

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSE M. BARRIENTES and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, Los Fresnos, TX

*Docket No. 03-964; Submitted on the Record;
Issued July 11, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On June 8, 2000 appellant, then a 45-year-old deportation assistant, filed a claim for traumatic injury alleging that on May 7, 2000 he sustained an injury to his right hip while pulling a box off a top shelf. The employing establishment stated that appellant's injury occurred on June 7, 2000 and that it was work related. By letter dated July 24, 2000, the Office advised appellant that the information he had submitted was insufficient to establish that he sustained an injury on May 7, 2000 as alleged. The Office requested that appellant's treating physician submit a report supporting a causal relationship, if the physician believed that the medical condition was caused or aggravated by his claimed injury.

By decision dated August 31, 2000, the Office noted that the incident occurred as alleged, but that the evidence submitted failed to establish that an injury occurred on that date as a result of the incident.

In an undated letter received by the Office on February 8, 2001, appellant requested reconsideration of the Office's August 31, 2000 decision denying benefits based on his June 7, 2000 work-related injury. In support of his request for reconsideration, appellant submitted an October 19, 2000 report from Dr. Gustavo Stern, his treating physician and a Board-certified surgeon, who stated that appellant was examined in his office on June 8, 2000 based on right hip pain sustained on June 7, 2000 when he was lifting heavy "bulks" at work. He noted that at that time appellant was diagnosed with right inguinal hernia, recurrent and painful and a possible left-sided hernia and that he had undergone a right hernia surgical repair on June 15, 2000. In a follow-up appointment on October 10, 2000, Dr. Stern stated that appellant's right inguinal canal "feels strong with no discomfort," but that a left-sided inguinal hernia remained and that it "most likely occurred at the same time that [appellant] developed the recurring right inguinal hernia." He added that the left hernia would require repair in the future.

In a decision dated March 15, 2001, the Office denied modification of its August 31, 2000 decision denying benefits. The Office noted that the date of injury would be corrected, noting that appellant initially stated that he was injured on May 7, 2000, but that a witness and the employing establishment stated that the injury occurred on June 7, 2000. Further, the Office found that appellant's evidence failed to establish a causal relationship between his condition and his employment. It noted that Dr. Stern's reports failed to provide an affirmative opinion on causal relationship of both hernias and did not offer any explanation as to how lifting an object off the top shelf caused bilateral hernias.

On May 9, 2002 appellant filed a claim for a recurrence of disability alleging that on May 7, 2002 he felt pain on his right and left sides while performing his duties. In a report dated May 9, 2002, Dr. Stern reported that appellant had right inguinal pain with no evidence of a hernia and a left-sided inguinal hernia.

In a letter dated June 11, 2002, Congressman Solomon P. Ortiz requested that the Office review appellant's case. In a report of a telephone call dated June 19, 2002, the Office stated that it had informed Congressman Ortiz' office that appellant's claim was denied on August 31, 2000 and that he "needs to exercise his appeal rights."

On June 21, 2002 appellant submitted¹ the employing establishment's authorized treatment report for appellant's June 7, 2000 work-related incident and a history and physical report dated June 15, 2000, in which Dr. Stern diagnosed appellant with a right inguinal hernia. Dr. Stern noted that appellant's medical history included a right inguinal hernia repair on September 30, 1997 and added that appellant had been doing well until June 7, 2000, when he felt a sharp pain in his right side when he was "getting down" a 20-pound box at work. An undated operative report for recurrent right inguinal hernia was attached. In a June 8, 2002 report, received by the Office on June 21, 2002, appellant requested that Congressman Ortiz pursue his claim. This was forwarded to the Office. In a letter dated September 10, 2002, Congressman Ortiz requested that the Office review appellant's case. Appellant attached an August 30, 2002 narrative, in which he stated that the Office initially denied his claim because the dates of injury were not "coinciding," but that this issue had been remedied by his physician's office. In an internal memorandum dated September 23, 2002, the Office noted that it had received appellant's request for reconsideration on September 13, 2002.

By decision dated October 9, 2002, the Office denied appellant's reconsideration request on the grounds that he failed to file his request for reconsideration within one year of the Office's March 15, 2001 decision and had not presented clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for a merit review.

The only decision before the Board on this appeal is the Office's October 9, 2002 decision denying appellant's request for a review on the merits of a March 15, 2001 decision, affirming the denial of his claim on the grounds that he did not establish an injury on June 7, 2000. Because more than one year has elapsed between the issuance of the Office's

¹ Appellant also submitted the October 19, 2000 report of Dr. Stern previously of record.

March 15, 2001 decision and March 7, 2003, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the March 15, 2001 Office decision.²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.³ The Office 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.⁴ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁵

The Board finds that as more than one year had elapsed from the date of issuance of the March 15, 2001 decision and appellant's request for reconsideration received by the Office on September 13, 2002, his request for reconsideration was untimely. The Board further finds that the evidence submitted by appellant in support of this request is insufficient to establish clear evidence of error.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence, which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. The Board 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.⁶

In its October 9, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision in appellant's claim was issued on March 15, 2001. The Office received appellant's request for reconsideration on September 13, 2002, which was more than one year after March 15, 2001.

² See 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.607(b)(1999); see *Gladys Mercado*, 52 ECAB ____ (Docket No. 00-898, issued February 2, 2001).

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ *Nancy Marcano*, 50 ECAB 110 (1998).

The evidence submitted by appellant in this case does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of his request for reconsideration, appellant resubmitted a report dated June 8, 2000 from the employing establishment authorizing medical treatment based on appellant's June 7, 2000 work incident. The report clarifies that appellant's work-related incident occurred on June 7, 2000 but does not establish clear evidence of error in the Office's March 15, 2001 decision.

Appellant further submitted a June 15, 2000 report in which his treating physician, Dr. Stern, diagnosed a right inguinal hernia, stating that on June 7, 2000 appellant felt sharp pain while moving a box. Appellant also submitted a May 9, 2002 report in which Dr. Stern noted that appellant had right inguinal pain with no evidence of a hernia and a left-sided inguinal hernia. The Board finds that this evidence failed to include a rationalized medical opinion supporting a causal relationship between appellant's hernia and his June 7, 2000 work incident, these reports are insufficient to raise a substantial question as to the correctness of the prior Office merit decision and do not constitute grounds for reopening appellant's case for a merit review.⁷

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

The decision of the Office of Workers' Compensation Programs dated October 9, 2002 is hereby affirmed.

Dated, Washington, DC
July 11, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ The Board notes that appellant filed a claim for recurrence of disability after the March 15, 2001 decision. The Office has not issued a decision in this case and thus it is not before the Board.