United States Department of Labor
Employees' Compensation Appeals Board

D.O., Appellant	)	
and	)	**Docket No. 08-1057**
	)	**Issued: June 23, 2009**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Employer	)	

Appearances:
Angelique O'Donnell, for the appellant
No appearance, for the Director

Oral Argument May 6, 2009

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 26, 2008 appellant filed a timely appeal from a May 30, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration as it was untimely filed and did not establish clear evidence of error. As the most recent merit decision was issued on January 12, 2005 and the appeal was filed on February 26, 2008, the Boards lacks jurisdiction to review the merits of this case.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the May 30, 2007 nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as it was not timely filed and did not demonstrate clear evidence of error.

[1] 20 C.F.R. §§ 501.2(c); 501.3.

FACTUAL HISTORY

This case is before the Board for the fifth time. On August 24, 1988 the Board affirmed a September 23, 1987 decision suspending appellant's compensation as he failed to attend a medical appointment.[2] In a decision dated March 11, 1994, the Board affirmed October 8, 1991 and June 25, 1992 decisions denying his request for a lump-sum payment.[3] On February 28, 2003 the Board affirmed an April 23, 2003 decision denying modification of the Office's termination of appellant's compensation and authorization for medical treatment effective March 26, 2000.[4] By decision dated January 12, 2005, the Board affirmed July 1, 2003 and February 13, 2004 decisions finding that he failed to establish continuing disability or the need for further medical treatment after March 26, 2000 due to his accepted conditions of cervical strain and chronic pain syndrome.[5] The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On March 11, 2007 appellant requested reconsideration of his claim based on evidence dated December 8, 2005, January 13, April 21 and 26, 2006. On December 8, 2005 Dr. Matt M. Vegari, a neurologist, evaluated appellant for severe pain in the neck and back. Appellant related that he experienced neck and back pain subsequent to an injury at the employing establishment in 1970. His pain in the neck and back had increased in recent years. Dr. Vegari diagnosed radiculopathy at L4-5 and L5-S1 and C4-5, C5-6 and C6-7 and to rule out herniated discs, lumbar and cervical spinal stenosis, cervical myelopathy and carpal tunnel syndrome. He opined that appellant was totally disabled.

In a progress report dated January 3, 2006, Dr. Vegari noted that appellant experienced continued severe back pain radiating to the lower extremity and paresthesia of the hands. On examination he found "severe limitation of neck movement" and muscle spasm of the thoracic and lumbar spines. Dr. Vegari referred appellant for diagnostic studies and advised him to avoid lifting, pushing or pulling heavy objects.

An April 21, 2006 magnetic resonance imaging (MRI) scan study revealed mild disc desiccation especially from L2-3 through L3-4, a moderate broad central disc herniation at L4-5 with thecal sac impingement, a small central disc herniation at L5-S1 without stenosis and a disc bulge at L2-3. An MRI scan study of the cervical spine dated April 21, 2006 showed a broad herniation at C4-5 approaching the cervical cord and disc herniations at C5-6 and C6-7. The study also showed disc desiccation at all levels.

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[2] Docket No. 88-638 (issued September 23, 1987). The Office accepted that on January 19, 1970 appellant, then a 24-year-old heavy duty mechanic, sustained a sprain of the cervical spine and somatoform psychogenic pain disorder when he slipped on ice exiting his truck. Appellant stopped work on March 2, 1970. The employing establishment separated him from employment on March 27, 1970 due to a reduction-in-force.

[3] Docket No. 93-206 (issued March 11, 1994).

[4] 54 ECAB 456 (2003).

[5] Docket No. 04-1545 (issued January 12, 2005).

On April 26, 2006 Dr. Vegari discussed appellant's complaints of pain in his back and neck radiating into his upper extremities and across his back. He reviewed the MRI scan studies of the lumbar and cervical discs and listed detailed findings on neurological examination. Dr. Vegari diagnosed severe radiculopathy at L4-5 and L5-S1 due to herniated nucleus pulposus (HNP), radiculopathy at C4-5, C5-6 and C6-7 due to HNP, radiculopathy at T7-8, a bulging disc at L2-3, cervical myelopathy due to HNP at C4-5 and C6-7 and bilateral sacroiliitis. He recommended further objective studies but noted that appellant did not have health insurance even though he understood "that these injuries are all coming from a work injury that happened [at the employing establishment] in January 1970." Dr. Vegari found that he was totally disabled.

By decision dated May 30, 2007, the Office denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error. It determined that the medical evidence submitted did not show that it erred in finding that he had no further employment-related disability.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act.[6] As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[7]

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.[8] 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.[9]

[6] 5 U.S.C. §§ 8101-8193.

[7] 20 C.F.R. § 10.607.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

[9] *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[10] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[11] As appellant's March 11, 2007 request for reconsideration was submitted more than one year after the last merit decision, which was issued by the Board on January 12, 2005, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.[12]

In the last merit decision, the Board found appellant had not established that he had a continuing medical condition or disability for employment after March 26, 2000 causally related to his accepted conditions of cervical strain and chronic pain syndrome. In his untimely request for reconsideration, appellant submitted new medical evidence. In a report dated December 8, 2005, Dr. Vegari noted appellant's history of a 1970 work injury. He diagnosed radiculopathy at L4-5, L5-S1, C4-5, C5-6 and C6-7 and possible herniated discs, spinal stenosis, cervical myelopathy and carpal tunnel syndrome. On January 3, 2006 Dr. Vegari referred appellant for objective tests and found restricted neck movement on examination. MRI scan studies of the cervical and lumbar spine obtained on April 21, 2006 showed disc herniations at multiple levels. His reports and the MRI scan studies do not contain an opinion on causation and thus are insufficient to show error by the Office in finding that he had no further employment-related disability or condition.

In a report dated April 26, 2006, Dr. Vegari diagnosed severe radiculopathy at multiple levels of the cervical and lumbar spine due to herniated discs, cervical myelopathy and bilateral sacroiliitis. He indicated that he understood appellant's injuries resulted from a 1970 employment injury. Dr. Vegari found that he was totally disabled. While he related a general history of a 1970 work injury, he did not provide an independent, rationalized opinion supporting causal relationship. Additionally, even if Dr. Vegari's opinion is construed as supporting causal relationship, 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 reopening the case.[13] The Board finds that Dr. Vegari's report is not the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.[14]

On appeal appellant, through his representative, cogently presented the case. The representative argued that the newly submitted medical evidence was sufficient to establish that

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[10] 20 C.F.R. § 10.607(a).

[11] *See Robert F. Stone*, *supra* note 9.

[12] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[13] *See Joseph R. Santos*, 57 ECAB 554 (2006); Federal (FECA) Procedure Manual, *supra* note 8.

[14] *See D.D.*, 58 ECAB ___ (Docket No. 06-1148, November 30, 2006).

he remained disabled due to his employment injury and that he required continued medical treatment for the injury. As discussed, however, when an application for review of a merit decision is not timely filed, the Office will consider the application only if it demonstrates clear evidence of error. To establish clear evidence of error, the evidence submitted must be positive, precise and explicit and must manifest on its face that the Office committed an error.[15] The evidence appellant submitted on reconsideration fails to meet this standard.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 30, 2007 is affirmed.

Issued: June 23, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[15] *See Robert F. Stone*, *supra* note 9.