United States Department of Labor
Employees' Compensation Appeals Board

ROBERT G. WILLIS, Appellant	)	
and	)	**Docket No. 05-1684**
	)	**Issued: December 5, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Newark, NJ, Employer	)	

Appearances:
Robert G. Willis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 8, 2005 appellant filed a timely appeal from January 9 and May 31, 2005 Office of Workers' Compensation Programs decisions, which denied his request for reconsideration. Because more than one year has elapsed from the last merit decision dated March 11, 2002 to the filing of this appeal on August 8, 2005, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's April 29, 2004 request for review was untimely filed and failed to demonstrate clear evidence of error; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has been before the Board on two prior occasions. By decision dated September 25, 2000, the Board found that appellant failed to establish that he sustained an injury

in the performance of duty but that the Office erred in denying his reconsideration request. The Board remanded the case to the Office to consider the medical evidence submitted with appellant's request for reconsideration.[1] The Office thereafter reviewed the case on the merits and issued a November 17, 2000 decision, finding that the medical evidence did not establish that appellant sustained a back injury causally related to his federal employment. Appellant timely requested reconsideration and in a January 30, 2001 decision, the Office denied his request for merit review. In a March 11, 2002 decision, the Board affirmed the November 17, 2000 decision finding that appellant failed to establish that he sustained an employment-related injury and the January 30, 2001 decision denying his request for reconsideration.[2] On April 4, 2002 appellant requested reconsideration of the Board's decision and in an order dated January 22, 2003, the Board denied this request. The law and the facts of the previous Board decisions are incorporated herein by reference.

On April 5 and September 4 and 28, 2004 appellant requested reconsideration and submitted a March 16, 2004 report from his attending Board-certified orthopedic surgeon, Dr. Morton Farber. He again requested reconsideration on January 6, 2005 and submitted a January 5, 2005 report from Dr. Farber, who noted that he had treated appellant since 1997 and reported appellant's history of a 1993 injury. He opined that appellant's condition was "due to injuries first suffered on the job in 1993" when he hurt his back lifting heavy objects with recurrent injuries "occurring because of the heavy workload." Dr. Farber concluded that appellant was totally disabled.

By decision dated January 19, 2005, the Office found that appellant's reconsideration requests were untimely filed and failed to demonstrate clear evidence of error. On February 24 and March 1, 2005 appellant again requested reconsideration and submitted additional medical evidence. This consisted of a lumbar spine x-ray dated October 5, 1996, Veterans Administration clinic notes dated in October and November 1996, an unsigned, unidentified treatment note dated November 15, 1996, unsigned treatment notes from a Dr. Shaw[3] dated October 9 and 15, 1998 and reports from Dr. Farber dated January 5 and 25, 2005. In the January 25, 2005 report, Dr. Farber advised, "evidently" he injured his lower back in 1993 that caused recurrent back and leg pain. He opined that appellant could no longer work as a driver because he could not lift heavy objects. Appellant also submitted a statement explaining that he initially hurt his back in 1993 while unloading a postal vehicle and in 1996 the pain became so severe he saw a doctor.

In a decision dated May 31, 2005, the Office denied appellant's reconsideration request, finding that he did not show that the Office erroneously applied or interpreted a specific point of law, advance a point of law or fact not previously considered by the Office or submit relevant or pertinent evidence not previously considered by the Office.

[1] Docket No. 99-1320.

[2] Docket No. 01-1716.

[3] The physician is not otherwise identified.

LEGAL PRECEDENT -- ISSUE 1

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[4] The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[5] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[6] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of Office regulations,[7] if the claimant's application for review shows "clear evidence of error" on the part of the Office. In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.[9]

ANALYSIS -- ISSUE 1

The Board notes that, as more than one year had elapsed from the date of issuance of the March 11, 2002 Board decision, appellant's requests for reconsideration in April and September 2004 and January 2005 were untimely filed. The one-year time limitation on reconsideration requests begins to run subsequent to any merit decisions on the issues, including any such decision of the Board.[10]

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[4] 5 U.S.C. §§ 8101-8193.

[5] 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

[6] *Cresenciano Martinez*, 51 ECAB 322 (2000).

[7] 20 C.F.R. § 10.607.

[8] *Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005).

[9] *Nancy Marcano*, 50 ECAB 110 (1998).

[10] *Odell Thomas*, 42 ECAB 405 (1991).

The Board finds that appellant failed to establish clear evidence of error with his requests. Appellant submitted additional medical evidence from his attending orthopedist, Dr. Farber. In order to establish clear evidence of error, a claimant must submit evidence that is positive, precise and explicit and must manifest on its face that the Office committed an error. 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] In two reports submitted by appellant prior to the January 19, 2005 Office decision, Dr. Farber merely reiterated findings and conclusions he had stated in reports previously of record. These reports do not raise a substantial question concerning the correctness of prior Office decisions. Consequently, appellant has not met his burden to establish clear evidence of error on the part of the Office such that the Office erred in denying merit review. The Office properly performed a limited review of appellant's argument to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[12] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[13] Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[14] Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[15]

ANALYSIS -- ISSUE 2

It is noted that, as more than one year had elapsed from the date of issuance of the March 11, 2002 Board decision, the last merit decision in this case and appellant's February and March 2005 reconsideration requests, these requests were untimely filed. However, section 10.610 provides that an award for or against payment of compensation may be reviewed at any time on the Director's own motion.[16]

With his February and March 2005 requests, appellant merely argued that the medical evidence established that he sustained an employment-related injury. The Board however finds

[11] *Nancy Marcano, supra* note 9.

[12] 20 C.F.R. § 10.606(b)(2).

[13] 20 C.F.R. § 10.608(b).

[14] *Helen E. Paglinawan*, 51 ECAB 591 (2000).

[15] *Kevin M. Fatzer*, 51 ECAB 407 (2000).

[16] 20 C.F.R. § 10.610.

that this does not demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[17]

With respect to the third above-noted requirement under section 10.606(b)(2), the October 5, 1996 x-ray the Veterans Administration clinic notes dated October 5 and 25 and November 2, 1996 and Dr. Farber's January 5, 2005 report were previously of record. The Board has long held that evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[18] As the reports of Dr. Shaw are unsigned and he is not further identified, the Board finds that these do not constitute competent medical evidence and are therefore insufficient to warrant merit review.[19] Appellant also submitted a handwritten November 15, 1996 report. There is nothing in the report to identify who prepared the report and while it contains a diagnosis of low back pain and degenerative disc disease, it too does not constitute competent medical evidence.[20] In a January 25, 2005 report, Dr. Farber merely reiterated his conclusion that work factors had caused appellant's condition and, as previously stated, both the Office and Board had previously reviewed numerous reports by Dr. Farber and this report is therefore duplicative.[21] Appellant therefore did not submit relevant and pertinent new evidence not previously considered by the Office and the Office properly denied his reconsideration requests.

CONCLUSION

The Board finds that, as appellant's reconsideration requests were not timely filed and he failed to establish clear evidence of error, the Office properly denied a merit review of his claim in its January 19, 2005 decision. The Board further finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.606(b)(2).

[18] *James A. Castagno*, 53 ECAB 782 (2002).

[19] *See Thomas L. Agee*, 56 ECAB ___ (Docket No. 05-335, issued April 19, 2005).

[20] *Id.*

[21] *James A. Castagno*, *supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 31 and January 19, 2005 be affirmed.

Issued: December 5, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board