

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RODERICK E. WALKER, SR. and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

*Docket No. 03-309; Submitted on the Record;
Issued April 4, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On March 6, 2000 appellant, then a 37-year-old letter carrier, filed a claim alleging that he developed a back condition causally related to his factors of employment. The Office accepted appellant's claim for aggravation of lumbar radiculopathy and paid appropriate compensation. Appellant stopped work on February 23 to March 10, 2000.

Appellant submitted reports from Dr. Jeffrey Kirouac and Dr. Dominick Lago, both Board-certified anesthesiologists, dated March 17, 2000. Dr. Kirouac noted that appellant was initially seen in consultation in 1994 after his chair at work collapsed causing him to fall and injure his back. Dr. Lago noted treating appellant for an aggravation of his lower back and leg pain. He diagnosed appellant with lumbar radiculopathy and myofascial dysfunction.

On July 20, 2000 appellant filed a CA-2a, notice of recurrence of disability alleging that he experienced a recurrence of back and leg pain on July 18, 2000 causally related to his accepted employment injury of April 14, 1999.

In a letter dated July 25, 2000, the Office requested detailed factual and medical evidence to support his recurrence of disability claim.

In a decision dated August 29, 2000, the Office denied appellant's claim for recurrence of disability on the grounds that the medical evidence was not sufficient to establish that appellant experience a recurrence of disability causally related to the accepted employment injury.

By letter dated September 23, 2000, appellant requested a hearing before an Office hearing representative. The hearing was held on March 14, 2001.

In a decision dated May 22, 2001, the hearing representative affirmed the decision of the Office dated August 29, 2000.

In a letter dated September 4, 2002, appellant requested reconsideration of the decision dated May 22, 2001 and submitted a report from Dr. Jack Belen, Board-certified in physical medicine and rehabilitation, dated July 16, 2002. Dr. Belen indicated a history of appellant's injury as reported by appellant noting that he experienced low back and leg pain in 1994 after falling from a chair which collapsed under him. He noted that appellant was off work from July 2000 until August 5, 2001 and returned at this time because of financial concerns. Dr. Belen indicated that appellant continued to work intermittently. He diagnosed appellant with left L5 radiculopathy and herniated lumbosacral disc. Dr. Belen indicated that appellant's condition came about as a direct result of the work-related injuries and activities as noted above. He noted that appellant was disabled from performing the type of work he was performing and should be in a sedentary job and avoid frequent bending, stooping, lifting, pushing or pulling over 15 pounds.

By decision dated October 29, 2002, the Office denied appellant's request for reconsideration on the grounds that it was not timely and that appellant did not present clear evidence of error by the Office.

The only decision before the Board on this appeal is that of the Office dated October 29, 2002. Since more than one year elapsed from the date of issuance of the Office's May 22, 2001 merit decision to the date of the filing of appellant's appeal, November 15, 2002, the Board lacks jurisdiction to review this decision.¹

The Board finds that the Office properly determined that appellant's request for reconsideration dated September 4, 2002 was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"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, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a)

¹ See 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128(a).

provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.³

In its October 29, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on May 22, 2001 and appellant's request for reconsideration was dated September 4, 2002, which was more than one year after May 22, 2001. Accordingly, appellant's petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁴

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁵

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁸ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.⁹

The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to establish clear evidence of error.

The Board has reviewed the evidence submitted with appellant's most recent reconsideration request and concludes that appellant has not established clear evidence of error

³ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁴ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁵ *Annie L. Billingsley*, *supra* note 3.

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

⁸ *Id.*

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

in this case. Appellant submitted a report from Dr. Belen dated July 16, 2002; however, this evidence does not specifically address whether he had employment-related disability after July 18, 2000. The Board has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.¹⁰ Dr. Belen indicated a history of injury as reported by appellant, noting that he experienced low back and leg pain in 1994 after falling from a chair which collapsed under him. He noted that appellant was off work from July 2000 until August 5, 2001 due to back and leg pain. Dr. Belen diagnosed appellant with left L5 radiculopathy and herniated lumbosacral disc. He did not provide any opinion regarding whether the accepted work injury caused disability after July 18, 2000. Dr. Belen did not provide any rationale explaining why appellant's employment injury precluded him from working after July 18, 2000. He neither addressed whether appellant was totally disabled due to his work injury on or after July 2000 nor offered any reasoned support for causal relationship of the claimed condition or disability to the accepted work-related injury. The medical evidence submitted does not raise a substantial question as to the correctness of the Office's prior decisions.¹¹ Therefore, the evidence is not sufficient to raise a substantial question as to the correctness of the Office's merit decision.¹² Appellant has not established clear evidence of error on the part of the Office.

The decision of the Office of Workers' Compensation Programs dated October 29, 2002 is hereby affirmed.

Dated, Washington, DC
April 4, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹¹ *Id.*

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