United States Department of Labor
Employees' Compensation Appeals Board

P.P., Appellant	)	
and	)	**Docket No. 08-2043**
	)	**Issued: June 8, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Sacramento, CA, Employer	)	

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 21, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decisions dated May 19, 2008, which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error and, November 29, 2007, denying an oral hearing. Because more than one year has elapsed from the last merit decision dated October 16, 2006 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for an oral hearing as untimely; and (2) whether the Office properly refused to reopen appellant's claim for reconsideration of the merits of his claim on the grounds that it was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

On August 29, 2006 appellant, then a 47-year-old city letter carrier, filed an occupational disease claim alleging that his federal employment duties caused his right shoulder condition. He submitted an August 29, 2006 work restriction report from Carol D. Wilhite, a family nurse practitioner, who stated that appellant had a labral tear of the shoulder, as noted on magnetic resonance imaging (MRI) scan, and was able to work with restrictions. Ms. Wilhite also noted that appellant needed to proceed with surgery. A copy of the August 12, 2006 letter from appellant's health care provider pertaining to the requested shoulder arthroscopy was also submitted.

In a September 14, 2006 letter, the Office advised appellant that additional factual and medical evidence was needed to establish his claim. It noted the medical slips from a nurse practitioner were not considered medical evidence as they were not from a physician. No additional evidence was received.

By decision dated October 16, 2006, the Office denied appellant's claim. It found that the claimed work events occurred as alleged but there was no medical evidence from a physician which provided a diagnosis that could be connected to the events.

On November 2, 2007 the Office received an oral hearing request which was postmarked October 27, 2007. In an attached note dated October 9, 2007, appellant indicated that his primary care physician and care manager had been deployed in the military and had little opportunity to treat him. He had recently been assigned a new primary care manager and asked that the Office take into consideration the circumstances of his situation.

By decision dated November 29, 2007, the Office denied appellant's request for an oral hearing on the grounds that his request was not made within 30 days of the Office's October 16, 2006 decision. It determined that appellant's claim could equally well be addressed through the reconsideration process.

On February 13, 2008 appellant requested reconsideration. He noted that on February 4, 2008 his care was assigned to Dr. Michael A. Meeker, a Board-certified family practitioner. Appellant indicated that a statement from Dr. Meeker was enclosed which supported his claim. He stated that Dr. Meeker clarified the medical issues and explained the details of his injury as well as the results of that injury to his current condition. No additional medical evidence, however, was received.

In a May 19, 2008 decision, the Office denied appellant's February 13, 2008 reconsideration request. It found that the request was untimely and failed to present clear evidence of error of the Office's October 16, 2006 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that, before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance

of the decision, to a hearing on his claim before a representative of the Secretary.[1] Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[2] The Office's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[3]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act,[4] has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[5] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.[6]

ANALYSIS -- ISSUE 1

The Office denied appellant's claim on October 16, 2006. Appellant's request for an oral hearing before the Office's Branch of Hearings and Review was postmarked October 27, 2007. As his request for a review was filed more than 30 days after the October 16, 2006 decision, the Board finds that the Office properly found that the request was untimely.

Although the Office determined that appellant's request was untimely, it nevertheless exercised its discretion by further considering his request for review. It determined that appellant could equally well pursue his claim by submission of a request for reconsideration along with new evidence. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's request for review. There is no evidence of an abuse of discretion in this case.[7]

[1] 5 U.S.C. § 8124(b)(1).

[2] 20 C.F.R. § 10.615.

[3] *Id.* at § 10.616(a).

[4] 5 U.S.C. §§ 8101-8193.

[5] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[6] *Teresa M. Valle*, 57 ECAB 542 (2006). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

[7] *See Daniel J. Perea*, 42 ECAB 214 (1990).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretion 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 anytime 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."[8]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[9]

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. 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 be manifested on its face that the Office committed an error.[10]

Evidence that 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.[12] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[13] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[14]

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[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

[10] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[11] *Jimmy L. Day*, 48 ECAB 652 (1997).

[12] *Id.*

[13] *Id.*

[14] *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS -- ISSUE 2

The Office issued a merit decision in appellant's claim on October 16, 2006. Appellant requested reconsideration on February 13, 2008, more than one year after the Office's October 16, 2006 decision. Therefore, his request was untimely. However, the Office will reopen the claim for a merit review, despite the untimely reconsideration request, if the request shows clear evidence of error by the Office in its October 16, 2006 decision, which denied appellant's claim on the grounds he failed to submit medical opinion evidence establishing a causal relationship between his diagnosed shoulder condition and the duties of his federal employment.

The Board finds that appellant has not established clear evidence of error on the part of the Office. While appellant's reconsideration request indicated a report from Dr. Meeker was attached, the record contains no report from Dr. Meeker or any other physician in support of appellant's reconsideration request. Causal relationship is a medical issue.[15] Appellant did not submit any evidence with his reconsideration request sufficient to *prima facie* shift the weight of the evidence in his favor and raise a substantial question as to the correctness of the Office's decision. Therefore, appellant has not established clear evidence of error.

On appeal, appellant's representative argued that appellant submitted medical documentation signed by Dr. Moon Y. Jeu on or shortly after October 19, 2006. The record, however, does not contain such evidence. Appellant's representative additionally argued that it was appellant's understanding that a waiver of time limits had been granted due to the unusual circumstance of his physician serving his country and therefore unavailable to provide the requested medical documentation. However, Office regulations provide that the only exception to the requirement for filing a reconsideration request within one year occurs where the claimant can establish through probative medical evidence that he was unable to communicate in any way and that his testimony was necessary in order to obtain modification of the Office's decision.[16] No such showing has been made in this case.

CONCLUSION

The Board finds that the Office properly denied appellant's request for an oral hearing as untimely. The Board further finds that appellant's untimely request for reconsideration did not establish clear evidence of error on the part of the Office.[17]

[15] *Mary J. Briggs*, 37 ECAB 578 (1986).

[16] 20 C.F.R. § 10.607(c).

[17] On appeal, appellant submitted new factual evidence. As this evidence was not a part of the record at the time the Office made its final decision, the Board is precluded from reviewing the evidence. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2008 and November 29, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 8, 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