

**United States Department of Labor
Employees' Compensation Appeals Board**

MARION E. STEPHENS, Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE)
ANNEX, Cincinnati, OH, Employer)

**Docket No. 05-1346
Issued: January 4, 2006**

Appearances:
Marion E. Stephens, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 8, 2005 appellant filed a timely appeal of a May 18, 2005 decision of the Office of Workers' Compensation Programs which denied appellant's request for reconsideration. Because more than one year has elapsed between the Office's most recent merit decision dated August 23, 1994, and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

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

The case has previously been on appeal.¹ In a June 3, 1997 decision, the Board noted that appellant sustained numerous injuries in a motor vehicle accident to his right hand, lumbosacral region and cervical spine. The Office accepted appellant's claim and began payment of temporary total disability compensation. In an August 23, 1994 decision, the Office terminated his compensation effective September 18, 1994 finding that disability due to the employment injury had ceased. The Board affirmed the decision based on the report of Dr. Charles D. Miller, a Board-certified orthopedic surgeon, acting as the impartial medical specialist. In the August 27, 2000 decision, reissued on October 2, 2001, the Board affirmed the Office's denial of reconsideration, finding that the evidence submitted was duplicative, irrelevant or repetitive. In an April 7, 2003 decision, the Board affirmed the Office's September 16, 2002 decision which denied appellant's request for reconsideration on the grounds that the request was untimely and lacking in clear evidence of error.

In a letter dated May 11, 2003, appellant alleged that he continued to have the same injuries and that Dr. Miller's examination was wrong as it was only 10 minutes long.

In a letter received by the Office on September 4, 2003, appellant requested that his case be reopened and alleged that he continued to have work-related symptoms to his low back and hand. The Office subsequently received reports dated May 20 and November 20, 2002 from Dr. Lawrence A. Zeff, a Board-certified physiatrist, who treated appellant with several injections in the low lumbar and upper sacral areas for low back pain.

Appellant also provided a May 20, 2003 electromyography (EMG) scan in which Dr. John J. Brannan, a Board-certified physiatrist, noted prolonged bilateral median motor distal latencies, with normal amplitudes and normal velocities and a prolonged bilateral median sensory distal latency, with low amplitude on the left. He further noted that other findings were normal. Dr. Brannan opined that there was evidence of median neuropathy of both wrists, which was moderate.

By letter dated June 23, 2003, the Office advised appellant's representative that his options for pursuing his claim included submitting new and relevant evidence or raising a new legal issue and to request reconsideration.

By letter dated April 12, 2005, appellant requested reconsideration. He alleged that he continued to experience residuals of his work-related injuries and that the EMG report of Dr. Brannan showed that his hands had worsened. He alleged that the Office took his schedule award and contended that the report of Dr. Miller was in error. Appellant also alleged that he was being followed by postal inspectors.

¹ Docket No. 03-107 (issued April 7, 2003); Docket No. 98-2438 (issued October 2, 2001) and Docket No. 95-410 (issued June 3, 1997). The history of the case is contained in the prior decisions and is incorporated by reference.

In a decision dated May 18, 2005, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² 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 --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”³

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).⁴ 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). 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.⁵ 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.⁶

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

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8128(a).

⁴ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ 20 C.F.R. § 10.607(b).

whether 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 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.⁸

ANALYSIS

In its May 18, 2005 decision, the Office properly determined that appellant failed to file a timely application for review. The most recent merit decision was rendered by the Board on June 3, 1997. Appellant's April 12, 2005 letter requesting reconsideration was submitted more than one year after the Board's June 3, 1997 decision which affirmed the Office's August 23, 1994 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 August 23, 1994 merit decision terminating benefits effective September 18, 1994.

On reconsideration, appellant alleged that he continued to experience residuals of his work-related injuries and that the EMG report of Dr. Brannan showed that his hands had worsened. Dr. Brannan's May 20, 2003 EMG report is not sufficient to establish clear evidence of error, however, as he diagnosed conditions that were not accepted by the Office and he did not offer any explanation relating these conditions to the accepted injury or address whether appellant had any disability after September 18, 1994 causally related to her January 26, 1976 employment injury. Appellant's argument and Dr. Brannan's report are insufficient to establish clear evidence of error.

Appellant also made allegations about a schedule award and alleged that the report of Dr. Miller, an impartial medical specialist, was in error. However, the underlying termination decision did not involve a schedule award and appellant did not offer any evidence to support his allegation that Dr. Miller's report was in error. Therefore, these arguments do not establish error

⁷ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

⁸ *Id.*

in the Office's decision. Appellant also alleged that he was being followed by postal inspectors. The Board notes that the underlying issue in this case is medical in nature and this allegation does not show error in the Office's termination decision. The Board finds that these contentions do not raise a substantial question that the Office erred in terminating his benefits effective September 18, 1994.⁹

Appellant also submitted reports dated May 20¹⁰ and November 20, 2002 from Dr. Zeff. These reports noted appellant's treatment and discussed appellant's degenerative condition, which was not an accepted condition. Furthermore, Dr. Zeff did not address the issue of whether appellant had any disability after September 18, 1994 causally related to his January 26, 1976 employment injury. This report is insufficient to establish clear evidence of error.

As noted above, none of the aforementioned reports addressed whether appellant had any continuing disability on or after September 18, 1994 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 September 18, 1994 causally related to appellant's employment injury.

The Board finds that the evidence submitted in support of appellant's reconsideration request is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in terminating his compensation benefits. Therefore, the Board finds that appellant has not presented clear evidence of error.

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.

⁹ *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

¹⁰ The May 20, 2002 report was previously submitted and discussed in the Board's April 7, 2003 decision.

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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