United States Department of Labor
Employees' Compensation Appeals Board

I.H., Appellant	)	
and	)	**Docket No. 07-325**
	)	**Issued: April 9, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Sacramento, CA, Employer	)	

Appearances:
Norman R. McNulty, Jr., Esq., for the appellant
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 November 16, 2006 appellant filed a timely appeal from an August 16, 2006 nonmerit decision of the Office of Workers' Compensation Programs that denied appellant's request for reconsideration as untimely filed. Because more than one year has elapsed between the most recent merit decision, dated June 25, 2004, 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. The only decision properly before the Board is the Office's August 16, 2006 decision denying appellant's request for reconsideration.

ISSUE

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

FACTUAL HISTORY

On May 7, 2004 appellant, then a 32-year-old city letter carrier, filed an occupational disease claim alleging that he developed cervical and lumbar pain in the performance of duty. He stated that he aggravated a preexisting condition when he returned to work following an occupational motor vehicle accident in February 1999, for which a separate claim was filed.[1] Appellant stopped work on May 7, 2004.

After the Office requested additional information, appellant submitted May 12 and 14, 2004 duty status reports[2] detailing his work restrictions. He also submitted a May 12, 2004 provider report[3] diagnosing chronic pain in the cervical and lumbar spines. Additionally, appellant submitted a May 11, 2004 report from a physician's assistant.[4]

The employing establishment challenged appellant's claim. In a June 16, 2004 statement, an injury compensation manager questioned the validity of appellant's previous motor vehicle accident claim but noted, nonetheless, that appellant had been provided with a limited-duty job assignment since 2002. Additionally, the employing establishment submitted a May 17, 2004 report from Dr. Randall W. Armstrong, a Board-certified family medicine specialist, who had previously treated appellant. Dr. Armstrong stated that he had informed appellant that he "could not recommend a surgical referral unless [appellant] got a better handle on his anger, social, return-to-work issues and entitlement issues. He has not done that." Dr. Armstrong reported that appellant had since sought medical care elsewhere.

Appellant then submitted a July 11, 2002 report from his treating physician, Dr. John J. Champlin, a Board-certified family medicine specialist, who diagnosed congenital spinal stenosis at levels L3 through L5-S1, lumbosacral strain and spondylolisthesis. Dr. Champlin indicated that appellant had experienced several traumatic injuries, including lower back pain sustained while fleeing from dogs on two separate occasions and that appellant's job also caused repetitive trauma from bending, twisting, lifting and prolonged sitting and standing. He concluded that "causation" in appellant's case was "complex" as appellant clearly had "a significant severe preexisting spinal stenosis." Dr. Champlin opined that it was "medically probable" that work-related repetitive bending, twisting and lifting and prior work injuries accelerated the development of appellant's back pain.

By decision dated June 25, 2004, the Office denied appellant's occupational disease claim on the grounds that the medical evidence was insufficient to establish a causal relationship between appellant's diagnosed condition and employment factors. The Office noted that, in a separate claim, it had denied the same condition in a recurrence of disability claim.[5] The Office

[1] Appellant reported that he filed File No. 131182590 concerning his motor vehicle accident.

[2] The signatures on the reports are illegible.

[3] The signature on the report is illegible.

[4] The name of the physician's assistant is illegible.

[5] File No. 13-2033393. This claim is not before the Board on the present appeal.

noted that it did not rely on evidence from the other claim in reaching its decision in appellant's occupational disease claim.

Appellant, through his attorney, requested reconsideration on May 15, 2006. Counsel argued that the Office erred in not considering medical evidence from a separate claim file, including an April 16, 2004 report of a computerized tomography (CT) scan conducted by Dr. Thomas Wu[6] and an April 22, 2004 report from Dr. Armstrong. Counsel noted that appellant had submitted both reports to the Office in connection with a claim for recurrence of disability in a separate Office claim. Counsel contended that the "refusal of the Office to consider the current medical evidence in File No. 13-2033393 in adjudicating [appellant's] occupational disease claim under File No. 13-2104739 is clear error. The supposed difference between a recurrence claim and an occupational disease claim is not a justification for ignoring important new medical evidence."[7]

Appellant also submitted Dr. Wu's April 16, 2004 report and Dr. Armstrong's April 22, 2004 report in support of his reconsideration request. Dr. Wu conducted a lumbar myelogram and a CT scan of appellant's lumbar spine. After noting that appellant's history was significant for "low back pain radiating to the left leg," Dr. Wu recorded an impression of focal left posterior disc protrusion at L5-S1 with large posterior inferior osteophyte at L5 and minor disc bulging at L4-5 and L3-4.

Dr. Armstrong, in his April 22, 2004 report, stated that he personally interpreted Dr. Wu's CT scan and myelogram results and concluded that appellant presented with an "impressive" osteophytic spur at the L5-S1 level, as well as disc protrusion. He recommended surgical decompression and stated that appellant could work up to eight hours per day.

By decision dated August 16, 2006, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[8] does not entitle a claimant to a review of an Office decision as a matter of right.[9] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[10] 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 application for reconsideration is filed within one

[6] Dr. Wu's specialty could not be ascertained from the record.

[7] The present appeal pertains to Office File No. 13-2104739.

[8] 5 U.S.C. § 8128(a).

[9] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[10] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

year of the date of that decision.[11] 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).[12]

The Office's regulations provide:

> "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."[13]

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.[14]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[15] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[16] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[17] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[18] 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.[19] 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.[20]

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[11] 20 C.F.R. §§ 10.607, 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[12] 20 C.F.R. § 10.607(b); *Thankamma Mathews*, *supra* note 9 at 769; *Jesus D. Sanchez*, *supra* note 10 at 967.

[13] 20 C.F.R. § 10.607(b).

[14] *Thankamma Mathews*, *supra* note 9 at 770.

[15] *Id.*

[16] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[17] *Jesus D. Sanchez*, *supra* note 10 at 968.

[18] *Leona N. Travis*, *supra* note 16.

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

[20] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

ANALYSIS

Appellant requested reconsideration on May 15, 2006. As he filed his reconsideration request more than one year following the Office's June 25, 2004 merit decision, the Office properly determined that the request was untimely.

The Board further finds that appellant did not establish clear evidence of error. Through counsel, appellant argued that the Office erred in not reviewing medical evidence that was part of appellant's recurrence of disability claim, File No. 13-2033393. Counsel stated that "[t]he refusal of the Office to consider the current medical evidence in File No. 13-2033393 in adjudicating [appellant's] occupational disease claim under File No. 13-2104739 is clear error." Counsel further asserted that the "supposed difference between a recurrence claim and an occupational disease is not a justification for ignoring important new medical evidence."

Appellant's assertions are without merit. The Board notes that it is appellant's burden to establish the essential elements of his claim by the submission of appropriate evidence.[21] As the record does not reflect that appellant submitted the reports in question to File No. 13-2104739, the Office was not under a duty to consider them when adjudicating that claim. Prior to issuance of the Office's June 25, 2004 decision, appellant chose not to submit either of the reports in question to the Office in support of his claim. There is no evidence to suggest that the Office refused to consider any evidence that appellant submitted in support of his occupational disease claim. The Board notes that the clear evidence of error standard is intended to be a difficult standard.[22] As noted above, appellant must submit evidence that proves, on its face, that the Office's decision was clearly erroneous. Counsel's argument that the Office should have reviewed evidence in a separate and distinct claim does not raise a substantial question as to the correctness of the Office's decision.

Furthermore, the medical reports submitted on reconsideration, Dr. Wu's April 16, 2004 report and Dr. Armstrong's April 22, 2004 report, also do not establish clear evidence of error by the Office. As noted above, the evidence submitted must be relevant to the issue which was decided by the Office. Here, appellant's claim was denied on the grounds that the medical evidence did not establish a causal relationship between appellant's diagnosed condition and employment factors. Accordingly, the evidence submitted in support of the reconsideration request must address causal relationship and be so persuasive that it shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of the Office's decision. 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 insufficient to show clear evidence of error.[23] However, neither Dr. Wu's nor Dr. Armstrong's report renders an opinion on causal relationship. Accordingly, neither Dr. Wu's nor Dr. Armstrong's report is sufficient to establish clear evidence of error in the Office's June 25, 2004 merit decision. Appellant has submitted no other

[21] *See, e.g., Larry D. Dunkin*, 56 ECAB ___ (Docket No. 04-1949, issued December 22, 2004).

[22] *See, e.g., James R. Mirra*, 56 ECAB ___ (Docket No. 05-998, issued September 6, 2005).

[23] *Id.*

evidence sufficient to 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.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration, as the request was filed outside the one-year time limitation and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 9, 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