstrated numerous myotomal and subcutaneous areas of inflammatory change. He noted that the February 2, 2004 MRI scan report reflected dessication of the disc at L5-S1 with a 2 millimeter central disc herniation. Dr. Brewer provided diagnoses of persistent low back pain, secondary to low back trauma while on the job; degenerative joint disease, lumbar associated with myelopathy; central obesity exacerbated by chronic pain syndrome; and anxiety disorder and insomnia associated with chronic pain. He stated that "correlating the chief complaints together with the abnormalities found on diagnostic study leads me to the conclusion that his injuries were proximally caused by his work-related accident."

In a nonmerit decision dated April 5, 2006, the Office denied appellant's March 14, 2006 request for reconsideration on the basis that it was untimely filed and did not present clear evidence of error.

[1] The hearing representative stated in the October 26, 2004 report, which was presented at the hearing, that Dr. Brewer had opined that appellant's lumbar condition was related to his December 26, 2003 work injury, but had provided no rationale for his opinion. The Board notes that the aforementioned October 26, 2004 report is not of record.

LEGAL PRECEDENT -- ISSUE 1

Under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[3] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that the Office erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the Office."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[4] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[5]

ANALYSIS -- ISSUE 1

Appellant's July 28, 2005 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant submitted a July 21, 2005 medical report from Dr. Brewer, who stated that on December 26, 2003 appellant felt excruciating pain when he twisted to pick up a bundle of mail from the back seat of his mail truck. He opined that this event caused or contributed to the lumbar herniated disc at L5, S1 shown by the February 2, 2004 MRI scan. However, Dr. Brewer did not explain how the alleged employment incident caused appellant's condition. In a January 10, 2005 decision, the hearing representative found that appellant had failed to submit a rationalized medical opinion explaining the causal relationship between his diagnosed condition and the alleged work injury. As Dr. Brewer did not address that issue, his report does not

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.606(b).

[4] *Id.*

[5] *See Helen E. Paglinawan,* 51 ECAB 591 (2000).

constitute relevant and pertinent new evidence not previously considered by the Office.[6] The Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his July 28, 2005 request for reconsideration.

LEGAL PRECEDENT -- ISSUE 2

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.[7] 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.[8] 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.[9] The Office procedures stated 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.[10] 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.[11]

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 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.[12] 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 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

[6] *See Susan A. Filkins*, 57 ECAB ___ (Docket No. 06-868, issued June 16, 2006).

[7] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[9] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[10] *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 decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

[11] *See Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005); *see also Nelson T. Thompson*, 43 ECAB 919 (1992).

[12] *See Alberta Dukes*, *supra note* 11; *see also Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004).

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.[13] 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.[14]

ANALYSIS -- ISSUE 2

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration commences the date following the original Office decision. A right to reconsideration within one year also accompanies any subsequent merit decision.[17] Appellant's March 14, 2006 letter requesting reconsideration was submitted more than one year after the Office's merit decision of January 10, 2005 and was untimely. Consequently, he must demonstrate clear evidence of error on the part of the Office in denying his claim for compensation.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error that would warrant reopening his case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. In his March 14, 2006 request for reconsideration, appellant stated that he had been hounding his doctor for a letter supporting his injury for approximately two years, but that the long-awaited narrative report was just drafted the week before. He claimed that he was not capable of working due to his December 26, 2003 injury and asked that his case be reviewed on its merits. Appellant submitted a February 21, 2006 report from Dr. Brewer, who reiterated that appellant's condition was "proximally caused by his work-related accident." The Board finds that the evidence submitted is not 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.[15] Appellant did not allege error on the part of the Office, but merely explained his delay in submitting Dr. Brewer's report. In turn, the report merely repeats evidence already in the case record and, therefore, has no evidentiary value.[16] Thus, the evidence and argument submitted by appellant are insufficient to show clear evidence of error by the Office.

The Board finds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error on the part of the Office.

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[13] *Id.*

[14] *See Alberta Dukes, supra* note 11. *See also Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

[15] *Id.*

[16] *See Helen E. Paglinawan, supra* note 5.

CONCLUSION

The Board finds that the Office properly denied appellant's July 28, 2005 request for reconsideration without conducting a merit review of the claim. The Board further finds that the Office properly determined that appellant's March 14, 2006 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 5, 2006 and October 31, 2005 are affirmed.

Issued: August 8, 2006
Washington, DC

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

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