United States Department of Labor
Employees' Compensation Appeals Board

DAVID G. BUELL, Appellant	)	
and	)	**Docket No. 04-2125**
	)	**Issued: January 25, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Orlando, FL, Employer	)	

Appearances
Ronald Webster, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 24, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated August 6, 2004, which denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error, and from an Office nonmerit decision dated January 27, 2004. Because more than one year has elapsed between the last merit decision dated April 29, 2003 and the filing of this appeal on August 24, 2004, 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).

ISSUES

The issues are: (1) whether the Office properly refused to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

Appellant, a 50-year-old city carrier, filed a claim for benefits on May 4, 2001, alleging that he injured his neck and lower back on May 3, 2001 when his postal vehicle was struck from behind by another motor vehicle. The Office accepted the claim for cervical and lumbar strain and bulging annulus at L5-S1.

On December 19, 2001 Dr. Michael J. Broom, an attending Board-certified orthopedic surgeon, requested authorization for a decompressive laminectomy at L5-S1. Dr. Broom did not submit a medical report explaining the need for surgery.

In order to determine the necessity for the proposed laminectomy, the Office referred appellant to Dr. Jack L. Gresham, a Board-certified orthopedic surgeon, for a second opinion examination. After stating findings on examination, reviewing the medical history and diagnostic test results and the statement of accepted facts, Dr. Gresham concluded that there was no objective medical evidence showing that the proposed surgery was necessary or causally related to appellant's May 3, 2001 employment injury.

By decision dated May 14, 2002, the Office denied authorization for appellant's proposed surgery, finding that he failed to submit sufficient medical evidence to establish that it was necessary or causally related to the accepted May 3, 2001 employment injury.

By letter dated May 20, 2002, appellant's attorney requested an oral hearing, which was held on February 25, 2003. By decision dated April 29, 2003, an Office hearing representative affirmed the May 14, 2002 decision denying authorization for surgery.

By letter dated November 14, 2003, appellant's attorney requested reconsideration. Appellant submitted a May 18, 1998 work limitation slip signed by Dr. John Gray, a chiropractor, which stated: "Prognosis = anticipates full recovery with no limitations" and a diagnosis of lumbar subluxation.

By decision dated January 27, 2004, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

By letter dated June 17, 2004, appellant's attorney again requested reconsideration and submitted a May 25, 2004 deposition of Dr. Gray who indicated that he treated appellant in 1998, who did not have any significant lower back problems or conditions. Dr. Gray was asked hypothetical questions regarding whether the low back symptoms and diagnostic findings of bulging L5-S1 annulus appellant was experiencing were likely to arise from the type of automobile accident he sustained in May 2001, since there were no such findings at the time he treated appellant in 1998. Dr. Gray noted that he had not seen or treated appellant since 1998.

By decision dated August 6, 2004, the Office denied appellant's request for reconsideration, finding that he had not timely requested reconsideration and failed to establish clear evidence of error. The Office stated that appellant was required to present evidence which

showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT -- ISSUE 1

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[1] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[2]

ANALYSIS -- ISSUE 1

In the present case, appellant did not show that the Office erroneously applied or interpreted a specific point of law; he did not advance a relevant legal argument not previously considered by the Office; and he did not submit relevant and pertinent evidence not previously considered. The evidence appellant submitted is not pertinent to the issue on appeal. The May 18, 1998 work limitation slip from Dr. Gray contains a summary statement pertaining to appellant's back condition in 1998, three years prior to the May 3, 2001 employment incident and did not address the relevant issue of causal relationship. Moreover, it is not readily apparent that Dr. Gray is a "physician" as defined under the Act. See 5 U.S.C. § 8101(2) which includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. It does not appear that the Office has accepted a subluxation of the spine in this case or that Dr. Gray obtained x-rays demonstrating the presence of a spinal subluxation. *See Jay K. Tomokiyo*, 51 ECAB 361 (2000). The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[3] Appellant's reconsideration request failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. The Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.[4]

[1] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[2] *Howard A. Williams*, 45 ECAB 853 (1994).

[3] *See David J. McDonald*, 50 ECAB 185 (1998).

[4] The Board notes that appellant submitted additional evidence to the record following the May 29, 2003 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act[5] does not entitle an employee to a review of an Office decision as a matter of right.[6] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] As one such limitation, the Office has stated that it 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.[8] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).[9]

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[10] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.[11]

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[5] 5 U.S.C. § 8128(a).

[6] *Jesus D. Sanchez,* 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *Gregory Griffin,* 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[7] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advances a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

[8] 20 C.F.R. § 10.607(b).

[9] *See* cases cited *supra* note 6.

[10] *Rex L. Weaver,* 44 ECAB 535 (1993).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifested 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's decision.[17] The Board makes an independent determination of whether an appellant 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.[18]

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on April 29, 2003. Appellant requested reconsideration on June 17, 2004; thus, the reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's June 17, 2004 request for reconsideration failed to show clear evidence of error. The deposition of Dr. Gray is of limited probative value as it does not provide a reasoned medical opinion on the relevant issues. Dr. Gray merely stated that appellant did not have any lower back problems or conditions at the time he treated him in 1998. He was asked a hypothetical question from appellant's attorney, who asked whether appellant's low back symptoms and findings of bulging L5-S1 annulus were likely to arise from the type of automobile accident he sustained in May 2001. Dr. Gray's noted that he had not seen or treated appellant since 1998. As noted, it is not readily apparent that Dr. Gray is a physician and his opinion is not relevant to the issue, the need for surgery.

The Office reviewed the medical evidence and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence

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

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

[14] *See Jesus D. Sanchez, supra* note 6.

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

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

[17] *Leon D. Faidley, Jr., supra* note 6.

[18] *Gregory Griffin, supra* note 6.

submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a). The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration request dated June 17, 2004. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on August 6, 2004.

ORDER

IT IS HEREBY ORDERED THAT the August 6 and January 27, 2004 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Issued: January 25, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member