United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 06-867**
	)	**Issued: September 12, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Grand Rapids, MI, Employer	)	

Appearances:
D.M., 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 March 1, 2006 appellant filed a timely appeal of the December 13, 2005 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated November 23, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this 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

On April 11, 2000 appellant, then a 42-year-old part-time flexible clerk, filed an occupational disease claim alleging that his stiff neck and sore shoulder were caused by his

employment. He first became aware of his condition on February 20, 2000. Appellant underwent cervical surgery on May 16, 2000 and returned to unrestricted duties on September 7, 2000. He underwent subsequent surgeries on October 17, 2003 and April 15, 2004.

By decision dated May 31, 2000, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an injury while in the performance of duty. It found that the evidence did not establish that a condition had been diagnosed in connection to the established employment factors.

In a June 26, 2000 letter, appellant disagreed with the Office's decision and requested a review of the written record. In an April 9, 2001 decision, an Office hearing representative directed further medical development.

After development of the medical record, the Office denied appellant's claim by decision dated August 7, 2001, on the basis that no causal relationship was established. The Office accorded determinative weight to the second opinion evaluation of Dr. Donald Paarlberg, a Board-certified orthopedic surgeon. In a July 18, 2001 report, Dr. Paarlberg opined that appellant's current condition and the cervical surgery of May 16, 2000 were due to his preexisting degenerative disc disease condition. He noted that appellant was working without restrictions and opined that he could continue to work without restrictions.

Appellant requested reconsideration of the Office's August 7, 2001 decision multiple times. By decisions dated February 8, 2002, January 13, 2003, January 27 and November 23, 2004, the Office denied modification of the prior decisions, finding that the medical evidence failed to establish a causal relationship between his job duties from 1980 to approximately April 2000 which led to his neck condition and first cervical surgery.[1] In a November 23, 2004 decision, the Office advised appellant that the factual foundation of the current claim involved only the work duties up to and including his return to unrestricted duties on September 7, 2000 following his first cervical surgery. The Office stated that, since he had returned to unrestricted work on September 7, 2000, after his first cervical surgery, appellant had new exposure to repetitive work duties as well as what appeared to be a traumatic injury on May 31, 2003. The Office advised appellant that a new occupational claim form must be filed for any additional exposures with respect to his neck condition which necessitated his October 17, 2003 and April 15, 2004 neck surgeries and a new claim should be filed for the May 13, 2003 incident, which he stated had prompted him to seek immediate medical care and treatment.

By letter dated November 21, 2005 and postmarked November 26, 2005, appellant requested reconsideration. He stated that a new occupational claim form was not required in his case as his medical condition was the result of his employment prior to the original filing date

[1] The evidence reviewed by the Office included: medical reports dated September 25, 2001 and March 15, 2002 from Dr. Guillermo Gonzales, appellant's May 16, 2000 operative report, a September 2, 2003 magnetic resonance imaging (MRI) scan; a January 8, 2004 report from Dr. Gregory Chupp, a December 29, 2004 report from an unknown source which described his occupational description, the history of the injury and medical treatment and provided a diagnosis on his current condition; a revised summary of appellant's work activities, a February 29, 2004 report from Dr. Robert M. Shugart, a Board-certified orthopedic surgeon, and an August 10, 2004 report from Dr. Gregory M. Sassmannshausen, an orthopedic surgeon.

and he was not claiming that new exposures beyond that date further caused or influenced his condition. Appellant asserted that Dr. Sassmannshausen, an orthopedic surgeon, Dr. Shugart, a Board-certified orthopedic surgeon, and Dr. Gonzalez rendered opinions based on his statement of work activity occurring prior to the original filing date and requested that the Office rereview their opinions. He noted that the employing establishment was not contesting his claim.

Appellant submitted copies of evidence previously of record and new evidence.[2] In a January 2, 2005 letter to Dr. Shugart and Dr. Sassmannshausen, he requested their opinions on the causal relationship of his neck condition. Appellant included a summary of appellant's employment dated July 5, 2005 and medical reports. In a March 28, 2005 report, Dr. Sassmannshausen noted that he was asked for his opinion as to the cause of appellant's cervical condition back in May 2000. However, as he had been primarily treated appellant for his shoulder, he did not feel comfortable stating an opinion regarding the etiology of his neck problems. In a May 25, 2005 report, Dr. Sassmannshausen provided examination findings of the right shoulder and permanent work restrictions. In a January 7, 2005 report, Dr. Shugart noted that appellant had asked him for an opinion on the cause of his cervical condition in May 2000 that required surgery by Dr. Gonzalez. Since he did not evaluate appellant at that time, Dr. Shugart stated it would be difficult to form any opinion since Dr. Gonzalez was the treating physician. Dr. Shugart stated that, as appellant was seen years after that injury and ultimate surgery, he could not offer any further information especially considering the clarity in Dr. Gonzalez's September 25, 2001 letter.

By decision dated December 13, 2005, the Office denied appellant's request for reconsideration on the grounds it was untimely filed and failed to establish clear evidence of error.

On appeal, appellant contends that the Office should have appointed an impartial medical specialist and that the same Office reconsideration examiner had issued the decisions of May 31, 2000 and November 23, 2004.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[5] One such limitation is that the application for

[2] The evidence already of file consisted of medical reports from Dr. Gonzalez dated September 25, 2001 and March 15, 2002, a February 29, 2004 medical report from Dr. Shugart and an August 10, 2004 report from Dr. Sassmannshausen.

[3] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C § 8128(a).

[5] 20 C.F.R. § 10.607 (1999).

reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[6] In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents clear evidence of error on the part of the Office in its most recent merit decision.[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 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.[8] 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 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.[9] 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.[10]

ANALYSIS

The Office found 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 begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[11] The most recent merit decision in this case was the Office's November 23, 2004 decision. Appellant's request for reconsideration was dated November 21, 2005 and postmarked November 26, 2005. If submitted by mail, a request for reconsideration will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark or it is not legible, other evidence such as (but not limited to), certified mail receipts, certificate of service and affidavits may be used to establish the mailing date. Otherwise, the date of the letter itself should be used.[12] Since appellant's request for reconsideration was

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[6] 20 C.F.R. § 10.607(a) (1999).

[7] 20 C.F.R. § 10.607(b) (1999). *See Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[8] *Darletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003); *Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004).

[9] *Id. See also Alberta Dukes*, 56 ECAB ___ (Docket No. 04-20, issued January 11, 2005).

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

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

[12] 20 C.F.R. § 10.607(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

postmarked November 26, 2005, it was submitted more than one year after the merit decision of November 23, 2004 and was untimely. Consequently, he must demonstrate clear evidence of error on the part of the Office in denying his claim for compensation.[13]

The Board has reviewed the evidence submitted with appellant's untimely reconsideration request and concludes that he has not established clear evidence of error on the part of the Office in its most recent merit decision. The Office denied the claim on the grounds that the medical evidence of record failed to establish a causal relationship between his work duties and his May 16, 2000 cervical surgery. With his reconsideration request, appellant submitted reports dated January 7, 2005 from Dr. Shugart and March 28 and May 25, 2005 from Dr. Sassmannshausen. However, those reports failed to provide an opinion regarding the etiology of his cervical condition and need for surgery. The medical reports fail to address the relevant issue of causation. Appellant's summary of employment dated July 5, 2005 and his January 2, 2005 letter to Dr. Shugart and Dr. Sassmannshausen have no bearing on the medical issue decided by the Office. Accordingly, such evidence does not constitute grounds for reopening his case for a merit review.

Appellant submitted duplicative copies of medical evidence from Dr. Gonzalez, Dr. Shugart and Dr. Sassmannshausen. However, he did not explain how, on reconsideration, this evidence raised a substantial question as to the correctness of the Office's decision. Appellant argued that these medical reports supported that his cervical condition was due to his employment activities which caused, accelerated or precipitated his cervical disc disease and the need for surgical repair on May 16, 2000. The issue of whether his condition is causally related to his employment is medical in nature and can only be resolved by the submission of medical evidence.[14] The Office previously reviewed these reports to find that the physicians did not provide a well-reasoned medical opinion to support causal relationship. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] Appellant's opinion as to the probative value of the physician's reports is not pertinent to the issue in this case and does not constitute grounds for reopening appellant's case for a merit review.

Appellant argued that he did not feel it was necessary or appropriate to file a new claim form after he returned to work with no restrictions on September 7, 2000. However, as noted by the Office, if he is alleging that his neck and shoulder condition on and after that date was caused or aggravated by his federal employment, this would be a basis for a new injury claim since new employment factors have been implicated.[16]

Appellant argued, on appeal, that the Office should have appointed an impartial medical specialist as a medical conflict existed between Dr. Paarlberg, the Office's referral physician, and

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[13] 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB __ (Docket No. 03-2223, issued January 9, 2004).

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

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

[16] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997).

his physicians with respect to whether his job activities contributed to, precipitated, accelerated and aggravated his condition. However, the Board has held that a simple disagreement between two physicians does not, of itself, establish a conflict. To constitute a conflict of medical opinion, the opposing physicians reports must be of virtually equal weight and rationale.[17] As noted, 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's decision.[18] Thus, even if these medical reports would otherwise be sufficient to create a medical conflict, this would not establish clear evidence of error. As such, appellant's argument regarding a medical conflict is insufficient to establish clear evidence of error.

Appellant also asserted error in that the same Office claims examiner was involved in issuing of the May 31, 2000 and November 23, 2004 decisions. However, he has not submitted evidence showing how this raises a substantial question as to the correctness of the Office's decision.

The evidence submitted and arguments raised on reconsideration do not establish 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 his request for reconsideration was untimely filed and did not constitute clear evidence of error.

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[17] *John D. Jackson*, 55 ECAB ___ (Docket No. 03-2281, issued April 8, 2004).

[18] Office procedures further note that "clear evidence of error" is intended to represent a difficult standard. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (February 2003).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2005
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