United States Department of Labor
Employees' Compensation Appeals Board

E.C., Appellant	)	
	)	**Docket No. 09-435**
and	)	**Issued: October 21, 2009**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, 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
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 1, 2008 appellant filed a timely appeal from an October 21, 2008 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for reconsideration as it was untimely and did not show clear evidence of error. As there is no merit decision within one year of the last merit decision, the Board lacks jurisdiction to review the merits of the case 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 as it was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

The Office accepted that on July 29, 1985 appellant, then a 30-year-old letter carrier, sustained acute lumbar strain and a herniated disc at L5 when he stepped in a hole in the floor while delivering mail. After sustaining intermittent periods of disability, he stopped work on July 12, 1989 and did not return.

By decision dated June 30, 2000, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work. It found that the opinion of Dr. Thomas Peff, a Board-certified orthopedic surgeon and impartial medical examiner, constituted the weight of the evidence and established that he could work eight hours per day with restrictions. On July 11, 2000 Dr. Peff asserted that appellant could work only six hours per day. In a decision dated November 30, 2000, a hearing representative affirmed the June 30, 2000 termination but found that further development was needed to ascertain the extent of appellant's disability.

On September 12, 2002 appellant accepted a position as a modified carrier working six hours per day. The Office paid compensation for two hours of wage loss a day, five days a week

On April 16, 2003 appellant filed a notice of recurrence of disability beginning that date causally related to his July 29, 1985 work injury. He related that the employing establishment refused to allow him to continue to take leave for two hours per day. Appellant claimed a recurrence of disability beginning April 16, 2003 due to increased back pain radiating into both legs. He also submitted a March 26, 2003 notice of suspension for 14 days for failing to meet attendance requirements.

By decision dated October 24, 2003, a hearing representative reviewed appellant's case under 5 U.S.C. § 8128 and vacated the June 30 and November 30, 2000 decisions. He noted that Dr. Peff had altered his opinion that appellant could work full time without adequate explanation. The hearing representative instructed the Office to refer appellant to another impartial medical examiner to resolve the conflict in his work restrictions. The Office paid appellant compensation benefits for total disability from July 15, 2000 to September 6, 2002 and compensation for four hours per day beginning September 6, 2002.

The Office referred appellant to Dr. Paul Liebert, a Board-certified orthopedic surgeon, for an impartial medical examination. In an accompanying statement of accepted facts (SOAF), it noted that Dr. James V. Conroy, a Board-certified neurosurgeon, recommended that appellant lose weight and suggested that he enroll in an Optifast program. The SOAF noted that he did not sign up for a weight loss program and that Dr. Conroy released him from treatment in March 1994 due to problems treating him when he was not in a weight loss program. On February 12, 2004 Dr. Liebert opined that appellant could work full time with restrictions.

By decision dated May 24, 2004, the Office found that appellant failed to establish that he sustained a recurrence of disability beginning April 16, 2003 causally related to his July 29, 1985 work injury. It noted that Dr. Liebert found that he could work full time. The Office determined that appellant continued to be entitled to compensation for four hours per day pending rehabilitation.

On June 3, 2004 appellant requested a review of the written record by an Office hearing representative. In a decision dated April 20, 2005, the hearing representative vacated the May 24, 2004 decision. She instructed the Office to obtain clarification from Dr. Liebert regarding whether appellant had any increase in disability beginning April 16, 2003.

By letter dated August 12, 2005, the Office informed appellant that the record contained no evidence that the employing establishment took away his limited-duty job. It further noted

that Dr. Liebert was a second opinion physician regarding whether he sustained a recurrence of disability on April 16, 2003 and a referee physician regarding his work restrictions.

On August 17, 2005 Dr. Liebert found that appellant was not totally disabled due to his work injury beginning April 16, 2003. He noted that the diagnostic studies showed "no structural basis for radiculopathy."

By decision dated November 29, 2005, the Office determined that appellant had not established that he sustained a recurrence of disability beginning April 16, 2003. On December 11, 2005 appellant requested a review of the written record.

In a decision dated April 21, 2006, the hearing representative affirmed the November 29, 2005 decision.[1]

On July 14, 2008 appellant requested reconsideration. He specified that his request for reconsideration was late because he did not receive a copy of the April 21, 2006 decision. Appellant argued that Dr. Liebert relied on an SOAF that inaccurately indicated that he refused to participate in a weight loss program.[2] He asserted that he began a weight loss program but stopped because of the expense. Appellant further noted that Dr. Conroy did not release him from treatment and that the physician repeatedly asked the Office to authorize a weight loss program. He also contended that the employing establishment withdrew his light-duty assignment when he stopped work in April 2003 by failing to allow him to use leave for hours not worked. Appellant maintained that the Office altered a medical report and that the referee physician did not resolve the conflict regarding whether appellant could work four or six hours per day.

With his request for reconsideration, appellant submitted 1993 treatment notes from Dr. Conroy who asserted that appellant's weight was aggravating his condition and recommending Optifast. On June 21, 1993 Dr. Conroy prescribed an Optifast program. On March 22, 1994 he asserted that appellant needed to try Optifast or another program to lose weight due to his disc problem. Dr. Conroy related that "his insurance company is not in agreement with this and will not cover it. Therefore, I am discharging him from my service because without his participation in a weight loss program, it makes it difficult to give [him] the treatment he needs."[3] On February 8, 1999 he indicated that appellant had not been discharged and that he had been treating him as needed. On May 13, 2003 Dr. Robert D. Aiken noted that appellant had not worked since April 16, 2003 due to low back pain radiating into his legs and that he "reports that he needs to work [six] hours per day, not [four]." He found that appellant was unable to work. Appellant also submitted a letter from the Office dated June 6, 2003 and

[1] The hearing representative indicated that Dr. Liebert was an impartial medical examiner; however, Dr. Liebert provided a second opinion examination on the issue of whether appellant established an employment-related recurrence of disability.

[2] Appellant maintained that the same inaccurate SOAF was provided to a second opinion physician whose report Dr. Liebert reviewed.

[3] In a report dated May 7, 1997, Dr. Conroy advised that appellant was disabled for work due to his employment injury.

envelopes showing that correspondence from the Office dated July and August 2005 was returned marked "attempted not known."[4] A magnetic resonance imaging (MRI) scan study of the lumbar spine dated June 16, 2008 revealed stable discovertebral and facet spondylosis and mild spondylotic encroachment on the lateral and subarticular recesses of L4-5 and L5-S1.

By decision dated October 21, 2008, the Office denied appellant's request for reconsideration on the grounds that his request was untimely and did not demonstrate clear evidence of error.

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.[5] As once such limitations, 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.[6]

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.[7] 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.[8]

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.[9] A right to reconsideration

[4] A myelogram of appellant's lumbar spine was attempted on July 3, 2008 but stopped when appellant became short of breath.

[5] 5 U.S.C. §§ 8101-8193.

[6] 20 C.F.R. § 10.607.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

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

[9] 20 C.F.R. § 10.607(a).

within one year also accompanies any subsequent merit decision on the issues.[10] As appellant's July 14, 2008 request for reconsideration was submitted more than one year after the last merit decision of record dated April 21, 2006, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.[11]

Appellant argued that he failed to receive a copy of the April 21, 2006 decision. He submitted copies of envelopes mailed from the Office on July and August 2005, which were returned marked "attempted not known." The Board has held that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.[12] The Office's April 21, 2006 decision was properly addressed to appellant in the ordinary course of business and there is no evidence in the record that it was not received.

Appellant further contended that the SOAF provided to Dr. Liebert was inaccurate because it erroneously indicated that he had refused to participate in a weight loss program and that his attending physician, Dr. Conroy, had discharged him from treatment. He asserted that he did not refuse to participate in a weight loss program but instead had to quit a program because of the expense. Appellant further maintained that the Office erred in refusing to pay for a weight loss program. He submitted treatment notes from Dr. Conroy recommending an Optifast program. On March 22, 1994 Dr. Conroy released appellant from treatment noting that his insurance company was not covering a weight loss program. On February 8, 1999 he indicated that he had not released appellant from treatment. The SOAF noted that appellant had not signed up for a weight loss program. It further accurately noted that on March 22, 1994 Dr. Conroy released him from care because he found it difficult to treat him when he was not in a weight loss program. The question of whether Dr. Conroy continued to treat appellant or whether he participated in a weight loss program is not relevant to the pertinent issue of whether he established a recurrence of disability on April 16, 2003 causally related to his work injury. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[13]

Appellant also contended that the employing establishment withdrew his light-duty assignment in April 2003 when it stopped allowing him to take two hours of leave a day for hours not worked. He also asserts that Dr. Liebert did not resolve the issue of whether he could work four or six hours per day. On September 12, 2002 appellant returned to work as a modified carrier working six hours per day. The Office paid him compensation for two hours per day and he used leave for two hours per day. After an October 24, 2003 hearing representative's decision, the Office retroactively paid appellant compensation for four hours per day beginning September 6, 2002. On February 12, 2004 Dr. Liebert resolved the issue of the number of hours that he could work by finding that he could work full time in a modified capacity. There is no

[10] *Robert F. Stone*, *supra* note 8.

[11] 20 C.F.R. § 10.607(b); *see Jack D. Johnson*, 57 ECAB 593 (2006).

[12] *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

[13] *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

evidence that the employing establishment withdrew appellant's light-duty position; instead, he stopped work when he was no longer allowed to take leave for two hours per day. Further, the Office previously addressed this argument and noted that he had not shown that the employing establishment took away his modified position. Consequently, appellant has not shown clear evidence of error.

Appellant also submitted a May 13, 2003 report from Dr. Aiken, who found that he was unable to work.[14] He also submitted an MRI scan study dated June 16, 2008. 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.[15] Dr. Aiken's report and the MRI scan study do show that that the Office committed an error in finding that appellant had not established a recurrence of disability.

On appeal, appellant reiterated that he did not receive a copy of the April 21, 2006 hearing representative's decision, that he did not refuse to participate in a weight loss clinic, that the employing establishment withdrew his light-duty position and that the medical evidence established that he was unable to work six hours per day. As noted the Board has reviewed his contentions and the supporting evidence and finds that he has not established clear evidence of error by the Office in finding that he did not establish a recurrence of disability beginning April 16, 2003.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

[14] Regarding appellant's argument that the Office altered Dr. Conroy's March 22, 1994 report, it appears that the record contains a poorly photocopied version of the report. There is no evidence that the Office altered the report.

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2008 is affirmed.

Issued: October 21, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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