United States Department of Labor
Employees' Compensation Appeals Board

P.R., Appellant	)	
	)	**Docket No. 06-2036**
and	)	**Issued: January 9, 2007**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Los Angeles, CA, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 5, 2006 appellant filed a timely appeal from the June 21, 2006 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for reconsideration as untimely filed and failing to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated May 20, 2005 and the filing of the appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On April 4, 2005 appellant, then a 57-year-old computer specialist, filed a traumatic injury claim alleging that on March 1, 2005 he sustained a compressed fracture of a rib as a

result of moving a monitor off of a desktop computer. He felt a sharp pain but continued to work. The pain persisted, yet appellant worked the entire day.

By letter dated April 18, 2006, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the medical evidence he needed to submit to establish his claim.

The Office received a March 16, 2005 medical report from Dr. Bernard L. Hardy, a Board-certified family practitioner, which stated that appellant sustained a compressed fracture at T9.

In a decision dated May 20, 2005, the Office found that appellant did not sustain an injury while in the performance of duty. The factual evidence established that the incident occurred at the time, place and in the manner alleged. The medical evidence, however, failed to establish that appellant sustained a medical condition causally related to the accepted employment incident.

Appellant submitted Dr. Hardy's treatment notes dated May 5 and 28 and June 1, 2005 and an August 1, 2005 report, stating that he sustained a compressed fracture at T8 as demonstrated by x-ray. He was also diagnosed with osteoarthritis and osteoporosis in the synovial joints and vertebrae. An undated and unsigned form report addressed appellant's physical limitations.

By letter dated June 6, 2006, appellant requested reconsideration of the Office's May 20, 2005 decision. He submitted a May 19, 2005 x-ray report from Dr. Chuong Michael Van Dang, a Board-certified radiologist, regarding his thoracic and lumbar spines. Dr. Van Dang found mild degenerative disc disease at L3-4 and L4-5 with slight decreased disc height and small anterior osteophytes. There was minimal anterior wedging of T12 vertebral body. The remaining lumbar spine examination was unremarkable with no significant lumbar spondylosis elsewhere. The visualized pedicles, sacral neural foramina and visualized bilateral S1 joints were unremarkable. Dr. Van Dang noted a T8 compression fracture resulting in about 50 percent reduction of height centrally and anteriorly. There was also mild compression of T9 vertebral body, resulting in about 20 percent reduction in height centrally and anteriorly. Dr. Van Dang related that there was slight exaggerated thoracic kyphosis through these levels. The remaining thoracic examination was unremarkable with no significant thoracic spondylosis. Dr. Van Dang concluded that the visualized pedicles were intact.

Dr. Hardy's treatment records covering intermittent dates from March 16, 2005 through February 11, 2006, stated that appellant had compression fractures at T8 and T9, breathing problems and back pain. In the June 18, 2005 report, he opined that appellant was totally disabled for work. In the February 8, 2006 report, Dr. Hardy stated that, in mid-July 2005, appellant's spine had healed enough to allow him to return to work with limitations. He provided a history of the March 1, 2005 employment incident which involved appellant lifting a monitor and twisting to the right to set it down on a table which caused him to experience a sharp pain in the thoracic region. Dr. Hardy opined that the weight of the monitor and awkwardness of twisting caused appellant's spine to fracture.

On July 7, 2005 Dr. Edwin E. Yeo, a Board-certified nuclear medicine specialist, performed a radionuclide skeletal scintigraphy which demonstrated T8-9 compression fractures and rib fractures. Dr. Yeo stated that the rest of the findings suggested degenerative process in these regions.

A February 22, 2006 x-ray report from Dr. Long Hoang Vu, a Board-certified radiologist, indicated that appellant had a moderate degree of degenerative changes at the L4-5 disc interspace and other levels showed a mild degree of degenerative change. Dr. Vu found no x-ray evidence of acute compression fracture of subluxation.

A March 11, 2005 treatment note from Dr. Carroll[1] stated that appellant had pneumonia and compression at T8.

Treatment notes dated March 11, 16 and 26 and April 19, 2005 from registered nurses whose signatures are illegible indicated that appellant suffered from severe back pain and the prescribed medications for his condition.

By decision dated June 21, 2006, the Office found that appellant's letter requesting reconsideration was dated June 6, 2006, more than one year after the Office's May 20, 2005 decision and was untimely. The Office found that he did not submit evidence to establish clear evidence of error in the prior decision rejecting his claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's 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.[4] Pursuant to this section, if a request for reconsideration is submitted by mail, the application 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.[5]

Section 10.607(a) 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

[1] The Board notes that the professional qualifications of Dr. Carroll are not contained in the case record.

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] 20 C.F.R. § 10.607(a).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

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, which was decided by the Office.[7] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[8] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] 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.[11]

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 decision.[12] 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.[13]

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, 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.[14]

The most recent merit decision in this case was issued by the Office on May 20, 2005. It found that the March 1, 2005 incident occurred at the time, place and in the manner alleged, but that appellant did not sustain an injury causally related to the accepted employment incident. As

[6] 20 C.F.R. § 10.607(b).

[7] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[8] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[9] *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

[10] *Leona N. Travis*, *supra* note 8.

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

[12] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

[13] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[14] *Larry J. Lilton*, 44 ECAB 243 (1992).

appellant's June 6, 2006 request for reconsideration was made more than one year following this merit decision, the Board finds that it was untimely filed.

The underlying issue is whether appellant established that he sustained an injury causally related to the March 1, 2005 employment incident. Appellant submitted medical evidence, including Dr. Hardy's May 5 and 28 and June 1, 2005 treatment notes and his August 1, 2005 report, which stated that appellant, had a compressed fracture at T9 and osteoarthritis and osteoporosis in the snyovial joints and vertebrae. The Board finds that these treatment notes and report are insufficient to shift the weight of the evidence in favor of appellant's claim. The medical evidence submitted did not provide any explanation of how the diagnosed conditions were caused by the March 1, 2005 employment incident. The Board finds that Dr. Hardy's treatment notes and report do not establish clear evidence of error.

The undated and unsigned form report revealing appellant's physical limitations is insufficient to shift the weight of the evidence in favor of appellant's claim. This evidence has no probative value as the author(s) cannot be identified as a physician.[15] The Board finds that the undated and unsigned report does not establish clear evidence of error.

Appellant submitted medical evidence along with his June 6, 2006 reconsideration request. This included diagnostic studies of Drs. Van Dang, Yeo and Vu. The Board finds that these studies are insufficient to shift the weight in favor of appellant's claim. They failed to explain how the various conditions related to appellant's thoracic and lumbar spines were caused by the accepted employment incident. The Board finds that the reports of Drs. Van Dang, Yeo and Vu do not establish clear evidence of error.

Similarly, Dr. Hardy's treatment notes covering intermittent dates from March 16, 2005 to February 11, 2006 and June 18, 2005 report and Dr. Carroll's treatment note, which found that appellant sustained fractures at T8 and T9, breathing problems, back pain and pneumonia, are insufficient to shift the weight in favor of appellant's claim. In the June 18, 2005 report, Dr. Hardy also found that appellant was totally disabled for work. Neither Dr. Hardy nor Dr. Carroll explained whether the diagnosed conditions and resultant total disability were caused by the March 1, 2005 employment incident. Further, the Board notes that pain is considered a symptom, not a diagnosis and does not constitute a basis for payment of compensation.[16] The Board finds that the treatment notes and report of Drs. Hardy and Carroll do not establish clear evidence of error.

Dr. Hardy's February 8, 2006 report found that appellant's fractured spine at T8 and T9 in the thoracic region was caused by the March 1, 2005 employment incident. Although he addressed causal relationship between appellant's diagnosed condition and the accepted employment incident, his report is insufficient to shift the weight of the evidence in favor of appellant's claim. As noted, it is not sufficient to merely show that the evidence could be construed so as to produce a contrary conclusion. Later medical evidence independently supporting causal relationship such as Dr. Hardy's February 8, 2006 report has no bearing on the

[15] *Ricky S. Storms*, 52 ECAB 349 (2001).

[16] *See Robert Broome*, 55 ECAB 339 (2004).

probative value of the medical evidence that was before the Office at the time of its May 20, 2005 merit decision.[17] Consequently, the evidence submitted in support of appellant's untimely reconsideration request in no way shows that the Office's decision was erroneous.[18]

The March 11, 16 and 26 and April 19, 2005 treatment notes from registered nurses, are insufficient to shift the weight of the evidence in favor of appellant's claim as a registered nurse is not considered to be a "physician" under the Act.[19] The Board finds that the Office properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that the Office properly determined that appellant's June 6, 2006 request for reconsideration was untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 21, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[17] *Dean B. Beets*, 43 ECAB 1153, 1158 (1992).

[18] *Id.*

[19] 5 U.S.C. § 8101(2); *see Sheila A. Johnson*, 46 ECAB 323 (1994).