United States Department of Labor
Employees' Compensation Appeals Board

BENNIE L. EVANS, Appellant	)	
and	)	**Docket No. 03-1435**
	)	**Issued: December 21, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Washington, DC, Employer	)	

Appearances:
Robert A. Taylor, Esq., for the appellant
Office of Solicitor, Paul Klingenberg, Esq., for the Director

Oral Argument held November 17, 2004

DECISION AND ORDER

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

JURISDICTION

On May 19, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated April 15, 2003, which denied his request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated March 13, 2000 and the filing of this appeal on May 19, 2003 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On June 30, 1998 appellant, then a 49-year-old letter carrier, filed an occupational disease

claim alleging that he sustained injuries to his cervical and lumbar discs and bilateral carpal tunnel syndrome in the performance of his federal duties.[1] He stopped work in June 1995.[2] On March 12, 1999 the Office accepted appellant's claim for bilateral tendinitis of the wrists and hands.

By letter dated July 21, 1999, the Office requested clarification from Dr. H.S. Pabla, a Board-certified orthopedic surgeon, regarding the cause of appellant's carpal tunnel syndrome.[3] In particular, the Office requested that he clarify what he meant in his May 1996 report by a "nonwork-related systemic medical condition".

On July 23, 1999 Dr. Pabla advised that appellant's carpal tunnel syndrome or upper extremity entrapment neuropathy were secondary to nonwork-related systemic medical disorders and that his repetitive motion or wrist flexion activity were not an underlying cause of his subjective paresthesias.

In a January 3, 2000 decision, the Office denied appellant's claim for carpal tunnel syndrome and found that he was not disabled from April 28, 1995 to March 28, 1999.

By decision dated March 13, 2000, the Office terminated appellant's compensation and medical benefits beginning June 30, 1998 on the basis that the weight of the medical evidence failed to establish that the disability was causally related to a work-related injury. The Office determined that the report of Dr. Pabla represented the weight of the medical evidence.

By letter dated July 28, 2002, appellant, through counsel, requested reconsideration and submitted arguments in support of reopening the claim.[4] With respect to the September 24, 1996 decision, he alleged that the Office tampered or created the appearance of tampering with the May 8, 1996 opinion of Dr. Pabla, the impartial medical examiner. Specifically, appellant noted that the Office should have accepted Dr. Pabla's May 8, 1996 opinion instead of requesting additional information which created the appearance of tampering. Additionally, his representative alleged that the Office erred in its March 13, 2000 decision by incorrectly noting

[1] Appellant has a separate claim for a June 4, 1987 lifting injury, which the Office accepted for lumbar and cervical strain and expanded to include herniated nucleus pulposus at C4-5. He also underwent anterior cervical discectomy and anterior cervical fusion on August 31, 1993 and a revision of the anterior discectomy on March 17, 1994. The record reflects that his medical history related that he had deformed feet and nerves and received benefits from the Veterans Administration for those conditions. Additionally, it was noted that appellant had a history of hypertension and carpal tunnel syndrome. He received compensation for partial disability on the basis of his loss of wage-earning capacity. Appellant returned to work in a light-duty capacity on April 17, 1995. In a September 24, 1996 decision, the Office denied his request for carpal tunnel surgery as this condition was not causally related to the June 4, 1987 employment injury.

[2] The record indicates that appellant stopped work on July 1, 1995 at page 9 and June 1995 at page 2.

[3] Dr. Pabla examined appellant in May 1996, as an impartial medical examiner in a prior claim for carpal tunnel syndrome.

[4] Appellant's representative referred to the Office's September 24, 1996 decision as well as its March 13, 2000 decision.

the dates of injury and disability, by incorrectly stating the issue, by failing to pay benefits for appellant's accepted condition and by improperly terminating benefits on June 30, 1998.[5]

In an April 15, 2003 decision, the Office denied further review of the claim on the grounds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[6] does not entitle a claimant to a review of an Office decision as a matter of right.[7] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[8] The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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.[9] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[10]

In those cases where requests for reconsideration are not timely filed, 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 in accordance with section 10.607(b) of its regulation.[11] Office regulation states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[13] The evidence must be positive, precise and explicit and must

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[5] Appellant's representative alleged that the Office incorrectly stated the issue as whether appellant's bilateral carpal tunnel syndrome was caused and or aggravated by repetitive motions from the job from September 1967 to June 4, 1987 and from April 17 to July 1, 1995, that the Office failed to pay benefits for appellant's bilateral tendinitis from July 1, 1995 to June 30, 1998 based on the accepted condition and subsequently terminated appellant's benefits on June 30, 1998 without meeting its burden of proof.

[6] 5 U.S.C. § 8128(a).

[7] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[8] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[9] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[10] 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 7 at 769; *Jesus D. Sanchez*, *supra* note 8 at 967.

[11] *Thankamma Mathews*, *supra* note 7 at 770.

[12] 20 C.F.R. § 10.607(b).

[13] *Thankamma Mathews*, *supra* note 7 at 770.

be manifest on its face that the Office committed an error.[14] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[15] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[16] 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.[17] 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.[18] The Board must make 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.[19]

ANALYSIS

In its April 15, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on March 13, 2000. Appellant's July 28, 2002 letter requesting reconsideration was submitted more than one year after the March 13, 2000 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening his case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office reviewed the evidence submitted by appellant's representative in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for reconsideration does not raise a substantial question as to the correctness of the Office's March 13, 2000 decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case, is whether appellant's carpal tunnel syndrome and any resulting disability is causally related to his employment.

With his July 28, 2002 request for reconsideration, appellant's representative alleged that there were several examples of error in the Office's March 13, 2000 and September 24, 1996 decisions. Regarding the September 24, 1996 decision, he alleged that the Office tampered with

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

[15] *Jesus D. Sanchez, supra* note 8 at 968.

[16] *Leona N. Travis, supra* note 14.

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

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

[19] *Gregory Griffin, supra* note 9.

the reports of Dr. Pabla by requesting additional information instead of accepting his initial report. However, appellant's representative did not submit any evidence to show tampering. He merely alleged that the Office, by requesting additional information, tampered with the evidence. The Board notes that the record reflects that Dr. Pabla saw appellant in 1996 and the request for additional information was made in 1999. There is no evidence of an improper contact and the Board notes that this is insufficient to show clear evidence of error.

Appellant's representative also alleged that there were three errors in the Office's March 13, 2000 decision. He alleged errors with respect to the dates of injury and disability, that the issue was improperly designated and that the Office failed to pay benefits for appellant's bilateral tendinitis and terminated his benefits on June 30, 1998 without meeting its burden of proof. However, the Board notes that his representative merely expressed a disagreement with the Office's conclusions. His arguments do not show that the issue in the prior decision was improperly decided. The Office properly addressed the issue of whether appellant had established that his carpal tunnel syndrome or need for treatment or disability was related to factors of his federal employment. He did not show that there was error that would *prima facie* shift the weight of the medical evidence in favor of appellant and raise a substantial issue as to the correctness of the Office's decision.

Office procedures provide that 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.[20]

The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in denying his claim for carpal tunnel syndrome related to his June 4, 1987 employment injury or to repetitive trauma in his employment.[21] Therefore, the Board finds that appellant has not presented clear evidence of error.

CONCLUSION

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

[20] *Annie L. Billingsley*, 50 ECAB 210 (1998).

[21] *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 21, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member