

**United States Department of Labor
Employees' Compensation Appeals Board**

J.L., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Cincinnati, OH, Employer**

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**Docket No. 07-1884
Issued: December 26, 2007**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 10, 2007 appellant filed a timely appeal of a June 20, 2007 decision of the Office of Workers' Compensation Programs, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board also has jurisdiction over a March 7, 2007 decision denying appellant's request for an oral hearing.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error; and (2) whether the Office abused its discretion in denying his request for an oral hearing.

FACTUAL HISTORY

This is the second appeal in this case.¹ By decision dated November 1, 2005, the Board affirmed a June 10, 2005 Office decision that terminated appellant's compensation and medical

¹ See Docket No. 05-1517 (issued November 1, 2005).

benefits.² The facts of this case, as set forth in the prior decision, are incorporated herein by reference.

On May 7, 2003 appellant, then a 57-year-old tractor trailer operator, sustained a low back strain, sciatica and lumbosacral radiculopathy when his right leg fell between the loading dock and a truck he was unloading. Appropriate compensation benefits were paid.

On March 8, 2006 appellant filed a claim for a recurrence of disability. He indicated that his accepted medical conditions had never resolved and he was still receiving medical treatment from his attending physician. On March 31, 2006 the Office requested additional information regarding appellant's recurrence of disability claim. In an August 8, 2006 letter regarding appellant's recurrence of disability claim, the Office advised him to exercise his appeal rights included with the June 10, 2005 termination decision.

In a February 1, 2006 report, Dr. Rajbir S. Minhas, appellant's attending Board-certified orthopedic surgeon, noted that an October 2003 magnetic resonance imaging (MRI) scan revealed a herniated disc at the L3-4 level. He asked the Office to amend appellant's claim to include a herniated disc. Dr. Minhas submitted progress notes dated June 7, 2005 through October 24, 2006 in which he described his treatment of appellant for a lumbosacral sprain, facet joint syndrome and iliac crest syndrome and provided findings on physical examination.

On November 3, 2006 appellant submitted a claim for a schedule award.³ In an October 20, 2006 report, Dr. Martin Fritzhand reviewed a partial medical history. He did not address the medical reports regarding the termination of appellant's compensation and medical benefits effective June 10, 2005. Dr. Fritzhand provided findings on physical examination. He stated that appellant's back pain had not improved since May 2003 and had worsened during the past 6 to 12 months. Dr. Fritzhand opined that appellant had an 8.5 percent impairment of his right lower extremity, based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.⁴

In letters dated December 5, 2006 and February 2, 2007, the Office stated that appellant was not entitled to a schedule award because the June 10, 2005 decision terminated his compensation and medical benefits. On February 2, 2007 the Office advised appellant to exercise his appeal rights provided with the June 10, 2005 decision.

On February 13, 2007 appellant requested an oral hearing on the February 2, 2007 "decision."

By decision dated March 7, 2007, the Office denied appellant's request for an oral hearing on the grounds that his request could be equally well addressed through a request for

² In its June 10, 2005 decision, the Office terminated appellant's compensation and medical benefits based on the March 11, 2005 report of Dr. Alan R. Kohlhass, a Board-certified orthopedic surgeon and an impartial medical specialist.

³ Appellant submitted his schedule award claim in a letter rather than on an Office claim form.

⁴ A.M.A., *Guides* (5th ed. 2001).

reconsideration and the submission of additional medical evidence establishing that he had residuals of his May 7, 2003 employment injury after June 10, 2005, the date his compensation and medical benefits were terminated.

On April 13, 2007 appellant requested reconsideration of the denial of his schedule award claim.⁵

By decision dated June 20, 2007, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of the Federal Employees' Compensation Act⁶ does not entitle a claimant to a review of an Office decision as a matter of right.⁷ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁸ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.⁹ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹⁰

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.¹¹ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is

⁵ Although appellant indicated that he was filing a claim for an "additional" schedule award, he did not submit a request for a schedule award until November 3, 2006, subsequent to the June 10, 2005 termination decision.

⁶ 5 U.S.C. § 8128(a).

⁷ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁸ *Id.* at 768.

⁹ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

¹⁰ *Thankamma Mathews*, *supra* note 7 at 769.

¹¹ 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB 241 (2004).

¹² *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *Leona N. Travis*, 43 ECAB 227 (1991).

insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ 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.¹⁷

ANALYSIS -- ISSUE 1

The merits of appellant's case are not before the Board. His request for reconsideration was postmarked April 13, 2007. As this request was filed more than one year after the Office's June 10, 2005 merit decision, it is not timely.¹⁸ The remaining issue is whether appellant demonstrated clear evidence of error in the June 10, 2005 Office decision which terminated his compensation and medical benefits.

In support of appellant's untimely request for reconsideration of the June 10, 2005 termination decision, he submitted a February 1, 2006 report in which Dr. Minhas noted that an October 2003 MRI scan revealed a herniated disc at the L3-4 level. Dr. Minhas asked the Office to amend appellant's claim to include a herniated disc. He submitted progress notes dated June 7, 2005 through October 24, 2006 in which he described his treatment of appellant for a lumbosacral sprain, facet joint syndrome and iliac crest syndrome. The conditions of a herniated disc, facet joint syndrome and iliac crest syndrome have not been accepted by the Office as causally related to appellant's May 7, 2003 employment injury. Therefore, the reports of Dr. Minhas are of diminished probative value on the issue of whether appellant had any work-related disability or medical condition after June 10, 2005 causally related to his accepted low back strain, sciatica and lumbosacral radiculopathy. Further, as Dr. Minhas was on one side of the conflict that Dr. Kohlhass resolved, the additional reports of Dr. Minhas are insufficient to overcome the weight accorded Dr. Kohlhass' report as the impartial medical examiner or to create a new conflict.¹⁹ In an October 20, 2006 report, Dr. Fritzhand reviewed a partial medical history but did not address the medical reports regarding the termination of appellant's compensation and medical benefits effective June 10, 2005. He stated that appellant's back pain had not improved since his May 2003 employment injury and had worsened during the past 6 to 12 months. Dr. Fritzhand also provided an impairment rating for appellant's right lower

¹⁴ *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁵ *Leona N. Travis*, *supra* note 13.

¹⁶ *Darletha Coleman*, *supra* note 14.

¹⁷ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁸ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹⁹ *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

extremity. He did not provide a specific diagnosis for his condition, just back “pain.” Dr. Fritzhand did not explain how appellant’s worsening condition was causally related to his May 7, 2003 employment injury. Further, his report is not based on a complete and accurate factual and medical background because he did not address the medical reports considered by the Office in issuing its termination decision. For these reasons, Dr. Fritzhand’s report does not demonstrate clear evidence of error in the Office’s June 10, 2005 termination decision. The medical evidence submitted by appellant does not raise a substantial question as to the correctness of the Office’s June 10, 2005 merit decision terminating his compensation and medical benefits. The Board finds that the Office properly found, in its June 20, 2007 decision, that appellant’s untimely request for reconsideration failed to establish clear evidence of error in the June 10, 2005 merit decision.²⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant’s entitlement to a hearing before an Office hearing representative, states: “Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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.”²¹ A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.²²

ANALYSIS -- ISSUE 2

In a February 2, 2007 letter, the Office stated that appellant was not entitled to a schedule award because the June 10, 2005 decision terminated his compensation and medical benefits, finding that he had no residuals from his May 7, 2003 employment-related low back strain, sciatica and lumbosacral radiculopathy. The Office advised appellant to exercise his appeal rights provided with the June 10, 2005 decision. On February 13, 2007 appellant requested an oral hearing on the February 2, 2007 “decision.” However, the February 2, 2007 letter was not a formal decision regarding his schedule award claim. It was a letter advising appellant to exercise the appeal rights provided with the June 10, 2005 termination decision. Another indication that the February 2, 2007 letter is not a formal decision is that no appeal rights were attached to the February 2, 2007 letter.

Inasmuch as appellant’s February 13, 2007 request for a hearing was not made within 30 days of the Office’s final decision, the Office properly concluded that appellant was not entitled to a hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue could equally well be

²⁰ The Board notes that the Office has not issued a final decision regarding appellant’s claims for a schedule award and for a recurrence of disability. On return of the case record, the Office should issue an appropriate decision on these claims.

²¹ 5 U.S.C. § 8124(b)(1).

²² 20 C.F.R. § 10.615.

addressed by requesting reconsideration. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

CONCLUSION

The Board finds that appellant has failed to demonstrate clear evidence of error in the Office's June 10, 2005 merit decision terminating his compensation and medical benefits. The Board further finds that the March 7, 2007 decision was issued in error and will be set aside.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 20, 2007 is affirmed.

Issued: December 26, 2007
Washington, DC

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

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

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