United States Department of Labor
Employees' Compensation Appeals Board

RUPERT R. FUTREAL, Appellant	)	
	)	**Docket No. 04-42**
and	)	**Issued: February 17, 2004**
DEPARTMENT OF THE NAVY, CAMP LEJEUNE MARINE CORPS BASE, Camp Lejeune, NC, Employer	)	

Appearances:
Rupert R. Futreal, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 1, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated July 3, 2003 which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. He also appealed an April 11, 2003 decision in which the Office denied appellant's request for an oral hearing. Because more than one year has elapsed between the last merit decision dated May 20, 2002 and the filing of this appeal on October 1, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2 and 501.3.

ISSUES

The issues on appeal are: (1) whether Office properly denied appellant's request for an oral hearing; and (2) whether the Office properly determined that appellant's request for reconsideration dated June 26, 2003 was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On March 27, 2002 appellant, then a 46-year-old engineer technician, filed a claim alleging that he injured his right knee and low back when his vehicle was struck by another while in the performance of duty on December 14, 2001. Appellant did not stop work. He submitted a report describing a December 14, 2001 motor vehicle accident in support of his claim.

By letter dated April 15, 2002, the Office asked appellant to submit additional information including a comprehensive medical report from his treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to his claimed injuries.

In a decision dated May 20, 2002, the Office noted that appellant did not respond to the April 15, 2001 letter and denied his claim on the grounds that he failed to submit the requested medical evidence as required by the Federal Employees' Compensation Act.[1] Via email dated October 28, 2002, appellant stated that he would like to "exercise my right of appeal" of the Office decision dated May 20, 2002.[2] In a letter dated January 13, 2003, the Office informed appellant of his appeal rights and requested that he clarify his request. In a letter dated February 3, 2003, appellant requested an oral hearing before an Office hearing representative.

By decision dated April 11, 2003, the Office denied appellant's request for an oral hearing. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

In a letter dated June 26, 2003, appellant requested reconsideration and submitted additional evidence in support of his claim, including medical records from Dr. Christopher Olcott, a Board-certified orthopedist, dated February 15 to September 17, 2002 which indicated that appellant was status post motor vehicle accident in which he sustained a low back and a right knee injury. He advised that appellant's back pain had slowly resolved but that his right knee pain persisted with some relief from a cortisone injection. Dr. Olcott's report of September 17, 2002 advised that appellant had a 10 percent impairment of the right lower extremity. Also submitted were reports from Dr. Richard L. Jordan, a Board-certified internist, dated December 7, 2001 and January 23, 2002 which noted that appellant was treated for plantar fasciitis and right knee pain. He advised that chest and a right knee x-rays revealed no abnormalities. A magnetic resonance imaging (MRI) scan of the right knee dated July 8, 2002 revealed no abnormalities.

By decision dated July 3, 2003, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

---

[1] 5 U.S.C. §§ 8101-8193.

[2] The email was addressed to Mary Turpin, a programs services specialist at the employing establishment who faxed it to the Office on November 4, 2002.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[3] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[4] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[5] The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

> "If the claimant is not entitled to a hearing or review (i.e. the request was untimely, the claim was previously reconsidered, etc.), H&R [Hearings and Review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons." [6]

ANALYSIS -- ISSUE 1

In the present case, appellant requested an oral hearing by an Office hearing representative on February 3, 2003. Section 10.616 of the federal regulation provides: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[7] As the postmark date of appellant's request, February 3, 2003, was more than 30 days after issuance of the May 20, 2002 Office decision, appellant's request for an oral hearing was untimely filed. Therefore, the Office was correct in finding in its April 11, 2003 decision that appellant was not entitled to an oral hearing as a matter of right because his request was not made within 30 days of the Office's May 20, 2002 decision.

While the Office also has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right, the Office, in its April 11, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for an oral hearing on the basis that the case could be resolved by the submission of additional evidence to establish that a diagnosed condition was causally related to his employment.

---

[3] 5 U.S.C. § 8124(b)(1).

[4] 20 C.F.R. §§ 10.616, 10.617.

[5] *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

[7] 20 C.F.R. § 10.616.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[8] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for an oral hearing, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for an oral hearing under section 8124 of the Act.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the 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."[9]

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) 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.[10] 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.[11]

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.[12] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that

---

[8] *Samuel R. Johnson*, 51 ECAB 612 (2000).

[9] 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

[11] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[12] *Annie L. Billingsley*, *supra* note 10.

[13] *Jimmy L. Day*, 48 ECAB 652 (1997).

the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[16]

ANALYSIS -- ISSUE 2

In its July 3, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on May 20, 2002 and appellant's request for reconsideration was dated June 26, 2003, more than one year after the May 20, 2002 decision. Accordingly, appellant's petition for reconsideration was not timely filed.

The Board has reviewed evidence submitted with appellant's most recent reconsideration request and concludes that appellant has not established clear evidence of error in this case. Although he submitted medical evidence, it does not specifically address whether he had any employment-related disability. 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.[17] Thus, this evidence was insufficient to show clear evidence of error in the Office's July 3, 2003 decisions.

Appellant submitted treatment notes from Dr. Olcott dated February 15 to September 17, 2002 which indicated that appellant was status post a motor vehicle accident in which he sustained a low back and a right knee injury. Other reports from Dr. Jordan dated December 7, 2001 and January 23, 2002 noted that appellant was treated for plantar fasciitis and right knee pain. However, none of these records indicate that these conditions were employment related[18] nor did they provide a rationalized opinion supporting causal relationship of the diagnosed conditions of low back and right knee pain to appellant's employment. The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.[19] Thus, it cannot be said that these reports raise a substantial question as to the correctness of the Office's prior decision.[20] The Board therefore finds these records insufficient to raise a

[14] *Id.*

[15] *Id.*

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

[17] *Alan G. Williams,* 52 ECAB 180 (2000).

[18] *Frank Luis Rembisz,* 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

[19] *See Jimmie H. Duckett,* 52 ECAB 332 (2001); *Franklin D. Haislah,* 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[20] *Id.*

substantial question as to the correctness of the Office's merit decision,[21] and the Office properly denied appellant's reconsideration request.

CONCLUSION

The Board therefore finds that the Office properly denied appellant's request for an oral hearing as untimely. The Board further finds that the Office properly determined that appellant's request for reconsideration dated June 26, 2003 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 3 and April 11, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 17, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[21] *Jimmy L. Day*, *supra* note 13.