United States Department of Labor
Employees' Compensation Appeals Board

K.C., Appellant	)	
and	)	**Docket No. 07-907**
	)	**Issued: May 21, 2008**
SMALL BUSINESS ADMINISTRATION, DISASTER ASSISTANCE, AREA TWO, Orlando, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 30, 2007 appellant filed a timely appeal from the December 14, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration as untimely and failing to establish clear evidence of error. The most recent merit decision of record is the December 27, 2004 decision denying his traumatic injury claim. Because he filed his appeal more than one year after this merit decision, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case. The only decision properly before the Board is the nonmerit decision denying reconsideration.

ISSUE

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

FACTUAL HISTORY

On September 30, 2004 appellant, then a 39-year-old loss verifier, filed a traumatic injury claim alleging that he sustained a laceration of his left leg and knee and inflammation or irritation of his pancreas due to the impact of an automobile accident on September 27, 2004. As he was making a left hand turn from a turn lane in Kissimmee, Florida, an automobile struck the left side of his vehicle, pushing it sideways into a third vehicle. The employing establishment stated that appellant was in the performance of duty and received medical care on the date of the accident. Appellant provided a mailing address in Weatherford, Texas.

On November 26, 2004 the Office sent a letter to appellant's address of record in Texas, informing him that he needed to submit additional medical evidence to establish his claim. It provided him 30 days to provide the requested materials and requested that the employing establishment forward any medical evidence in its possession. The Office did not receive any additional information in the allotted time.

By decision dated December 27, 2004, the Office denied appellant's claim. The Office found that the evidence was insufficient to establish either that the automobile accident occurred as alleged or that there was any diagnosis connected to the claimed event.

On September 7, 2005 the Office received hospital intake and nursing records related to appellant's treatment following the September 27, 2004 automobile accident. On the day of the accident appellant was brought to the emergency room in an ambulance. He had a laceration above his left knee and a contusion on his rib cage. On September 28, 2004 Dr. Muhammad Hizkil, a Board-certified internist, diagnosed acute pancreatitis.

On March 9, 2006 the employing establishment called the Office to request that appellant's claim be transferred to the Dallas District Office. It stated that appellant did not respond to the Office's requests because he was on temporary duty and did not receive any documentation it sent.

On March 10, 2006 the Office received an undated report form from Dr. Hizkil, who stated that appellant's diagnosed traumatic pancreatic, left knee laceration and right foot sprain were caused by his automobile accident. Dr. Hizkil stated that he examined appellant on September 28, 2004 and discharged him September 29, 2004.

On March 13, 2006 the Office received medical reports prepared by Dr. Hizkil, along with supporting x-ray reports. On September 28, 2004 Dr. Hizkil stated that appellant had been involved in an automobile accident and arrived at the emergency room with pain on the right side of his chest and upper abdominal area. Appellant had no history of loss of consciousness or neck or back pain. He had a laceration on his left knee, which was sutured in the emergency department. Dr. Hizkil reviewed appellant's diagnostic test results and noted that he had a white blood count of 11,000, hemoglobin of 16.2, a platelet count of 250,000 and an internal normalization ratio of 0.96. A basic metabolic panel test showed glucose of 138, blood urea nitrogen of 12, creatine of 1.1 and potassium of 3.7. Appellant's liver function tests were within normal limits. His amylase was 196 and lipase was 1138. Cardiac enzymes were negative and urinalysis was within normal limits. Radiographs of the chest, cervical spine and left knee

showed no abnormalities. Dr. Hizkil diagnosed chronic pancreatitis, left knee laceration, right rib strain and status post motor vehicle accident. Appellant was treated with a regimen of intravenous fluids and clear liquids. On September 29, 2004 Dr. Hizkil discharged appellant from the hospital. In his report, he noted that appellant had been admitted with elevated lipase and amylase levels, which dropped with treatment. Dr. Hizkil stated that appellant's amylase and lipase were normal at the time of discharge. He advised appellant to follow up with his primary care physician in one week and to have his sutures removed at that time. Dr. Hizkil's discharge diagnosis was traumatic pancreatitis, resolved; status post motor vehicle accident; left knee laceration; and right foot sprain.[1]

On August 16, 2006 appellant telephoned the Office to check the status of his appeal. The Office informed him that no appeal had been received. He stated that the employing establishment advised him to submit medical evidence and appeal to their office. On August 22, 2006 the Office faxed appellant a copy of the development letter and the December 27, 2004 decision.

On September 28, 2006 the employing establishment requested reconsideration of appellant's claim. It stated that appellant's claim had been inappropriately handled by their Atlanta and Fort Worth offices due to inexperienced staff. The employing establishment stated that appellant was not at fault in any way for the handling of his claim. It confirmed that appellant had been seriously injured while performing disaster assistance duties in Florida. The employing establishment provided the accident report form appellant completed on September 29, 2004, which indicated that the accident happened as he was going to do disaster verification of properties near Juno Beach, Florida. Appellant provided the names and insurance information for the other drivers involved in the accident and stated that he had been charged with the accident for a right of way violation.

On November 17, 2006 the Office notified appellant and the employing establishment that the request for reconsideration filed by the employing establishment was not valid. The Office stated that appellant was required to file a request for reconsideration if he wanted to appeal the denial of his claim.

On November 20, 2006 appellant requested reconsideration of the Office's December 27, 2004 decision. He stated that he had been in contact with his employing establishment about his injury several times over the previous two years and that it was his understanding that they were handling his claim. Appellant stated that he had provided employing establishment personnel with paperwork and documents pertaining to his claim. Along with his request, he submitted copies of medical bills, documents related to the accident and correspondence with the employing establishment. In a police report, prepared on September 27, 2004, Trooper Damaso Ortiz indicated that appellant turned left in front of an approaching vehicle. Appellant submitted a vehicle storage receipt for the towing of his car from the scene of the accident and a traffic ticket for his moving violation.

[1] The Board notes that "foot sprain" appears to be a transcription error. The previous day, Dr. Hizkil diagnosed a sprain of the right rib and discussed appellant's rib and abdomen pain. There was no mention of a foot injury.

On December 5, 2006 the employing establishment submitted administrative documents related to appellant's automobile accident. In a February 5, 2006 e-mail to Paul Arrington, the director of administrative services, appellant stated that he filled out accident forms for the employing establishment during his three-day stay at the hospital in September 2004. On discharge he filled out additional claim forms at the employing establishment's Orlando, Florida office, where he was informed that he needed to be patient because the workers' compensation process took a long time. A few months later, appellant received the letter from the Office denying his claim. He telephoned the employing establishment, which told him to ignore the letter because the information about his claim had been sent in, but not processed by the Office. Appellant followed up with the employing establishment intermittently in 2005 and was told that the case was being handled and to be patient. The Fort Worth, Texas office of the employing establishment notified him that he had no reason for concern, because he had three years to file a claim. When appellant called the Office himself he learned that his claim had been denied for lack of documentation and that he had few options available.

By nonmerit decision dated December 14, 2006, the Office denied further merit review of appellant's claim. The Office found that appellant had not filed his request for reconsideration within one year and had not presented any clear evidence that the Office's last merit decision was incorrect.

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.[2] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted of the Office under section 8128(a) of the Federal Employees' Compensation Act.[3]

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 in accordance with section 10.607(b) of its regulations.[4] The Office's regulations provide that the application must establish, on its face, that the appealed decision was erroneous.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence which does not raise a

[2] 20 C.F.R. § 10.607(a).

[3] 5 U.S.C. § 8128(a); *James R. Mirra*, 56 ECAB 738 (2005).

[4] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[5] 20 C.F.R. § 10.607(b).

[6] *Id.*

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

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10] 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.[11]

ANALYSIS

Appellant filed his request for reconsideration of the Office's December 27, 2004 on November 13, 2006. Because it was filed more than one year after the decision, the Board finds that appellant's request was untimely. As such, the issue to be resolved is whether appellant has established clear evidence of error in the Office's denial of his claim.

The Office denied appellant's claim on the grounds that he had established neither an employment incident nor a related medical diagnosis because he had not submitted any evidence. To establish clear evidence of error in this decision, appellant's burden of proof requires him to show that the Office made an error at the time the decision was issued. For purposes of this analysis, it is immaterial that appellant subsequently submitted evidence that cured the defects found by the Office in the December 27, 2004 decision.[12]

Following the denial of the claim on December 27, 2004, appellant and his employing establishment submitted medical and factual evidence related to his claimed automobile accident of September 27, 2004 and his subsequent hospitalization. On review of this evidence, the Board finds that it addresses the factual basis of appellant's claim, including whether the incident occurred as alleged and whether he sustained injuries as a result of that accident. Unfortunately, this evidence is not probative of the issue at hand: whether the Office erred in finding that appellant had not submitted evidence sufficient to establish his claim by December 27, 2004.[13]

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

[9] *Leona N. Travis*, *supra* note 7.

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

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

[12] *See Dean D. Beets*, 43 ECAB 1153, 1158 (1992) ("The issue, for purposes of establishing clear evidence of error, is not whether appellant has subsequently submitted medical evidence curing the defects of earlier reports, but whether those earlier reports in fact failed to establish causal relationship, as the Office found.")

[13] *See id.* (finding no clear evidence of error when appellant submitted medical evidence that independently supported causal relationship because the report had no bearing on the probative value of the medical evidence that was before the Office at the time of its earlier decision). *Compare James R. Mirra*, *supra* note 3 at 740 and 743 (finding clear evidence of error when appellant, submitted evidence establishing that he was a federal employee when the Office had denied the claim solely on the grounds that he was not a federal civilian employee).

On September 28, 2006 the employing establishment stated that it had mishandled appellant's claim and that he was not at fault for the delays in submitting evidence for his claim. It later provided an e-mail, sent by appellant, detailing his efforts to advance his claim in 2005 and 2006. In the e-mail, he stated that he received the Office's December 27, 2004 decision and was told to ignore it. On November 13, 2006 appellant acknowledged that he did not submit documents directly to the Office. Though this evidence indicates appellant submitted materials to employing establishment, it does not show that the Office was in possession of any evidence supporting his claim when it issued its decision. Neither does it establish that he did not receive notice of the Office's request for additional information or the decision denying his claim.

Therefore, the Board finds that appellant has not met his burden of proof to establish clear evidence of error on the part of the Office is issuing its December 27, 2004 decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 14, 2006 is affirmed.

Issued: May 21, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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