United States Department of Labor
Employees' Compensation Appeals Board

F.D., Appellant	)	
and	)	**Docket No. 09-876**
	)	**Issued: November 25, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Des Moines, IA, 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 February 13, 2009 appellant filed a timely appeal of a January 5, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated July 23, 2007 and the filing of the 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.

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 February 10, 2006 appellant, then a 52-year-old city letter carrier, filed an occupational disease claim for bilateral carpal tunnel. He attributed his condition to the repetitive motion associated with casing and delivering mail. The Office accepted the condition

of bilateral carpal tunnel syndrome and authorized bilateral carpal tunnel releases, which appellant underwent in 2007. Appellant returned to regular work with no restrictions following each carpal tunnel release.

On April 10, 2007 appellant filed a Form CA-7 claim for compensation for a schedule award. He submitted a copy of a January 9, 2007 electromyogram and nerve conduction study and treatment notes from his treating physician, Dr. Scott M. Shumway, a Board-certified surgeon specializing in surgery of the hand.

In an April 25, 2007 letter, the Office advised appellant of the type of medical evidence required to support a schedule award claim. It noted that Dr. Shumway did not state whether appellant reached maximum medical improvement for the accepted condition of bilateral carpal tunnel syndrome or prove a detailed description of impairment, specific measurements and percentages of scheduled member based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).

In a June 14, 2007 report, Dr. Shumway advised that appellant reached maximum medical improvement with respect to the work-related bilateral carpal tunnel syndrome on October 13, 2006 and was allowed to return to unrestricted work activities. He advised that appellant returned in early December because of a new onset of symptoms on both hands. A repeat nerve conduction study of January 9, 1997 showed new C8-T1 cervical radiculopathy, worse on right than the left. Dr. Shumway opined that the new symptoms were related to the radiculopathy and not to his previous carpal tunnel syndrome. With respect to appellant's work-related carpal tunnel syndrome, he opined that appellant had a zero percent impairment for the right and left upper extremities under the fifth edition of the A.M.A., *Guides.*

By decision dated July 23, 2007, the Office denied appellant's schedule award claim. It found there was no evidence of any ratable impairment resulting from the accepted bilateral carpal tunnel syndrome.

Appellant continued to submit medical records noting his treatment and status. These records did not address permanent impairment of either arm under the A.M.A., *Guides*.

On October 21, 2008 appellant filed another CA-7 claim for a schedule award. Treatment notes from Dr. Shumway were provided along with nerve conduction studies of April 4, 2008. In an October 29, 2008 letter, the Office advised appellant no further action could be taken on his schedule award claim as its July 23, 2007 decision had denied schedule award entitlement.

On December 4, 2008 appellant requested reconsideration of the Office's July 23, 2007 decision. In a letter dated December 4, 2008, he advised that Dr. Shumway did not conduct a proper examination to show entitlement to a schedule award. Appellant also indicated that Dr. Shumway suggested that he undergo a re-release of his carpal tunnel but he choose to wait for nerve improvement which never came. Copies of nerve conduction studies dated January 9, 2007 and April 4, 2008 were submitted.

By decision dated January 5, 2009, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.[1] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[2]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[3] Office regulations and procedure provide 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(a), if the claimant's application for review shows clear evidence of error on the part of the Office.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] 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.[9] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

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[1] 20 C.F.R. § 10.607(a).

[2] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[3] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[4] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, 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 that a schedule award was miscalculated). 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. *Id*. at Chapter 2.1602.3c.

[5] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[6] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[7] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[8] *See Leona N. Travis, supra* note 6.

[9] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.[10]

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.[11]

ANALYSIS

The merits of appellant's case are not before the Board. Appellant's request for reconsideration was dated December 4, 2008 and received by the Office on December 15, 2008. As this request was filed more than one year after the Office's July 23, 2007 merit decision, it was not timely filed within one year of that decision. The next issue to be determined is whether appellant demonstrated clear evidence of error in his untimely request for reconsideration.

The Board finds that the Office properly denied appellant's untimely request for reconsideration on the grounds that the evidence failed to demonstrate clear evidence of error in the July 23, 2007 merit decision.

Appellant submitted copies of nerve conduction studies dated January 9, 2007[12] and April 4, 2008. The nerve conduction studies do not address the Office's criteria for establishing permanent impairment of a scheduled member of the body and do not otherwise raise a substantial question as to the correctness of the Office's previous decision. Additionally, none of the treatment notes from Dr. Shumway explained how any findings established permanent impairment under the A.M.A., *Guides*, and also do not raise a substantial question as to the correctness of the Office's previous decision. For these reasons, this evidence does not raise a substantial question concerning the correctness of the Office's July 23, 2007 decision and is insufficient to establish clear evidence of error. While appellant contends that Dr. Shumway did not conduct a proper examination to show entitlement to a schedule award, it is noted that Dr. Shumway had opined in his June 14, 2007 report that the new symptoms were related to the radiculopathy and that appellant did not have permanent impairment to his arms as a result of his accepted bilateral carpal tunnel syndrome. Thus, appellant's argument does not raise a substantial question concerning the correctness of the Office's decision and is insufficient to establish clear evidence of error.

For these reasons, the Office properly denied appellant's request for reconsideration.

On appeal, appellant asserts that his hand conditions did not improve after carpal tunnel surgery. However, this assertion is insufficient to establish clear evidence of error in the Office's July 23, 2007 decision. As noted, appellant did not submit sufficient evidence or argument in support of his untimely request for reconsideration to shift the weight of the evidence in his favor

[10] *Leon D. Faidley, Jr., supra* note 2.

[11] *Pete F. Dorso*, 52 ECAB 424 (2001).

[12] This nerve conduction study was previously of record.

and raise a substantial question as to the correctness of the Office decision. The Office properly found that appellant did not establish clear evidence of error.

CONCLUSION

The Board finds that 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.

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 25, 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