United States Department of Labor
Employees' Compensation Appeals Board

JAMES C. BRINK, Appellant	)	
and	)	**Docket No. 03-2304**
	)	**Issued: February 24, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Buffalo, NY, Employer	)	

Appearances:
Scott J. Learned, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 25, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated July 3, 2003, finding that appellant's request for reconsideration was untimely and failed to show clear evidence of error. Because more than one year has elapsed between the last merit decision of August 27, 2001 and the filing of this appeal on September 25, 2003, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUES

The issues are: (1) whether the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed; and (2) whether the Office properly found that appellant failed to present clear evidence of error in his untimely request for reconsideration.

FACTUAL HISTORY

On February 16, 1984 appellant, then a 33-year-old letter carrier, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that he twisted his ankle in the performance of his federal duties. The claim was accepted for sprain of the right foot and later for right-sided sciatica, lumbar spondylosis with L5-S1 radiculopathy. The Office later accepted recurrence claims dated April 24, 1991, November 25, 1996 and March 29, 1999. A January 5, 2001 recurrence claim was denied in a May 5, 2001 decision due to insufficient medical evidence. Specifically, the Office found that the medical evidence did not establish that appellant's medical condition worsened to the point he could not perform his light-duty job or that the nature or extent of his light-duty job changed. The Office further found that the medical evidence failed to establish a causal relationship between appellant's medical condition and the accepted injury.

In a May 25, 2001 letter, appellant requested reconsideration and submitted medical evidence including an April 11, 2001 magnetic resonance imaging (MRI) scan that showed appellant had scar tissue producing pain subsequent to a laminectomy. In an August 27, 2001 decision, the Office denied modification finding that the medical evidence submitted failed to explain how appellant's condition worsened to the point he was totally disabled when appellant had been working subsequent to the laminectomy.

In a September 6, 2001 letter, appellant, through his attorney, submitted an August 20, 2001 report from Dr. Mark Gibson, an orthopedic surgeon and appellant's treating physician. With the report the attorney wrote:

> "Please find enclosed a clarifying report from [appellant's] attending orthopedic surgeon ... I believe this letter more than amply addresses the concerns previously expressed. Therefore, could you please advise as soon as possible as to your position in this regard so that [appellant] may have a hearing. Hopefully, this will not be necessary, as I believe Dr. Gibson more than adequately addresses the concerns raised by your Office."

In a September 10, 2001 letter, appellant's representative wrote:

> "Please find enclosed a clarifying report from [appellant's] attending orthopedic surgeon that was inadvertently mailed to the State of New York's Workers' Compensation Board. As requested[,] in my September 6, 2001 letter, please advise as soon as possible as to your position."

In a January 11, 2002 letter, appellant's attorney wrote:

> "Please accept this letter as a follow up and clarification to my previous correspondence dated September 10, 2001, which also included a narrative report from (appellant's treating physician). In order to clarify [appellant's] position at this time, we do intend to request reconsideration

> of the determination dated August 27, 2001. However, we intend to submit yet another clarifying medical report … I anticipate having this report ready to accompany the request for reconsideration within the next several weeks. We want to make certain that we have absolutely and abundantly dealt with the issues raised in the prior denial … I want to make absolutely certain that we have covered all the bases."

In a November 25, 2002 letter, appellant's representative wrote "[w]e previously requested reconsideration of the denial of total disability payments to [appellant] from the January 5 to June 25, 2001. Could you please advise as to the status of this request."

In a March 12, 2003 letter, appellant's attorney wrote that appellant has been waiting several years for a hearing. In a March 25, 2003 letter, the Office asked appellant to clarify if he was requesting a hearing or reconsideration. In an April 17, 2003 letter, appellant's attorney indicated that he wanted reconsideration.

In a July 3, 2003 decision, the Office denied appellant's request for reconsideration finding appellant's claim was not timely filed and failed to establish clear evidence of error. The Office determined that appellant's request for reconsideration was dated November 25, 2002.

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[2] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[3] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[4] 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.[5]

With respect to the requirements for a request for reconsideration, the Office's procedural manual provides in relevant part: "while no special form is required, the request must be in writing, identify the decision and the specific issue(s) for which reconsideration is being

[1] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.606(b)(2).

[3] 20 C.F.R. § 10.607(a).

[4] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

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

requested and be accompanied by relevant new evidence or argument not previously considered."[6]

ANALYSIS -- ISSUE 1

Appellant's representative argues, in his appeal to the Board, that he had previously requested reconsideration on May 25, 2001 and later on September 10, 2001 and January 11, 2002. Alternatively, he argues that these three letters in "their entirety" should be considered a request for reconsideration.

The decision at issue in this case is the August 27, 2001 decision denying modification of a January 5, 2001 merit decision, a decision that the Office refused to modify in a merit review dated May 7, 2001. Appellant's May 25, 2001 request for reconsideration was received by the Office and is the precipitating event that led to the August 27, 2001 denial of modification. Thus, it could not be the request for reconsideration of the August 27, 2001 decision.

The September 10, 2001 letter that asks the Office to "please advise as soon as possible as to your position" is vague and ambiguous about to what appellant is referring. It says nothing about reconsideration nor does it include new evidence or a new argument.

In his January 11, 2002 letter, appellant's attorney is very specific that a request for reconsideration will be made when appellant has stronger medical evidence and that it would be weeks before that evidence was available. He wrote: "[i]n order to clarify [appellant's] position at this time, we do intend to request reconsideration of the determination dated August 27, 2001. However, we intend to submit yet another clarifying report, medical report … I anticipate having this report ready to accompany the request for reconsideration within the next several weeks. We want to make certain that we have absolutely and abundantly dealt with the issues raised in the prior denial … I want to make absolutely certain that we have covered all the bases." On its face it is clear that appellant's attorney does not consider this letter to be a reconsideration request. Additionally, it did not include additional evidence or argument.

The Office found that appellant's November 25, 2002 letter constituted a request for reconsideration. As this is more than a year after the August 27, 2001 decision, the Board finds that it is untimely.

LEGAL PRECEDENT -- ISSUE 2

The Office may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[7] Office procedures provide that the Office will reopen a claimant's

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (June 2002).

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

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.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must 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 decision.[14] 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.[15]

ANALYSIS ISSUE -- 2

In accordance with its 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 appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

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[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states, "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 and would not require a review of the case...."

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

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

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

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

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

[14] *Leon D. Faidley, Jr.*, *supra* note 5.

[15] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The Board affirms that decision. The issue is whether appellant has submitted evidence that clearly shows the Office erred in denying his recurrence claim. In support of his request for reconsideration, appellant submitted two reports from Dr. Gibson, his treating physician. In both his August 20, 2001 and October 30, 2002 reports, Dr. Gibson writes that appellant's surgery resulted in scar tissue that caused pain to the point that appellant could not continue working between January 5 and June 25, 2001. However, these reports are not probative on the critical issue because neither report explains why or how appellant's condition actually worsened to the point he could no longer do his modified job. Absent that explanation these reports are irrelevant.

In his August 20, 2001 report, Dr. Gibson failed to answer that specific question from the Office. He wrote that "It is amazing that further documentation is necessary based on the plethora of information available." In his October 30, 2002 report, Dr. Gibson wrote "[t]he bottom line is appellant was totally disabled from January 5 through June 25, 2001 as a result of his February 16, 1984 injury … this I think is the natural course of his disease based on that injury and deterioration of symptomatology." As neither of these reports addresses the critical issue, they are not 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 decision.

CONCLUSION

The Board affirms the Office's denial of appellant's request for reconsideration as not timely filed. The Board further finds that the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision by the Office of Workers' Compensation Programs dated July 3, 2003 is hereby affirmed.

Issued: February 24, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member