

**United States Department of Labor
Employees' Compensation Appeals Board**

DEBORAH HODGES, Appellant)
and) Docket No. 04-164
U.S. POSTAL SERVICE, POST OFFICE,) Issued: February 26, 2004
Royal Park, MI, Employer)

)

Appearances:
Linda DeCarlo, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 17, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated August 5, 2003 denying appellant reconsideration as her request was untimely and failed to establish clear evidence of error. The last decision on the merits of the claim was dated March 28, 2002. Pursuant to 20 C.F.R. § 501.3(d)(2), the Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal. The only decision before the Board on this appeal is the Office's August 5, 2003 decision denying appellant's request for a review on the merits of its March 28, 2002 decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On June 6, 2000 appellant, then a 41-year-old letter carrier, filed an occupational disease claim alleging that continuous heavy lifting at her federal employment caused pain in her lower back. In a June 15, 2000 report, Dr. Roger Skindell, an osteopath, wrote that appellant had a history of the same sacral and illiac pain from injury since 1995. He diagnosed recurrent sacroiliac strain with possible radiculopathy. In a June 26, 2000 decision, the Office accepted appellant's claim for sacroiliac strain and later for aggravation of preexisting degenerative disc disease at L5-S1. Appellant stopped work on June 6, 2000 while continuing to receive regular treatments from Dr. Skindell. In a September 18, 2000 report, Dr. Skindell wrote that a magnetic resonance imaging (MRI) scan revealed a herniated disc at L3-4 and radiculopathy.

In a December 21, 2000 report, Dr. Donald Paarlberg, an orthopedic surgeon and Office referral physician, wrote that appellant presented with complaints of low back pain. On examination he found bilateral positive straight leg raising with subjective complaints on rotation and bending. Dr. Paarlberg stated that x-rays revealed severe degenerative arthritis at L5-S1 and to a lesser degree at L4-5. He diagnosed sacroiliac strain and aggravation of preexisting degenerative disc disease and opined that appellant could return to work four hours a day, limited duty. Appellant returned to work part time with restrictions on February 5, 2001 and full time with restrictions on March 19, 2001.

On May 2, 2001 the Office referred appellant back to Dr. Paarlberg. In a May 22, 2001 report, Dr. Paarlberg opined that, based on experience with strains and aggravations, a physical examination and x-rays, appellant's sacroiliac strain and temporary aggravation had resolved and that her current low back pain was related to preexisting degenerative disc disease. He noted that the only objective findings were of degenerative disc disease. Dr. Paarlberg opined that appellant could continue to work with restrictions; however, the restrictions were prophylactic and related to the preexisting degenerative disc disease and not her accepted work conditions.

In an August 22, 2001 letter, the Office proposed terminating appellant's compensation based on Dr. Paarlberg's report. In an August 31, 2001 letter, she stated that she had never had back problems prior to the 1995 injury which had resolved. Appellant added that the pain in her lower back in June 2000 was unbearable and that she has been treated for a herniated disc. In an August 27, 2001 report, Dr. Young Seo, a pain management specialist, wrote that appellant had not recovered from her accepted injury and that she should not be working full time. In a September 25, 2001 decision, the Office finalized the termination.

On November 1, 2001 appellant requested a review of the written record by the Branch of Hearings and Review. In support of her request, she submitted an October 19, 2001 report from Dr. Ira Lieberman, an orthopedist, who wrote that he treated appellant for her 1995 injury and she did not at that time have degenerative disc disease. In a March 28, 2002 decision, the hearing representative affirmed the September 25, 2001 termination, finding the medical evidence supported appellant continued to have back pain, but it did not support that the pain was related to the accepted conditions.

In a letter dated February 27, 2003, but faxed on May 28, 2003, appellant requested reconsideration and submitted a report from Dr. James Bullock, an orthopedic surgeon. In his February 13, 2003 report, Dr. Bullock wrote that, while he had limited access, appellant's medical history, based on test results and a physical examination of appellant had chronic lower lumbar back pain with radiation into the buttocks and lower extremities. He added that he believed appellant's condition to be causally related to her accepted injuries of June 2000. Dr. Bullock stated that, from an organic standpoint, appellant had a mechanical and radicular component to her symptomatology that remained persistent and not clinically improving. He added that radiology studies confirm degenerative changes from L3 down to the sacrum coupled with facet joint arthropathy bilaterally from L3 to the sacrum and disc herniation at the L3-4 level with impingement upon the right L3 and L4 nerve root. Appellant also submitted results from a February 1, 2002 MRI scan that showed disc herniation at L3-4.

In an August 5, 2003 decision, the Office denied reconsideration finding that appellant's claim was untimely and did not establish clear evidence of error. The decision noted that appellant's letter requesting reconsideration was dated February 27, 2003 but was date stamped May 28, 2003 by a fax machine.¹

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² 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.³ 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.⁴ 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.⁵ 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.⁶

The Office, however, 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

¹ Appellant submitted additional evidence after the Office's last decision of August 5, 2003. However, the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c). Appellant may wish to resubmit such evidence to the Office through the reconsideration process. *See* 5 U.S.C. § 8128; 20 C.F.R. § 10.138.

² 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).

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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 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

In its August 5, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on March 28, 2002. Although appellant’s letter requesting reconsideration was dated February 27, 2003, the evidence

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

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 6.

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

in the record indicates that the letter was faxed from the employing establishment and received by the Office on May 28, 2003. The Board must base its decision on the evidence that was in the record at the time of the Office's final decision.¹⁶ Based on the evidence of record, appellant's request for reconsideration was not sent until May 28, 2003. Since this is more than one year after the March 28, 2002 decision, it is untimely.

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.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. The critical issue is the causal relationship between appellant's ongoing back pain and the accepted conditions of sacroiliac strain and temporary aggravation of preexisting degenerative disc disease at L5-S1. With her May 28, 2003 request for reconsideration, appellant submitted a February 13, 2002 report from Dr. Bullock who diagnosed chronic lower lumbar back pain with radiation into the buttocks and lower extremities which he believed to be causally related to her accepted injuries of June 2000. Dr. Bullock stated that from an organic standpoint appellant had a mechanical and radicular component to her symptomatology that remained persistent and not clinically improving. He added that radiology studies confirm degenerative changes from L3 down to the sacrum coupled with facet joint arthropathy bilaterally from L3 to the sacrum and disc herniation at the L3-4 level with impingement upon the right L3 and L4 nerve root. While this report supports appellant's position that she has residual pain from her accepted conditions, it does not, on its face, show a clear evidence of error. Dr. Bullock provided no rationale why he feels appellant's back pain is related to the accepted injuries and not to her degenerative disc disease. In addition, Dr. Bullock indicated he made a limited review of appellant's medical history and he does not discuss appellant's lengthy history of back troubles.

Appellant also submitted results from a February 1, 2002 MRI scan that showed disc herniation at L3-4. This report is irrelevant as it does not discuss the cause of her pain or whether or not her accepted injuries had resolved.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for merit review because her request for reconsideration was untimely and failed to show clear evidence of error.

¹⁶ 20 C.F.R. § 501.2(c). Appellant submitted additional evidence after the August 5, 2003 decision, but the Board cannot review this evidence on the current appeal.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2003 decision by the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member