United States Department of Labor
Employees' Compensation Appeals Board

W.T., Appellant	)	
and	)	**Docket No. 08-1570**
	)	**Issued: January 14, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Baltimore, MD, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 12, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 10, 2008 nonmerit decision, denying his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated November 30, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

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 and failed to demonstrate clear evidence of error.

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

This is the third time this case has been before the Board on appeal. By decision dated May 9, 1997, the Board affirmed the Office's decisions dated June 1 and August 26, 1994 and January 23, 1995, denying his claim on the grounds that the medical evidence was insufficient to establish a causal relationship between his then current back condition and his accepted October 29, 1990 employment injury and denying his requests for a hearing and review of the merits.[2] In a decision dated November 30, 2004, the Board affirmed the Office's April 14, 2004 decision, finding that the medical evidence failed to establish the required causal relationship.[3] The facts and the law contained in those decisions are incorporated herein by reference.

On April 29, 1990 appellant, then a 41-year-old manual distribution clerk, filed a traumatic injury claim alleging that he injured his head, neck and back when he fell from a chair. His claim was accepted for head contusion and cervical strain.[4]

On January 13, 1992 appellant filed a claim alleging that he was disabled as a result of a lower back condition, which he attributed to his accepted October 29, 1990 employment injury. He submitted reports from his treating physician, Dr. Eli M. Lippman, a Board-certified orthopedic surgeon, who diagnosed cervical and lumbosacral strains.

On June 1, 1994 the Office denied appellant's claim. In a decision dated May 9, 1997, the Board affirmed the Office's denial, finding that there was no medical evidence of record establishing that his back condition was causally related to the accepted 1990 injury. On September 14, 1998 the Office denied appellant's request for reconsideration on the grounds that the evidence failed to establish a relationship between the claimed back condition and the accepted injury.

Appellant submitted additional medical evidence, including a January 2, 2003 report from Dr. Lippman. Noting that Dr. Lippman was aware that appellant had a lumbar condition, he stated that he could not unequivocally conclude that appellant's condition was related to his 1990 accepted injury.

By decision dated November 30, 2004, the Board affirmed the Office's April 14, 2004 decision. The Board found that appellant had not submitted sufficient evidence to establish that his claimed lumbosacral condition was causally related to the October 29, 1990 work injury.

By letters dated August 22 and November 8, 2006 and March 1 and 29, August 10 and 14 and September 21, 2007, appellant requested reconsideration of the Office's April 14, 2004 decision, expressing disagreement with the Office's denial of his claim. In support of his request, he submitted medical reports from Dr. Lippman dated November 12, 1990 and April 25,

[2] Docket No. 95-1368 (issued May 9, 1997).

[3] Docket No. 04-1364 (issued November 30, 2004).

[4] The record reflects that appellant filed a claim for a November 10, 1989 traumatic injury, which was accepted for cervical thoracic and lumbosacral strains. The Office subsequently combined File No. xxxxxx956 with the instant case, File No. xxxxxx457, which became the master case number.

1991, which provided a diagnosis of cervical strain. In an August 22, 2005 letter, Dr. Lippman advised appellant to see another physician, as the Office continued to reject his reports. Appellant provided a March 27, 2000 report from Dr. Gebreye W. Rufael, a Board-certified internist, who stated that the patient had been experiencing back pain since 1989, when he injured his back. He submitted a June 22, 1998 report from Dr. Joseph Schanno, a Board-certified surgeon, who diagnosed degenerative disease of the cervical spine and disc disease of L5-S1. Appellant also submitted copies of correspondence from the Social Security Administration, decisions of the Office and Board, a report of an August 10, 1992 x-ray of the lumbar spine and a copy of a report of a July 19, 1994 magnetic resonance imaging (MRI) scan of the cervical spine.

In a decision dated April 10, 2008, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[5] It 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.[6] 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.[7]

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.[8] Office procedures state 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.[9] 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.[10]

[5] 5 U.S.C. §§ 8101-8193.

[6] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

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

[8] *Id.*

[9] *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).

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

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 which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] 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.[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 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 begins on the date of the original Office decision.[14] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[15] As appellant's earliest request for reconsideration, dated August 22, 2006, was submitted more than one year after the last merit decision of record on November 30, 2004, it was untimely. Consequently, he must demonstrate clear evidence of error on the part of the Office in denying his claim.[16]

Appellant's contention that his claim was improperly denied based on the medical evidence of record, does not establish error or the part of the Office, but merely repeats arguments considered previously. Reports from Dr. Lippman, Dr. Rufael and Dr. Schanno failed to address the relevant issue of causal relationship. Therefore, their reports are of limited probative value. Copies of correspondence from the Social Security Administration, copies of decisions of the Office and Board and x-ray and MRI scan reports, were also not relevant to the issue decided by the Office, namely whether appellant's claimed lumbosacral condition was causally related to the October 29, 1990 work injury. Additionally, these documents were repetitious of documents already received and reviewed by the Office.

[11] *Leon J. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

[12] *Id.*

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

[14] 20 C.F.R. § 10.607(a).

[15] *Robert F. Stone*, 57 ECAB 292 (2005).

[16] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

The Board finds that the evidence submitted by appellant in support of his untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that the Office committed an error. The term "clear evidence of error" is intended to represent a difficult standard. The submission of 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.[17] Although the evidence submitted generally supports appellant's claim, it fails to raise a substantial question as to the correctness of the Office's decision. Although appellant made assertions that the Office erred, he failed to document his allegations. Thus, the evidence and argument submitted by appellant are insufficient to show clear evidence of error on the part of the Office.

As the evidence submitted by appellant is insufficient to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's last merit decision, he has not established clear evidence of error.[18]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely and failed to demonstrate clear evidence of error.

[17] *Joseph R. Santos*, 57 ECAB 554 (2006).

[18] *See Veletta C. Coleman*, *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 14, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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