United States Department of Labor
Employees' Compensation Appeals Board

S.D., Appellant	)	
and	)	**Docket No. 07-1120**
	)	**Issued: September 24, 2007**
DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Hungry Horse, MT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 19, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' nonmerit decision dated January 29, 2007 which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated August 12, 2005 to the filing of this appeal on March 19, 2007, 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 denied appellant's request for reconsideration on the grounds that it was untimely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On May 23, 2005 appellant, then a 52-year-old plant mechanic and welder, filed an occupational disease claim alleging that he developed "neurological symptoms/loss of balance" in the performance of duty. He first became aware of his condition in August 2001 and first

related it to his employment in April 2004. Appellant noted: "Because of the uncertainty of the diagnosis from the doctors they said it would have to get worse before giving a definite diagnosis." He stopped work on August 17, 2004. The employing establishment advised that appellant had been separated.

In support of his claim, appellant submitted a statement and several medical reports and diagnostic test results. In a September 28, 2001 report, Dr. Bret D. Lindsay, a Board-certified psychiatrist and neurologist, diagnosed paresthesias in "an unusual variety of autonomic and potentially central neurological symptoms." On August 16, 2004 Dr. Marie Christine Leisz, an osteopath, noted that appellant had a history of working as a welder, during which time he was "exposed to multiple metals in poorly ventilated working situations." She noted that during the previous year appellant had multiple falls and gait problems that limited his ability to work. Dr. Leisz diagnosed gait and movement disorder.

On August 17, 2004 Dr. Paul J. Tuite, a Board-certified psychiatrist and neurologist, reported that he was unable to provide a clear diagnosis explaining appellant's symptoms. He noted that appellant's gait was atypical for Parkinson's disease and that the medical history and physical examination findings did not support a diagnosis of welding-related Parkinson's disease. Dr. Tuite also noted that appellant's lead, manganese and chromium levels were unremarkable and that a magnetic resonance imaging (MRI) scan "did not show the typical iron/manganese deposits commonly seen. He does balance impairment with falls, but does not fit the diagnostic criteria for progressive supranuclear palsy at this time. It is possible that [appellant] could have brain damage related to manganese exposure." Appellant also provided a June 17, 2004 report from Dr. Daniel E. Munzing, who diagnosed dysequilibrium.

On June 21, 2005 the Office requested additional information concerning appellant's claim.

By decision dated August 12, 2005, the Office denied appellant's occupational disease claim on the grounds that appellant did not submit sufficient medical evidence to establish an injury or disease connected to the established work events.

Following the Office's decision, the employing establishment submitted an August 15, 2005 statement from Ralph Carter, a facility manager, who noted that appellant advised, in a casual conversation about a year prior, that his symptom onset occurred after welding a bed in his personal dump truck at home. Mr. Carter listed a variety of filtering equipment that was used at the employing establishment but noted that he did not know if appellant used any filtering equipment in his outside construction business. He advised that, after talking to a project manager and plant mechanics, appellant would have averaged welding about two hours per day at the employing establishment as welding was not a full-time activity for a plant mechanic.

Appellant requested reconsideration on January 15, 2007. He stated that his health had declined "to the point that an accurate diagnosis was able to finally be made." Appellant submitted diagnostic testing from the Regional Parkinson Center at Aurora Sinai Medical Center. In a December 21, 2006 report, Dr. Paul A. Nausieda, a Board-certified psychiatrist and neurologist, diagnosed manganism. He stated that appellant's only neurotoxin exposure was connected to his 36-year employment as a welder and explained: "Studies show that both acute

and chronic inhalation of manganese oxide cause cell loss in the brain, mimicking the symptoms of Parkinson's disease." Dr. Nausieda stated that welding rods contained a large amount of manganese and that, during welding, fumes containing very small particles of manganese oxides were inhaled by those who work in the area. He opined that appellant had a "significant history of unprotected exposure" in a variety of open and confined spaces. Dr. Nausieda advised that, based on his findings, he believed that appellant's case was "indeed a result of cumulative occupational exposure to manganese."

By decision dated January 29, 2007, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] 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 year of the date of that decision.[4] 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).[5]

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."[6]

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.[7]

---

[1] 5 U.S.C. § 8128(a).

[2] *Thankamma Mathews*, 44 ECAB 765, 658 (1993).

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

[4] 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).

[5] 20 C.F.R. § 10.607(b); *Thankamma Mathews*, *supra* note 2 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

[6] 20 C.F.R. § 10.607(b).

[7] *Thankamma Mathews*, *supra* note 2 at 770.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] 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.[12] 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.[13]

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration as untimely. The Act's implementing regulations provide that a request for reconsideration must be filed within one year from the date of the Office decision for which review is sought.[14] The most recent merit decision was the Office's August 12, 2005 decision denying appellant's occupational disease claim. As appellant's January 15, 2007 reconsideration request was made more than one year following the August 12, 2005 decision, the Board finds that appellant's request was untimely filed. Consequently, to have his claim reopened, appellant must show clear evidence of error by the Office in its August 12, 2005 decision.

The Board finds that appellant has not presented evidence establishing that the Office's decision was erroneous or which raises a substantial question as to the correctness of the Office's decision. Appellant did not assert that the Office's August 12, 2005 decision was erroneous, but rather advised that it took additional time for his symptoms to deteriorate sufficiently that his doctor was able to diagnose his condition. However, Dr. Nausieda's December 21, 2006 report is not sufficient to raise a substantial question concerning the correctness of the Office's decision or otherwise entitle appellant to a merit review despite the untimeliness of his request for reconsideration.

Appellant's claim was initially denied on the grounds that the evidence of record failed to establish a diagnosis to which the established employment factors could be connected.

---

[8] *Id.*

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

[10] *Jesus D. Sanchez, supra* note 3 at 968.

[11] *Leona N. Travis, supra* note 9.

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

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

[14] 20 C.F.R. § 10.607(a).

Accordingly, the evidence submitted in support of the reconsideration request must not only address causal relationship but must be so positive, precise and explicit as to *prima facie* shift the weight of the evidence in appellant's favor.[15] In his December 21, 2006 report, Dr. Nausieda diagnosed manganism. He noted appellant's history of metal exposure as a welder and indicated that studies showed that inhalation of manganese oxide caused symptoms similar to Parkinson's disease. He concluded that appellant's condition was employment related. However, Dr. Nausieda did not provide a rationalized medical opinion on causal relationship explaining in sufficient detail his reasons for ruling out the diagnoses of other physicians or specifically how appellant's work exposures caused the diagnosed condition.[16] His report is general in nature and does not provide sufficient detail explaining how manganese exposure at work caused or contributed to the diagnosis. The report does not address appellant's exposure outside the workplace or explain why any exposure outside of work would not be the cause of his condition.[17] Dr. Nausieda did not address the use or nonuse of any inhalation or filtering equipment or the hours spent welding. Accordingly, the Board finds that Dr. Nausieda's December 21, 2006 report does not establish clear evidence of error as it is of insufficient probative value to raise a substantial question as to the correctness of the Office's decision denying the claim.[18] Other evidence submitted following the Office's August 12, 2005 decision is also insufficient to 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 it was untimely filed and did not present clear evidence of error.

[15] *See supra* note 9.

[16] In order to be considered rationalized medical evidence, a physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and claimant's specific employment factors. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989); *Steven S. Saleh*, 55 ECAB 169, 172 (2003). The Board has held that a medical opinion not fortified by medical rationale is of little probative value. *Caroline Thomas*, 51 ECAB 451, 456 n. 10 (2000); *Brenda L. Dubuque*, 55 ECAB 212, 217 (2004).

[17] *See James R. Taylor*, 56 ECAB ___ (Docket No. 05-135, issued May 13, 2005) (medical opinions based on an incomplete or inaccurate history are of diminished probative value).

[18] On appeal, appellant submitted additional medical evidence. The Board, however, notes that it cannot consider this evidence for the first time on appeal because the Office did not consider this evidence in reaching its final decision. The Board's review is limited to the evidence in the case record at the time the Office made its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 24, 2007
Washington, DC

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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