

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

STAN W. STERGER, Appellant)	
)	
and)	Docket No. 04-425
)	Issued: May 24, 2004
U.S. POSTAL SERVICE, POST OFFICE,)	
Toledo, OH, Employer)	
)	

<i>Appearances:</i> Alan J. Shapiro, Esq., for the appellant Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
--	-------------------------------------

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On December 8, 2003 appellant filed a timely appeal from the decision of the Office of Workers' Compensation Programs dated October 31, 2003, which denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated September 22, 2000 and the filing of the appeal on December 8, 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(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error on October 31, 2003.

FACTUAL HISTORY

This case is on appeal to the Board for the third time.¹ On November 22, 1991 appellant, then a 36-year-old letter sorter machine clerk, filed an occupational claim alleging that he became aware on September 5, 1991 that he had a work-related thoracic sprain accompanied by cervical pain which was diagnosed as fibromyositis. Appellant attributed his pain to working on the letter sorting machine. He stopped working for the employing establishment on September 3, 2001. In a November 22, 1996 decision, the Board found that the opinions of his treating physicians, Dr. Donald B. Marshall, an osteopath, and Dr. Ted E. Berber, a Board-certified neurologist, that appellant's employment aggravated his myofascial pain syndrome and spinal stenosis supported additional development of the medical evidence. The case was remanded for the Office to refer appellant to a second opinion physician for an opinion on whether his employment caused or aggravated his back condition.

On remand the Office referred appellant to Dr. Lawrence M. Spetka, a Board-certified neurological surgeon. On March 4, 1997 Dr. Spetka reviewed appellant's history of injury, performed a physical examination and reviewed a magnetic resonance imaging (MRI) scan which showed mild narrowing of the cervical spinal canal at the C3-4 level, but no evidence of disc herniation or cord or nerve root compression. He opined that appellant's symptoms were more consistent with myofascial pain in the neck and to some extent cervical radiculopathy, although it seemed that there was probably a significant functional overlay to his symptomatology. Dr. Spetka opined that appellant's job as a letter sorter machine operator would not cause any significant nerve root or spinal cord compression and he had no history of any particular injury to the neck or shoulders. He saw no evidence that appellant's job caused or contributed to his present symptom complex. Dr. Spetka thought that appellant developed a chronic pain syndrome and perhaps even a reflex sympathetic dystrophy.

By decision dated April 17, 1997, the Office found that Dr. Spetka's opinion constituted the weight of the evidence and denied the claim.

Appellant requested an oral hearing before an Office hearing representative which was held on May 6, 1998. He described his working conditions, stating that the chairs he used were not ergonomic, that the employing establishment was charged by Occupational Safety and Health Administration (OSHA) with health and safety violations regarding its use of letter sorting machines and that the repetitive motion was particularly great on them. Appellant's attorney stated that Dr. Spetka's diagnosis of chronic pain syndrome was really the same as the diagnoses of chronic myofascial strain syndrome and, therefore, Dr. Spetka's opinion supported that appellant's conditions were work related or at least required clarification.

Appellant submitted a medical report from Dr. Barber dated June 19, 1998, which found that he had a cumulative trauma disorder, myofascial pain syndrome and bilateral median nerve

¹ Docket No. 95-205 (issued November 22, 1996). Docket No. 99-2112 (issued September 22, 2000). The facts and history surrounding the prior appeals are set forth in the prior two decisions and are hereby incorporated by reference.

entrapment at the carpal tunnel as demonstrated on electromyography in 1994. He stated that the cervical MRI scan in 1992 showed narrowing of the spinal canal at C3-4 level related to degenerative spurs and mild herniation of discs at that level. Dr. Barber stated that his opinion was unchanged and that he believed that appellant's injuries occurred as a result of his employment as a letter sorter for the employing establishment over a seven-year period from 1984 to 1991.

By decision dated May 4, 1999, the Office hearing representative affirmed the Office's April 17, 1997 decision, finding Dr. Spetka's report constituted the weight of medical opinion.

On May 25, 1999 appellant appealed to the Board. In a decision dated September 22, 2000, the Board affirmed the Office's May 4, 1999 decision.

By letter dated October 1, 2003, appellant requested reconsideration before the Office and submitted three medical reports from Dr. Barber dated October 9, 2002 and February 5 and July 23, 2003 and a cervical MRI scan dated July 2, 2003. In the October 9, 2002 report, Dr. Barber stated that he had written numerous letters on behalf of the claim and he did "not know how much more unequivocal [he could] make it that [appellant's] previous duties contributed, if not entirely caused, his disability." On July 23, 2002 Dr. Barber noted that he had written three detailed letters regarding appellant's condition, prognosis and mechanism of injury." He indicated that he had nothing further to add. On February 5, 2003 Dr. Barber stated that he wanted to send an update and correction of an earlier correspondence. He used the diagnosis of fibromyalgia which was in error and that the correct diagnoses were fibromyositis as well as carpal tunnel syndrome.

The July 2, 2003 MRI scan showed changes of degenerative spondylosis with posterior marginal osteophyte formation encroaching left intervertebral foramina at C3-4 and a combination of posterior bulging of the disc and likely some marginal osteophyte formation encroaching left intervertebral foramina at C6-7. The report stated that changes at C6-7 had progressed since the previous examination.

By decision dated October 31, 2003, the Office found that appellant's reconsideration request of October 1, 2002 was filed more than a year after the Board's September 22, 2000 decision. Therefore, the request was untimely and the evidence failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

The Office, through its regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office's merit decision, for which review is sought.³

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a).

The imposition of a one-year time limitation, within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).⁴ This section does not mandate that the Office review a final decision simply upon request by a claimant.

Section 10.607(b) states that, the Office will consider an untimely application for reconsideration only if it demonstrates clear error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁵ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ Thus, evidence such as a well-rationalized medical report that, 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 does not require merit review of a case.¹⁰ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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.¹¹ 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.¹² 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 a merit review in the face of such evidence.¹³

⁴ *Diane Matchem*, 48 ECAB 532 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ *Id.*

⁶ *Pete F. Dorso*, 51 ECAB 424, 427 (2001); *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *Pete F. Dorso*, *supra* note 6; *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *See Jesus D. Sanchez*, 41 ECAB 964, 967-68 (1990).

⁹ *Leona N. Travis*, *supra* note 7.

¹⁰ *Annie Billingsley*, 50 ECAB 210 (1998).

¹¹ *George C. Vernon*, 54 ECAB ___ (Docket No. 02-1954, issued January 6, 2003).

¹² *Jimmy L. Day*, 48 ECAB 654 (1997).

¹³ *Thankamma Mathews*, 44 ECAB 765 (1993).

ANALYSIS

In this case, appellant's letter requesting reconsideration dated October 1, 2003, was more than one year after the Board's September 22, 2000 merit decision and was, therefore, untimely. He must, therefore, establish clear evidence of error by the Office in the denial of his claim. The reconsideration request must establish that the Office's decision was, on its face, erroneous.

In this case, the evidence submitted in support of appellant's request for reconsideration includes Dr. Barber's October 9, 2002 and February 5 and July 23, 2003 reports. In his October 9, 2002 report, Dr. Barber emphasized that appellant's previous duties might have caused, if not entirely contributed to his disability. He did not address whether the aggravation was temporary or permanent. Dr. Barber's opinion is generally repetitious and duplicative of his prior reports. In the July 23, 2003, report, Dr. Barber stated that he had nothing new to add to his reports. The February 5, 2003 report stated that the correct diagnoses were fibromyositis as well as carpal tunnel syndrome, but did not address the issue of causation. The July 2, 2003 MRI scan showed degenerative changes but is not relevant to the determination of whether causation was established. Even if it were found that Dr. Barber's opinion was sufficiently rationalized to conflict with Dr. Spetka's opinion, it is not enough to establish clear evidence of error. The fact that the evidence may be construed so as to produce a contrary conclusion does not *prima facie* shift the weight of evidence in favor of the claim or raise a substantial question as to the correctness of the Office's decision.¹⁴ Appellant has not established clear evidence in the Office's decision.¹⁵ The evidence he submitted does not establish that the Office committed clear evidence of error in its May 4, 1999 decision.

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration dated October 21, 2003, filed more than a year after the Board's September 22, 2000 decision, was untimely and failed to establish clear evidence of error.

¹⁴ See *Veletta C. Coleman*, 48 ECAB 367 (1997).

¹⁵ Appellant's contention at the hearing that Dr. Spetka's opinion actually supported that his neck and back conditions were work related is contrary to Dr. Spetka's specific opinion that his work as a letter sorter operator did not cause his condition.

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2003 decision of the Office of Workers' Compensation be affirmed.

Issued: May 24, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member