United States Department of Labor
Employees' Compensation Appeals Board

ROBERT G. JOHNSON, Appellant	)	
and	)	**Docket No. 05-1306**
	)	**Issued: January 18, 2006**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Memphis, TN, Employer	)	

Appearances:
Robert G. Johnson, 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 May 31, 2005 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated February 17, 2005 which denied his request for reconsideration. Because more than one year has lapsed from the date of the last merit decision of May 14, 2003 to the date of this appeal, the Board does not have jurisdiction over the May 14, 2003 merit decision. The Board also has jurisdiction over the issue of a December 17, 2004 decision of the Branch of Hearings and Review which denied appellant's request for an oral hearing as untimely filed.[1]

ISSUES

The issues are: (1) whether appellant timely filed a request for an oral hearing under 5 U.S.C. § 8124(b)(1); and (2) whether the Office properly denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error.

[1] 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On March 25, 2003 appellant filed a traumatic injury claim (Form CA-1) alleging that on March 22, 2003 he injured his groin, left side and left leg because of a sudden jolt he experienced when he pulled a tractor out from underneath a trailer. On March 31, 2003 the Office advised appellant of the deficiencies of his claim and afforded him 30 days to submit the additional information.

By decision dated May 14, 2003, the Office denied appellant's claim as he failed to provide sufficient evidence to establish any causal relationship between the alleged work incident and any injury.

Appellant disagreed with the decision and by form dated November 17, 2004, he requested an oral hearing with the Branch of Hearings and Review. By decision dated December 17, 2004, the Branch of Hearings and Review denied an oral hearing as his request was made more than 30 days following the May 14, 2003 decision. The Branch of Hearings and Review further determined that the claim could equally well be handled by requesting reconsideration and submitting further evidence.

On December 28, 2004 appellant requested reconsideration of the May 14, 2003 decision. He submitted an undated CA-20 attending physician's report from Dr. Arsen H. Manugian, a Board-certified orthopedic surgeon, three medical reports from Memphis Orthopedic Group dated November 14, December 12 and 29, 2003, a magnetic resonance imaging scan of his cervical spine dated December 9, 2003, a cervical myelogram dated March 1, 2004, and a denial of limited duty from the employing establishment dated March 10, 2004. He also submitted an operative report discussing surgery for a C5-6 herniated nucleus pulposus dated March 20, 2004, two undated and unsigned supplementary statements of disability, and a medical report from Dr. John D. Brophy, a Board-certified neurosurgeon, dated February 27, 2004. The reports from Memphis Orthopedic Group noted that appellant's neck and shoulder problems were aggravated by straining at work. The March 20, 2004 operative report addressed the cervical surgery appellant underwent. The February 7, 2004 report from Dr. Brophy stated that appellant experienced an onset of pain on November 2, 2003 while operating a truck. Its July 1, 2004 form report of Dr. Brophy contained the diagnosis cervical radiculopathy.

By decision dated February 17, 2005, the Office denied appellant's reconsideration request because it was not filed within the one-year time limitation for reconsideration and failed to establish clear evidence of error.[2]

[2] *See* 20 C.F.R. § 10.607(b).

LEGAL PRECEDENT -- ISSUE 1

A claimant for compensation not satisfied with a decision by the Office is entitled, on request made within 30 days after the date of the issuance of the decision,[3] to a hearing on his claim before a representative of the Secretary.[4] As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing on his claim as a matter of right unless the request is made within the requisite 30 days.[5]

A request received after those dates will be subject to the Office's discretion.[6] The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[7] The Board has held that the Office has the discretion to grant or deny a hearing request on a claim,[8] when the request is made after the 30-day period for requesting a hearing[9] and when the request is for a second hearing on the same issue.[10] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[11]

ANALYSIS -- ISSUE 1

The issue is whether the Office abused its discretion by refusing to grant appellant a hearing. The Office issued a decision denying appellant's claim on May 14, 2003. Appellant requested a hearing on a form dated November 17, 2004. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[12] Since appellant did not request a hearing within 30 days of the Office's May 14, 2003 decision, he was not entitled to a hearing under section 8124 as a matter of right.

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[3] Appellant must send a request in writing to the Branch of Hearings and Review, with which appellant specifically disagreed, within 30 days as determined by the postmark or other carrier's date marking of the date of the issuance of the decision for which a hearing is sought. *See* 5 U.S.C. § 8124(b)(1). The claimant must not have previously submitted a reconsideration request on the same decision. *See* 20 C.F.R. § 10.616(a) and (b).

[4] 5 U.S.C. § 8124(b)(1).

[5] *Delmont L. Thompson*, 51 ECAB 155 (1999); *Charles J. Prudencio*, 41 ECAB 499 (1990).

[6] 20 C.F.R. §§ 10.615 and 10.616(a) and (b).

[7] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[8] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[9] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[10] *Johnny S. Henderson*, *supra* note 7.

[11] *Id.*; *Rudolph Bermann*, *supra* note 8.

[12] 20 C.F.R. § 10.616(a).

The Branch of Hearings and Review considered appellant's hearing request in its December 17, 2004 decision and denied it on the basis that appellant could pursue his claim by requesting reconsideration and submitting additional relevant and probative evidence. An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, action of the kind that no conscientious person acting intelligently would reasonably have taken prejudice, partiality, intentional wrong or action against logic.[13] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

LEGAL PRECEDENT -- ISSUE 2

Section 8128 of the Federal Employees' Compensation Act vests the Office with discretion to determine whether it will review an award for or against compensation either under its own authority or on application of the claimant. Under 20 C.F.R. § 10.607(a) a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered, or providing new and not previously considered evidence. Section 10.607(a) also provides that when an application for review of the merits of the claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for opening a case.[14]

Further, the Act's procedures provide that the Office will not review a decision denying or terminating benefits unless the application for reconsideration is filed within one year of the dated of the Office's last merit decision. However, the Office cannot deny an application for review based solely on the grounds that it was not timely filed. Instead, the Office must conduct a limited review based solely on the grounds that it was not timely filed. Instead, the Office must conduct a limited review of any evidence that a claimant submits with an untimely application for reconsideration to determine whether such evidence clearly shows that the last merit was erroneous.

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the Office's May 14, 2003 decision on December 17, 2004. As this request was more than 30 days after issuance of the Office's May 14, 2003 decision, the Board finds that it is untimely filed.

Appellant would still be entitled to a merit review if the evidence he submitted in support of his reconsideration request demonstrated clear evidence of error on the part of the Office in the issuance of its May 14, 2003 decision. The Board finds that he has failed to do so.

[13] *Delmont L. Thompson*, 51 ECAB 155 (1999); *Daniel J. Perea*, 42 ECAB 214 (1990); *Charles J. Prudencio*, 41 ECAB 499 (1990).

[14] *Eugene Butler*, 36 ECAB 393 (1984).

The May 14, 2003 decision by the Office denied appellant's claim finding that there was insufficient evidence to support causal relationship between his left-sided lower body injuries and identifiable work factors. The evidence submitted thereafter lacked any mention of appellant's originally claimed left-sided groin and leg injuries, and therefore was not relevant to that issue nor did it support causal relationship with his employment and, therefore, it failed to identify any clear evidence of error on the part of the Office.

Dr. Manugian submitted a Form CA-20 diagnosing cervical radiculopathy for which appellant underwent a C5-6 anterior cervical discectomy and fusion. He checked "yes" to the form question of whether he believed there was an employment relationship, but the date of injury was given as 2004 and it had no relationship to appellant's earlier March 22, 2003 claimed lifting injuries being addressed, his left groin, side and leg. Therefore causal relationship was not established, and no evidence of error was apparent in this form report.

Multiple reports from Memphis Orthopedic Group provided only cervical-related diagnoses. These cervical-related diagnoses do not have any relationship to appellant's claimed March 22, 2003 groin, left side and left leg injuries. Neither does a December 9, 2003 cervical spine magnetic resonance imaging (MRI) scan results, the March 1, 2004 myelogram, a March 10, 2004 denial of limited duty, a Blue Cross/Blue Shield letter from March 19, 2004, and an operative report from March 20, 2004 for a C5-6 herniated nucleus pulposus.

Also submitted were two undated and unsigned supplemental statements of disability and a report from Dr. Brophy, a Board-certified neurosurgeon dated February 27, 2004. As the authorship of the unsigned undated reports cannot be established, they cannot constitute probative medical evidence.[15] Dr. Brophy addressed his report to the cervical surgery for a discectomy and decompression secondary to repair of a C5-6 herniated nucleus pulposus, it is not probative regarding appellant's initial injuries of left side, left groin and left leg strain injuries which were caused by lifting a trailer hitch, nor does it reveal any evidence of clear evidence of factual or procedural error. His subsequent reports have the same deficiency.

None of the reports appellant submitted addressed the claimed left-sided and lower extremity pain including, groin or leg original injuries, therefore, they are irrelevant to the issue of the case and thus do not demonstrate clear evidence of error.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing. It also properly found that appellant untimely requested reconsideration of the Office's May 14, 2003 decision and the evidence failed to establish clear evidence of error warranting a reopening of the case.

[15] *Vickey C. Randall*, 51 ECAB 357 (2000) (to constitute competent medical opinion evidence, the medical evidence submitted must be signed by a qualified physician).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 17, 2005 and December 17, 2004 are hereby affirmed.

Issued: January 18, 2006
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