United States Department of Labor
Employees' Compensation Appeals Board

C.Z., Appellant	)	
and	)	**Docket No. 08-2309**
	)	**Issued: June 10, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Rahway, NJ, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 19, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated June 9, 2008 which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated March 23, 2006 and the filing of this appeal on April 2, 2008, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and that appellant's request for reconsideration did not demonstrate clear evidence of error.

FACTUAL HISTORY

On April 19, 2000 appellant, a 36-year-old letter carrier, injured his left wrist and left shoulder when he fell down some stairs.[1] He filed a claim for benefits on September 22, 2000, which the Office accepted left shoulder contusion, left wrist contusion and left shoulder tendinitis. The Office paid appropriate compensation for temporary total disability for intermittent periods.

On November 9, 2000 appellant underwent arthroscopic surgery on his left shoulder.

In a June 29, 2004 report, Dr. George P. Glenn, Board-certified in orthopedic surgery, stated that appellant had a four percent permanent impairment of the left upper extremity pursuant to impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (the A.M.A., *Guides*). He stated that appellant had a one percent left upper extremity impairment for range of motion deficit of the left shoulder under Figure 16-40 at page 476 of the A.M.A., *Guides*; 30 percent abduction deficit of the left shoulder which equated to 1 percent left upper extremity impairment under Figure 16-43 at page 476; and 30 percent internal rotation deficit which yielded 2 percent impairment of the left upper extremity under Figure 16-46 at page 479.

On June 3, 2005 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his left upper extremity causally related to his accepted left wrist and left shoulder conditions.

In a report dated March 29, 2005, Dr. David Weiss, an osteopath, found that appellant had 25 percent lower extremity permanent impairment under the A.M.A., *Guides*. He rendered this impairment based on the following calculations: 1 percent impairment for range of motion deficit based on decreased left shoulder flexion, pursuant to Figure 16-40 at page 476 of the A.M.A., *Guides*; 5 percent impairment for range of motion deficit based on decreased left shoulder abduction, pursuant to Figure 16-43 at page 477; 10 percent impairment based on a 4 out of 5 motor strength deficit for left wrist extension, pursuant to Table 16-11 at page 484; 10 percent impairment based on left grip strength deficit pursuant to Table 16-34 at page 509, for a combined left upper extremity impairment of 22 percent. Dr. Weiss added 3 percent impairment for pain, pursuant to Figure 18-1 at page 574, for a total 25 percent left upper extremity impairment.

In a report dated August 30, 2005, an Office medical adviser, relying on Dr. Glenn's findings and calculations, accorded appellant four percent left upper extremity impairment pursuant to the A.M.A., *Guides*.

[1] Appellant stated on the Form CA-1 that he sustained his injury on April 12, 2000. By letter dated November 30, 2000, however, he amended this assertion and informed the Office that his injury had actually occurred on April 19, 2000.

By decision dated September 15, 2005, the Office granted appellant a schedule award for four percent permanent impairment of the left upper extremity for the period June 29 to September 24, 2004, for a total of 12.48 weeks of compensation.

On December 21, 2005 appellant's attorney requested reconsideration of the September 15, 2005 schedule award decision.

By decision dated March 23, 2006, the Office denied the request for modification of the September 15, 2005 decision.

On November 16, 2006 appellant requested an oral hearing.

On March 14, 2008 appellant requested reconsideration of the September 15, 2005 schedule award decision. He did not submit any additional medical evidence.

By decision dated June 9, 2008, the Office denied appellant's request for reconsideration without a merit review, finding appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that appellant was required to present evidence which showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle an employee to a review of an Office decision as a matter of right.[3] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] As one such limitation, the Office has stated

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[4] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

that it 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.[5] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).[6]

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifested 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's decision.[14] The Board makes an independent determination of whether an appellant 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.[15]

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[5] 20 C.F.R. § 10.607(b).

[6] *See* cases cited *supra* note 3.

[7] *Rex L. Weaver*, 44 ECAB 535 (1993).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

[11] *See Jesus D. Sanchez*, *supra* note 3.

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

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

[14] *Leon D. Faidley, Jr.*, *supra* note 3.

[15] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. It issued its last merit decision in this case on March 23, 2006. Appellant requested reconsideration on March 14, 2008; thus, his reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's March 14, 2008 request for reconsideration failed to show clear evidence of error. Appellant did not submit any new factual or medical evidence in support of his claim. His request letter did not contain any legal arguments showing error on the part of the Office. No other evidence was received by the Office. The Board finds that the Office did not abuse its discretion in denying further merit review. Therefore, appellant has failed to demonstrate clear evidence of error on the part of the Office.[16]

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration request dated March 14, 2008. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on June 9, 2008.

[16] The Board notes the Office Branch of Hearings and Review failed to provide a review of appellant's November 16, 2006 request for an oral hearing. However, inasmuch as the request was filed well past the 30-day period provided for filing such requests, the request was untimely. The Board also notes that appellant pursued reconsideration with the Office following this request for hearing.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board