United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 10-1886**
	)	**Issued: April 15, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer	)	

Appearances:
Thomas Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 20, 2010 appellant filed a timely appeal from a January 25, 2010 nonmerit decision of the Office of Workers' Compensation Programs' denying his request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. The most recent merit decision in this case was the Office's November 14, 2007 decision denying his occupational disease claim. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence on appeal. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

On appeal, counsel contends that the Office's denial of merit review was improper, as the medical evidence of record was clearly sufficient to establish appellant's claim.

FACTUAL HISTORY

On June 27, 2005 appellant filed a claim for compensation, alleging that he developed pain in his lower back, neck and shoulders as a result of repetitive work activities, including boxing mail. He stopped working on May 2, 2005.[3]

Appellant was treated by Dr. Perry Stein, a Board-certified physiatrist. In an August 15, 2006 report, Dr. Stein noted appellant's complaints of neck, right shoulder, lower back and bilateral leg pain. He provided examination findings and diagnosed cervical spondylosis with radiculopathy, rotator cuff tear, congenital spinal stenosis with superimposed degenerative spinal stenosis with lumbar radiculopathy. Dr. Stein opined that appellant's repetitive work-related activities had exacerbated the degenerative changes in his lumbar spine.

In a September 8, 2006 decision, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that his condition resulted from factors of employment identified by appellant.

On November 13, 2006 appellant requested reconsideration. In a February 12, 2007 nonmerit decision, the Office denied his request for merit review. On February 26, 2007 appellant again requested reconsideration.

In an October 23, 2006 report, Dr. Stein provided examination findings, noting painfully restrictive range of motion of the lumbar spine; weakness in the left lower extremity; and positive Flamingo sign. He stated that appellant had a known case of congenital stenosis with degenerative disc disease. Dr. Stein indicated that appellant's work activities, which included boxing mail, required prolonged static postures and repetitive movements of the upper extremities. He opined that the work-related activities exacerbated appellant's condition.

In a December 4, 2006 report, Dr. Stein diagnosed spinal stenosis, both acquired and congenital, which was demonstrated by magnetic resonance imaging (MRI) scans. He again expressed his opinion that appellant's repetitive work activity, including verifying and stamping

[3] The Office accepted appellant's April 6, 2003 occupational disease claim (File No. xxxxxx989) for lumbar strain and paid compensation for total disability until March 31, 2005, when he returned to work four hours per day. On May 1, 2005 appellant claimed a recurrence of disability as of that date under File No. xxxxxx989 due to boxing mail. By decision dated December 13, 2005, the Office denied his recurrence claim. On March 10, 2006 appellant requested reconsideration. By letter dated June 12, 2006, the Office advised him that it would develop his claim as a new occupational disease claim (File No. xxxxxx955) based on the allegations contained in his June 27, 2005 CA-2a claim form.

mail, exacerbated his underlying congenital spinal stenosis and that the repetitive strain injury resulted from being forced to sustain prolonged static postures while doing repetitive work.

In a June 1, 2007 decision, the Office denied appellant's reconsideration request, finding that Dr. Stein's reports were cumulative and immaterial.

On August 31, 2007 appellant again requested reconsideration. On July 12, 2007 Dr. Stein reported that appellant had painfully restricted range of motion of the cervical spine, particularly for right lateral flexion, which reproduced right upper extremity and shoulder pain. In addition, objective weakness was demonstrated with gross grasping 10K in the right hand and 20K in the left hand. Dr. Stein stated that appellant's symptoms were precipitated by his work activities, specifically, maintaining prolonged static postures as a base of support for repetitive activities of the upper extremities while boxing mail. He opined that the identified work activities precipitated a recurrence of appellant's neck, shoulder and arm symptoms, which were due to cervical radiculopathy and tendinitis of both shoulders.

In a November 14, 2007 decision, the Office denied modification of its September 8, 2006 decision on the grounds that the evidence did not establish a causal relationship between appellant's diagnosed conditions and factors of employment.

On August 21, 2008 appellant requested reconsideration. In a September 11, 2008 decision, the Office denied his request for further merit review.

On January 15, 2009 appellant requested reconsideration, indicating that he was attaching a note from his treating physician.[4]

Appellant submitted a November 20, 2008 report from Dr. Stein, who related appellant's report that he had to stop working because of specific work activities that aggravated his condition, including boxing, verifying and stamping mail and that while he had neck, shoulder and back pain prior to May 1, 2005, it was on that date that the symptoms became intolerable from the repetitive activities that he was performing on the job. Dr. Stein noted painfully restricted range of motion of the cervical spine, particularly for right lateral flexion and right rotation. As on previous examinations, he had signs of bilateral lumbar nerve root compression with absent right knee jerk and atrophy of the left calf. Dr. Stein diagnosed cervical radiculopathy, cervical spondylosis, spinal stenosis on a congenital basis with superimposed degenerative changes resulting in multi-level lumbar radiculopathy. He stated that appellant's "diagnoses are exacerbated by his work[-]related activity, specifically maintaining prolonged static postures of the trunk in order to support the upper extremity for repetitive activity such as boxing, verifying and stamping mail."

By decision dated January 25, 2010, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

[4] The record contains a return receipt reflecting that the Office received appellant's reconsideration request on January 20, 2009.

LEGAL PRECEDENT

The Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.[5] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 8128(a). To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.[6] 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 Act.[7]

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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[8] 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.[9]

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

[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.607(a).

[7] *Supra* note 5; *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

[9] *Id*. at § 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.

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

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

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

[13] *See Leona N. Travis, supra* note 11.

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

makes an independent determination of whether a claimant 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]

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The one-year time limitation period for requesting reconsideration begins on the date of the original Office decision and upon any subsequent merit decision.[16] As appellant's January 15, 2009 request for reconsideration was submitted more than one year after the Office's November 14, 2007 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by the Office in the denial of his claim.[17]

In his letter requesting reconsideration, appellant stated that he was attaching a report from his treating physician. This note does not allege or establish error on the part of the Office and is insufficient to raise a substantial question concerning the correctness of the Office's denial of his claim or to shift the weight of the evidence in his favor.

The medical report submitted by appellant is insufficient to establish clear error by the Office in denying his claim. In a November 20, 2008 report, Dr. Stein reiterated his previous diagnoses and his opinion that appellant's diagnosed conditions were exacerbated by his work-related activity, specifically maintaining prolonged static postures of the trunk in order to support the upper extremity for repetitive activity such as boxing, verifying and stamping mail. His report does not, however, provide new information or further explain the basis for his opinion. Rather, it merely repeats information contained in several reports previously received and considered by the Office.[18] This cumulative report does not raise a substantial question as to the correctness of the Office's decision and does not establish clear evidence of error.

On appeal, counsel contends that the Office improperly denied merit review, arguing that the medical evidence establishes that appellant's diagnosed conditions were exacerbated by repetitive employment activities. For reasons stated, the Board finds that the evidence submitted in support of his request for reconsideration is insufficient to establish clear evidence of error on the part of the Office in its January 25, 2010 decision. Counsel's arguments address the merits of the case, over which the Board has no jurisdiction.

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[15] *Pete F. Dorso*, 52 ECAB 424 (2001).

[16] 20 C.F.R. § 10.607(a); *see Robert F. Stone*, 57 ECAB 292 (2005).

[17] *Id.* at § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[18] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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