United States Department of Labor
Employees' Compensation Appeals Board

LAWRENCE TRIGG, Appellant	)	
and	)	**Docket No. 04-2252**
	)	**Issued: March 8, 2005**
DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA, Employer	)	

Appearances:
Lawrence Trigg, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 15, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 2, 2004, denying his request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error in the Office's last merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the September 2, 2004 decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

This is the third appeal in this case.[1] By decision dated November 3, 1999, the Board remanded the case, finding that the Office improperly found that appellant's request for reconsideration of its November 5, 1992 appeal was untimely filed. By decision dated January 9, 2002, the Board remanded the case for referral to an impartial medical specialist to resolve an unresolved conflict in the medical opinion evidence.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[2] As appellant filed his appeal with the Board on September 15, 2004 the only decision properly before the Board is the Office's September 2, 2004 decision denying his request for reconsideration. The Board has no jurisdiction to consider the Office's April 26, 2002 decision, accepting appellant's claim that his preexisting degenerative disc disease was temporarily aggravated by factors of his federal employment but found that the aggravation ceased when he changed to a different job at the employing establishment or a May 23, 2003 Office decision denying modification of its April 26, 2002 decision.[3]

In letters dated June 16 and July 9, 2004, appellant submitted a report dated May 23, 2004 from Dr. Robert R. McIvor, the Board-certified orthopedic surgeon and impartial medical specialist selected by the Office to resolve an earlier conflict in the medical opinion evidence. The Office based its April 26, 2002 decision on an earlier report of Dr. McIvor.[4] Appellant requested that the Office review Dr. McIvor's report. He indicated that Dr. McIvor's May 23, 2004 report supported a continuing back condition caused by his employment.

In the May 23, 2004 report, Dr. McIvor stated that information he received from appellant indicated that he sustained a mild lumbar strain at the employing establishment in 1983 and another lumbar strain in 1985. He stated:

> "I would have to say that neither of these episodes appears to be other than transient back strains and there is no way of knowing whether or not there were disc injuries at that point in time….
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> "From the standpoint of pathology in the lower back, [appellant] does have several areas of degenerative change. These are somewhat premature for a fellow even at the age of 39 and certainly such could be related to his doing hard physical work. Again, though, from a symptomatic standpoint, I would say these episodes, which are now documented, that is to say 1983 and 1985, were again transient episodes of flare-up of back pain, which seemed to not require much

[1] Docket No. 97-2271 (issued November 3, 1999); Docket No. 00-2513 (issued January 9, 2002).

[2] 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

[3] *Algimantas Bumelis*, 48 ECAB 679 (1997).

[4] In a report dated March 30, 2002, Dr. McIvor opined that the aggravation of appellant's preexisting degenerative disc disease ceased when he stopped performing the duties of a heavy equipment operator.

more than a week of modified work thereafter and then [he] was back at his regular job.

"If one postulates that these episodes of back trouble were of temporary natures as far as causing disability, one might on the other hand look towards a cumulative trauma claim.

"[Appellant] was transferred in September 1991 to a light-duty desk job and, apparently, the lower back symptoms proportionately diminished. So, if one were to implicate his employment at [the employing establishment], it would be cumulative trauma one year prior to the September 1991 date, assuming that before then he was working as a heavy equipment mechanic…. The reason I felt that this period of cumulative trauma caused a temporary increase in symptoms sufficient to justify switching jobs would be that once he got on a light-duty desk job, his symptoms substantially diminished, which would suggest that the reason for his symptoms prior to 1991 would be the heavy work that he was doing, but that heavy work caused symptoms only while he was doing the heavy work as opposed to symptoms diminishing when he was switched to a desk job and later to his job as a teacher.

"How all this relates to the x-ray changes is difficult to say. Conceivably, these x-ray changes may have been caused to a certain extent by his work at [the employing establishment], but there is really no way of telling for sure and there are certain individuals that develop degenerative changes in the back just on the basis of their constitutional tendency towards such. At any rate, these are my conclusions after receiving these documents and do acknowledge that there is documented lower back strain in 1983 and 1985."[5]

By letter dated July 27, 2004, appellant requested reconsideration.

By decision dated September 2, 2004, the Office denied appellant's request for reconsideration on the grounds that his request was untimely filed and failed to demonstrate clear error in its May 23, 2003 merit decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[6] 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

[5] It appears that appellant wrote directly to Dr. McIvor but appellant's letter or any accompanying documents sent to Dr. McIvor are not of record.

[6] 5 U.S.C. § 8128(a).

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

[8] *Id.* at 768.

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]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[11] The Office's regulations state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[12] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[13]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[15] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17] 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.[18] 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.[19]

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[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] *Alberta Dukes, supra* note 9.

[12] *See Gladys Mercado,* 52 ECAB 255 (2001).

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

[14] *Dean D. Beets,* 43 ECAB 1153 (1992).

[15] *Leona N. Travis,* 43 ECAB 227 (1991).

[16] *Darletha Coleman,* 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003).

[17] *Leona N. Travis, supra* note 15.

[18] *Darletha Coleman, supra* note 16.

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

ANALYSIS

Since more than one year elapsed between the May 23, 2003 Office decision and appellant's July 27, 2004 reconsideration request, the request for reconsideration is untimely.[20] Consequently, he must demonstrate "clear evidence of error" by the Office in denying his claim for compensation.[21]

The evidence submitted by appellant in his July 27, 2004 request for reconsideration does not raise a substantial question as to the correctness of the Office's last merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in appellant's favor.

In support of his untimely request for reconsideration, appellant submitted a May 23, 2004 report from Dr. McIvor, who indicated that he had reviewed additional medical reports, which are not of record. It appears that appellant felt that Dr. McIvor's opinion expressed in his earlier report, that appellant sustained only a temporary aggravation of his preexisting back condition, would be different if Dr. McIvor had known that the 1983 and 1985 injuries were employment related and if he had seen medical documents relating to these injuries. However, the May 23, 2004 report of Dr. McIvor does not demonstrate clear error in the Office's April 26, 2002 decision that appellant sustained only a temporary aggravation of his preexisting degenerative disc disease. In essence, Dr. McIvor indicated that the 1983 and 1985 injuries were minor juries that resolved within a short period of time. He indicated that these were transient episodes of back pain "which seemed to not require much more than a week of modified work" and then appellant was back at his regular job. Dr. McIvor repeated his previous opinion that appellant's back symptoms diminished after he switched to a sedentary job. The May 23, 2004 report does not show clear evidence in the Office's determination that appellant had only a temporary aggravation of his preexisting degenerative disc disease that ceased when he stopped performing the duties of his heavy equipment operator job. Therefore, the Office properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied further merit review of appellant's claim on the grounds that his request for reconsideration was untimely and failed to demonstrate clear evidence of error.

[20] Even if appellant's June 16 and July 9, 2004 letters to the Office were interpreted as requests for reconsideration, the letters were sent more than one year after the Office's May 23, 2003 decision and would not constitute timely requests for reconsideration.

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 2, 2004 is affirmed

Issued: March 8, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member