United States Department of Labor
Employees' Compensation Appeals Board

JOE W. MAYBEE, Appellant	)	
and	)	**Docket No. 04-1500**
	)	**Issued: October 19, 2004**
U.S. POSTAL SERVICE, POST OFFICE, West Sacramento, CA, Employer	)	

Appearances:
Joe W. Maybee, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 19, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated May 10, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's February 19, 2003 decision, denying his claim for a recurrence of disability. Because more than one year has elapsed between this decision and the filing of the appeal on May 19, 2004 the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for merit review on the grounds that his application for review was untimely and did not show clear evidence of error.

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). A claimant may only appeal a final decision of the Office which adversely affects him. *See* 20 C.F.R. § 501.3(a). The record contains a July 8, 2003 Office merit decision, but this decision was not adverse to appellant as the Office found that his compensation should not be terminated.

FACTUAL HISTORY

On January 15, 1998 appellant, then a 52-year-old letter carrier, filed an occupational disease claim alleging that he sustained injury to his neck, shoulders and upper back due to employment factors. Appellant stopped work in early November 1997. In May 1998, the Office accepted that appellant sustained acceleration of cervical spine degeneration and paid compensation for periods of disability. He returned to limited-duty work for the employing establishment in August 1998.

Appellant stopped work on September 3, 2002 and claimed that he sustained a recurrence of total disability on that date due to his accepted employment injury.

By decision dated February 19, 2003, the Office determined that appellant did not meet his burden of proof to establish that he sustained an employment-related recurrence of total disability on or after September 3, 2002.[2] The Office determined that the November 30, 2002 report of Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon who served as an Office referral physician, constituted the weight of medical opinion. In his report, Dr. Sherman indicated that appellant did not require any work restrictions due to an employment-related cervical condition.[3]

In May 2003, the Office determined that there was a conflict in the medical evidence regarding whether appellant continued to have any residuals of his accepted employment injury. It referred appellant and the case record to Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, for an impartial medical examination.[4] In a report dated May 22, 2003, Dr. Auerbach stated that appellant had intermittent stiffness in his neck and burning pain at the base of his neck into the right upper trapezius. He concluded that appellant continued to have residuals of his employment injury, acceleration of cervical spine degeneration and noted that this aggravation was permanent.

By decision dated July 8, 2003, the Office determined that it would not terminate appellant's compensation as proposed. The Office noted that the May 22, 2003 report of Dr. Auerbach established that appellant had residuals of his accepted employment injury.

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[2] The Office inadvertently listed that dates of appellant's claimed recurrence of disability as June 12, 2001 and July 26, 2002, but appellant actually claimed that he sustained a recurrence of total disability when he stopped work on September 3, 2002.

[3] On February 19, 2003 the Office also issued a notice of proposed termination of appellant's compensation.

[4] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

By letter dated April 15, 2004, appellant requested reconsideration of his claim.[5] He alleged that the denial of his claim was based on flawed medical information and argued that the opinion of Dr. Sherman, finding that he ceased to have residuals of his employment injury, was refuted by the opinion of Dr. Auerbach. Appellant noted that Dr. Auerbach determined that the effects of his employment injury were permanent. He further indicated that the findings of his treating physicians also showed that he had employment-related residuals.

By decision dated May 10, 2004, the Office denied appellant's request for merit review on the grounds that his application for review was untimely and did not show clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.[6] 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.[7]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. 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."[8] Office regulation and procedure 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.[9]

[5] In an undated letter received by the Office on March 10, 2004, appellant indicated that he wished to have another Office representative review his claim. He did not request reconsideration of his claim at that time.

[6] 20 C.F.R. § 10.607(a).

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

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

[9] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "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." *Id.* at Chapter 2.1602.3c.

ANALYSIS

In the May 10, 2004 decision, the Office properly determined that appellant filed an untimely request for reconsideration of the February 19, 2003 decision.[10] Appellant's reconsideration request was filed on April 15, 2004, more than one year after February 19, 2003 and therefore he must demonstrate clear evidence of error on the part of the Office in issuing this decision.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17]

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its February 19, 2003 decision. The Office determined that appellant did not meet his burden of proof to establish that he sustained an employment-related recurrence of total disability between September 3, 2002 and February 19, 2003, *i.e.*, the date the decision was issued. In his April 15, 2004 reconsideration letter, appellant argued that this determination was refuted by the May 22, 2003 opinion of Dr. Auerbach, a Board-certified orthopedic surgeon, who served as an impartial medical specialist to resolve a conflict in the medical evidence regarding whether appellant continued to have any residuals of his accepted employment injury. However, appellant's

[10] In his April 15, 2004 letter, appellant did not explicitly identify the Office decision for which he was requesting reconsideration. However, the Office's February 19, 2003 decision was the last adverse Office merit decision of record. The record contains a July 8, 2003 decision in which the Office determined that it would not finalize its February 19, 2003 notice of proposed termination of appellant's compensation. However, this decision was not adverse to appellant and Office regulation provides that a claimant may only request reconsideration of an adverse Office decision. *See* 20 C.F.R. § 10.605.

[11] *See supra* notes 7 to 9 and accompanying text.

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

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

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

[15] *See Leona N. Travis*, *supra* note 13.

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

[17] *Leon D. Faidley, Jr.*, *supra* note 7.

argument is not relevant to the main issue of the Office's February 19, 2003 decision; Dr. Auerbach did not provide any opinion regarding whether he sustained an employment-related recurrence of total disability for the period September 2002 and February 2003. Dr. Auerbach merely found that, at the time of the May 22, 2003 examination, appellant exhibited residuals of his employment-related injury such as neck stiffness and pain in his neck and right shoulder. Appellant also suggested that the opinions of his attending physicians showed that he sustained an employment-related recurrence of total disability on or after September 3, 2003, but he did not adequately articulate the basis for this argument. For these reasons, appellant has not raised a substantial question concerning the correctness of the Office's February 19, 2003 decision.

CONCLUSION

The Board finds that the Office properly denied appellant's request for merit review on the grounds that his application for review was untimely and did not show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2004
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member