United States Department of Labor
Employees' Compensation Appeals Board

K.C., Appellant	)	
and	)	**Docket No. 06-1706**
	)	**Issued: October 25, 2006**
DEPARTMENT OF VETERANS AFFAIRS, TAHOMA NATIONAL CEMETERY, Kent, WA, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 18, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated April 20, 2006 denying his request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated February 11, 2005 and the filing of this 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 refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On December 10, 2004 appellant, then a 49-year-old cemetery caretaker, filed a traumatic injury claim alleging that he injured his lower back on December 3, 2004 while setting

headstones, removing and replacing niche covers and climbing ladders in the course of his federal employment. In support of his claim, appellant submitted an unsigned case worksheet from Joan E. Barbacovi, R.N., reflecting that he stopped working in December 3, 2004.

On January 3, 2005 the Office informed appellant that the information submitted was insufficient to establish his claim and advised him to submit, within 30 days, additional factual information and a narrative statement from a physician, with a diagnosis and rationalized opinion as to the cause of his diagnosed condition.

Appellant submitted unsigned notes dated December 6 and 13, 2004 and February 10, 2005 from Dr. Ulrich Birlenbach, a Board-certified internist. On December 6, 2004 Dr. Birlenbach indicated that appellant's back discomfort developed after doing repetitive lifting at work. He stated that appellant "may have strained the back [while] lifting at work." On December 13, 2004 Dr. Birlenbach noted appellant's belief that his back discomfort was related to having "set some niche covers at the cemetery." He stated that appellant "appears to have strained his back." On February 10, 2005 Dr. Birlenbach indicated that appellant had a history of straining his back while working on the job and noted an underlying problem with spinal stenosis.

In a December 21, 2004 note, Donna M. Parker Bush, ARNP, indicated that she treated appellant on that date for a back injury and that he would "need to remain off work pending further evaluation."

The employing establishment controverted appellant's claim. On January 18, 2005 Diane Jelich stated that appellant failed to report in a timely fashion that he had injured himself at work. In a letter dated January 12, 2005, Joseph Turnbach, director of the Tahoma National Cemetery, noted that appellant did not report any injury to him prior to leaving work on December 3, 2004. He stated that appellant called in on December 6, 2004 to request eight hours of sick leave, but did not mention a work-related injury. On December 7, 2004 Mr. Turnback left a voice mail message for appellant to the effect that he had no accrued sick leave and would be considered absent without leave if he failed to report for duty that day. Later that day, he received a facsimile from appellant, which included a physician's work excuse and a note from appellant indicating that he "need[ed] to fill out C1 work-related injury." Mr. Turnback also reported that appellant had sustained work-related injuries on January 6 and October 25, 2004. After returning to full duty on December 1, 2004, he worked one day before allegedly injuring himself again.

By decision dated February 11, 2005, the Office denied appellant's claim, finding that the evidence presented was insufficient to establish that the events occurred as alleged, and that there was no medical evidence that provided a diagnosis which could be connected to the claimed event.

Appellant submitted numerous unsigned notes from the Puget Sound Spine Clinic. Urgent care triage notes dated October 28, 2004 reflected appellant's complaint that he pulled his arm while moving a head stone. A Consult Request dated December 20, 2004 reflected that appellant had experienced an increase in spinal pain that had been ongoing in excess of six months. In progress notes dated January 18, 2005, Dr. Faried Gulamali, a Board-certified internist, noted appellant's history of disc disease and persistent back pain. According to a

computerized problem list, appellant's active problems included intervertebral disc displacement, low back pain, tennis elbow, myopia, presbyopia and hemorrhoids.[1]

Appellant submitted work excuses from Dr. Birlenbach dated December 6 and 13, 2004.

In an attending physician's report dated March 13, 2006, Dr. Ranjy Basd, a treating physician, provided a diagnosis of acute exacerbation of chronic back pain. He stated that appellant's lifting of headstones and niche covers and digging holes over a two-week period "caused [his] lower back pain to become progressively worse." Noting that the date of his first examination of appellant was March 13, 2006, Dr. Basd identified the date of appellant's injury as December 3, 2004. In response to the question as to whether he believed appellant's condition was caused or aggravated by an employment activity, Dr. Basd placed a check mark in the "yes" box, and stated that appellant "did a lot of digging, lifting, bending over at work."

On April 10, 2006 appellant requested reconsideration, on the grounds that all medical evidence was not presented and that the claims from the employing establishment regarding the events following the alleged injury were intentionally false. He alleged that his physician, Dr. Gulamali, and Mr. Turnbach intentionally interfered with the filing of his claim. Appellant stated that he was unable to obtain a CA-20 from Dr Gulami. Describing the events of December 3, 2004, he admitted that he continued to work the remainder of the day following the alleged injury and failed to report the injury on that date. Appellant stated that, at 1:30 p.m., he bent down to pick up a niche and felt a "humph, twinge, small pop, a release that tightens." He claimed that he stood for a moment, with his right leg tingling, adjusted his weight and walked toward his vehicle. Appellant stated that he was in pain, but did not tell anyone because he is "always in pain, [his] back always hurts." On Monday, December 6, 2004 he allegedly called and spoke with Mr. Turnbach to request time off from work, informing him that his back was in pain due to the December 3, 2004 work injury. Appellant again contacted Mr. Turnbach on December 7, 2004 to request a CA-1 form. He stated that he filed an EEO complaint against Mr. Turnbach.

In a nonmerit decision dated April 20, 2006, the Office denied appellant's April 10, 2006 request for reconsideration on the basis that it was untimely filed and did not present clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[2] The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[3] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents

[1] Dr. Gulamali's notes indicated that they were electronically signed; however, no signature appeared on the document.

[2] 5 U.S.C. §§ 8101-8193, 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

clear evidence that the Office's final merit decision was in error.[4] The Office procedures 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.[5] 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.[6]

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. 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. 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. 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.[8] 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.[9]

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[10] The last merit decision in this case was the Office's February 11, 2005 decision denying appellant's traumatic injury claim. As appellant's April 10,

[4] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[5] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

[6] *See Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005); *see also Nelson T. Thompson*, 43 ECAB 919 (1992).

[7] *See Alberta Dukes, supra* note 6; *see also Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004).

[8] *Id*.

[9] *See Alberta Dukes, supra* note 6. *See also Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

[10] *Veletta C. Coleman, supra* note 4; *Larry L. Lilton*, 44 ECAB 243 (1992).

2006 request for reconsideration was submitted more than one year after the last merit decision, it was untimely. Consequently, he must demonstrate "clear evidence of error" on the part of the Office in denying his claim for compensation.[11]

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error that would warrant reopening his case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. In his April 10, 2006 request for reconsideration, appellant claimed that all medical evidence had not been not presented and that the claims from the employing establishment regarding the events following the alleged injury were intentionally false. He alleged that his physician and Mr. Turnbach had intentionally interfered with the filing of his claim and that he was unable to obtain a CA-20 from Dr Gulami. Appellant described the events of December 3, 2004, admitting that he continued to work the remainder of the day following the alleged injury and failed to report the injury on that date. He stated that, at 1:30 p.m., he bent down to pick up a niche and felt a "humph, twinge, small pop, a release that tightens"; that he stood for a moment, with his right leg tingling, adjusted his weight and walked toward his vehicle; and that he was in pain, but did not tell anyone because he is "always in pain, [his] back always hurts." Appellant alleged that on Monday, December 6, 2004 he asked for time off from work and informed Mr. Turnbach that his back was in pain due to the December 3, 2004 work injury. He again contacted Mr. Turnbach on December 7, 2004 to request a CA-1 form. Appellant submitted numerous unsigned notes from the Puget Sound Spine Clinic; work excuses from Dr. Birlenbach dated December 6 and 13, 2004; and a March 13, 2006 attending physician's report dated from Dr. Basd, which provided a diagnosis of acute exacerbation of chronic back pain.

The Board finds that the evidence submitted is not 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.[12] Appellant did not allege error on the part of the Office, but merely made unsubstantiated allegations against his own treating physician and the employing establishment. None of the notes from Puget Sound Spine Clinic contains a definite, specific diagnosis related to appellant's alleged work injury. Moreover, these unsigned notes, lacking proper identification, cannot be considered as probative evidence.[13] As pain is considered a symptom and not a diagnosis, Dr. Basd's March 13, 2006 diagnosis of acute exacerbation of chronic back pain does not constitute the basis for payment of compensation.[14] Dr. Birlenbach's December 6 and 13, 2004 work excuses merely repeat evidence already in the case record and, therefore, have no evidentiary value.[15] Although the evidence submitted by appellant in support of his untimely request for reconsideration generally supports his claim, it fails to raise a substantial question as to the correctness of the Office's decision. Thus, the

[11] 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB ___ (Docket No. 03-2223, issued January 9, 2004).

[12] *Id*.

[13] *Merton J. Sills*, 39 ECAB 572 (1988)

[14] *Robert Broome*, 55 ECAB ____ (Docket No. 04-93, issued February 23, 2004).

[15] *See Helen E. Paglinawan*, 51 ECAB 591 (2000).

evidence and argument submitted by appellant are insufficient to show clear evidence of error on the part of the Office.

The Board finds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly determined that appellant's April 10, 2006 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 20, 2006 is affirmed.

Issued: October 25, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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