United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 06-1021**
	)	**Issued: April 5, 2007**
U.S. POSTAL SERVICE, POST OFFICE, White Plains, NY, 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 March 30, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 15, 2006 nonmerit decision denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's December 22, 2003 decision concerning appellant's entitlement to schedule award compensation. Because more than one year has elapsed between the last merit decision and the filing of this appeal on March 30, 2006, the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

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

FACTUAL HISTORY

On April 11, 1992 appellant, then a 51-year-old distribution clerk, filed a traumatic injury claim alleging that he sustained a low back injury due to lifting a heavy tray of mail. The Office accepted that he sustained a back sprain, exacerbation of preexisting degenerative disc disease of the low back, radiculopathy and discogenic disease.[2] Appellant retired from the employing establishment effective October 2, 1992.

Appellant received care for his back condition from Dr. Elio J. Ippolito, an attending Board-certified orthopedic surgeon, who found that he had permanent impairment of legs due to effects of the employment-related back condition, which extended into his legs. In a November 8, 1993 decision, the Office granted appellant a schedule award for a 15 percent permanent impairment of his right leg and a 9 percent permanent impairment of his left leg.

Appellant received care from additional attending physicians, including Dr. Joseph C. Polifrone, a Board-certified neurosurgeon. In reports dated September 10, 2001, January 14, July 9 and December 20, 2002 and November 11, 2003, Dr. Polifrone determined that appellant had significant permanent impairment of his legs due to sensory, motor and range of motion losses.

The Office periodically reviewed the reports of appellant's attending physicians and made determinations regarding whether these reports showed that he was entitled to additional schedule award compensation. In a December 3, 2001 decision, the Office granted appellant a schedule award for an additional two percent permanent impairment of his right leg and an additional eight percent permanent impairment of his left leg. In an April 14, 2003 decision, the Office granted appellant a schedule award for an additional eight percent permanent impairment of his right leg and an additional eight percent permanent impairment of his left leg.

By decision dated December 22, 2003, the Office determined that appellant had not shown that he had more than a 25 percent permanent impairment of his right leg and a 25 percent permanent impairment of his left leg, for which he had already received schedule award compensation.

In a February 25, 2004 letter, received by the Office on March 2, 2004, appellant requested reconsideration on the Office's December 22, 2003 decision. In support of his reconsideration request, he submitted a February 21, 2004 report of Dr. Polifrone which contained a calculation of his permanent impairment. Appellant later submitted a March 23, 2004 impairment calculation of Dr. Polifrone.[3]

On July 15, 2005 an Office district medical adviser indicated that the medical evidence of record showed that appellant had no more than a 20 percent permanent impairment of each leg due to sensory loss. The district medical adviser stated that there was no objective evidence to

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[2] Between March 1970 and October 1979, appellant sustained four employment-related low back sprains, which caused him to stop work for brief periods.

[3] Appellant also requested reconsideration of the Office's schedule award determinations in a June 26, 2005 letter.

show permanent impairment due to motor loss.[4] On September 2, 2005 Dr. Polifrone determined that appellant had a combined 57 percent permanent impairment of the legs due to motor loss which should be included in addition to previous calculations for sensory and range of motion losses. On September 14, 2005 the district medical adviser stated that Dr. Polifrone needed to apply schedule award standards which related to the lower extremities.

On September 23, 2005 the Office requested that Dr. Polifrone provide an opinion on appellant's permanent impairment under the portion of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), which related to the lower extremities. On October 19, 2005 Dr. Polifrone reported impairment ratings for a right calf atrophy and loss of range of motion of the ankles and toes. On October 31, 2005 the district medical adviser stated that, due to motor loss, appellant had a 37 percent permanent impairment of his right leg and a 37 percent permanent impairment of his left leg. On December 15, 2005 Dr. Polifrone asked the Office to consider his October 19, 2005 evaluation.

On November 14, 2005 the Office advised appellant by telephone that he was not entitled to any further schedule award compensation because he "removed himself from his light[-]duty position to accept a buy out by the [employing establishment]." In a December 21, 2005 letter, received by the Office on December 22, 2005, appellant requested reconsideration of the Office's schedule award determinations.

By decision dated March 15, 2006, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error. The Office determined that appellant filed a reconsideration request on December 22, 2005, which was untimely and that he did not submit evidence showing clear evidence of error in the Office's schedule award determinations. It noted that he had separated from the employing establishment on or about October 2, 1992 and that he did not have any further exposure to "employment factors or additional workplace injury which could provide basis for an increased schedule award."

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.[5] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[6]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application

[4] It appears that the adviser evaluated Dr. Polifrone's March 23, 2004 calculations.

[5] 20 C.F.R. § 10.607(a).

[6] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

establishes "clear evidence of error."[7] Office regulations and procedure provide 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(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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 decision.[14]

ANALYSIS

The Office accepted that appellant sustained an employment-related back sprain, exacerbation of preexisting degenerative disc disease of the low back, radiculopathy and discogenic disease and he received schedule award compensation for a 25 percent permanent impairment of his right leg and a 25 percent permanent impairment of his left leg. By decision dated December 22, 2003, the Office determined that appellant had not shown that he had more than a 25 percent permanent impairment of his right leg and a 25 percent permanent impairment of his left leg. In a March 15, 2006 decision, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

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[7] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[8] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "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 that a schedule award was miscalculated). Evidence such as 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." *Id.* at Chapter 2.1602.3c.

[9] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[10] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[11] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[12] *See Leona N. Travis*, *supra* note 10.

[13] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[14] *Leon D. Faidley, Jr.*, *supra* note 6.

In its March 15, 2006 decision, the Office improperly determined that appellant filed an untimely request for reconsideration. The Office determined that appellant first filed a reconsideration request on December 22, 2005 in connection with its December 22, 2003 decision. The record clearly reveals, however, that appellant submitted a February 25, 2004 letter, received by the Office on March 2, 2004, in which he requested reconsideration of the Office's December 22, 2003 decision.

Appellant timely filed his reconsideration request, effectuated on March 2, 2004, within one year of the December 22, 2003 merit decision and the Office improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case to the Office for review of this evidence under the proper standard of review for a timely reconsideration request.[15] Among the documents appellant submitted between December 22, 2003 and March 2, 2004 that the Office should review in this regard are several reports in which Dr. Polifrone, an attending Board-certified neurosurgeon, provided ratings of permanent impairment.[16]

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error. The case will be remanded to the Office for a proper evaluation of his timely reconsideration request.

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[15] *See Donna M. Campbell,* 55 ECAB 241, 244-45 (2004).

[16] The Board further notes that in September 2005 the Office specifically requested that Dr. Polifrone provide an opinion on appellant's permanent impairment under the A.M.A., *Guides.* On October 19, 2005 Dr. Polifrone reported impairment ratings for a right calf atrophy and loss of range of motion of the ankles and toes and on October 31, 2005, the Office district medical adviser appears to have stated that, due to motor loss, appellant had a 37 percent permanent impairment of his right leg and a 37 percent permanent impairment of his left leg. It is unclear why the Office conducted this further evaluation of appellant's permanent impairment but did not issue a decision at that time. It is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 15, 2006 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: April 5, 2007
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