United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket Nos. 06-1348 & 06-1414**
	)	**Issued: December 4, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Memphis, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2006 appellant filed a timely appeal of a March 31, 2006 decision of the Office of Workers' Compensation Programs that denied his request to change physicians. On June 13, 2006 appellant filed a timely appeal of a July 7, 2005 Office decision which denied his request for reconsideration without conducting a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the change of physician and reconsideration decisions.

ISSUES

The issues are: (1) whether the Office properly exercised its discretion in denying appellant's request to change treating physicians; and (2) whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On November 6, 1998 appellant, then a 49-year-old mail handler, filed a traumatic injury claim alleging that workplace equipment caused him to be thrown to the floor.[1] He did not initially stop work. On February 7, 2001 the Office accepted appellant's claim for a cervical strain and thoracic strain. On August 14, 2003 the Office expanded the claim to include aggravation of cervical spondylosis and appellant underwent an authorized anterior cervical discectomy on August 27, 2003.[2]

The record reflects that appellant filed a claim for recurrence of disability on February 3, 2001 which was denied by the Office on August 2, 2001. On February 4, 2002 an Office hearing representative affirmed the Office's August 2, 2001 decision which denied appellant's claim for a recurrence of disability on or after February 3, 2001 causally related to his employment injury. A subsequent claim for a recurrence of disability on February 9, 2004 was accepted by the Office in a decision dated June 30, 2004.

On December 7, 2004 Dr. David West, an osteopath, Board-certified in orthopedic surgery, and a second opinion physician, determined that appellant should be placed on permanent restrictions, which included no lifting greater than five pounds, no pushing or pulling, no squatting, no lifting above the shoulders and no overhead activity. He recommended pain management, and additional therapy such as work hardening and a functional capacity evaluation.

On February 25, 2005 appellant filed a Form CA-7 for compensation for leave without pay from March 20 to June 22, 2001. By letter dated March 28, 2005, the Office advised appellant that it had received his CA-7 claim for compensation for the period March 20 to June 22, 2001; however, he had previously filed a claim for this same period of time on March 19, 2001, which was denied by decision dated August 2, 2001. Furthermore, the Office noted that, after appellant requested a hearing, the Office hearing representative affirmed the decision on February 4, 2002.

In a June 7, 2005 letter, appellant requested reconsideration of the Office's decision denying his request for compensation from March 20 to June 22, 2001. Appellant noted that he was under the care of Dr. Lovell, who placed him off work from March 20 to June 22, 2001, while awaiting surgery.

In support of his request, the Office received several medical reports. These included diagnostic reports from January 15, 1999, February 16, 2001, May 24 and June 16, 2005,

[1] Appellant has several prior claims and also a nonwork-related back injury in 1998 and hepatitis in 1995.

[2] The record reflects that appellant initially returned to light duty and intermittent total disability before returning to full duty on March 3, 1999. He subsequently stopped work on June 16, 2003 and underwent a cervical discectomy on August 27, 2003. Appellant returned to limited duty on November 6, 2003 and stopped work again on November 12, 2003. He subsequently returned to work on February 4, 2004 and stopped work on February 9, 2004. On March 9, 2004 appellant was return to full duty with no restrictions by his treating physician, Dr. LaVerne Lovell, a Board-certified neurological surgeon.

hospital admission records from January 15, 1999, and a copy of a note from Dr. Lovell dated March 9, 2001, which indicated that appellant was off work and was awaiting surgery with an approximate date of March 23, 2001. Appellant also provided a copy of Dr. Lovell's June 19, 2001 report which indicated that appellant could return to work on June 20, 2001 without restrictions. In a May 24, 2005 report, Dr. Lovell determined that appellant had left upper extremity pain of an unclear etiology, which was not work related. The Office also received several reports such as vocational rehabilitation reports and requests for authorization for treatment.

In a June 15, 2005 letter, appellant indicated that he would like to change physicians. He noted that the care he received from his treating physician, Dr. Lovell, included two surgeries on August 27, 2003 and January 2, 2004. He asserted that he was still in pain, and alleged that, after receiving permanent restrictions from the second opinion physician, Dr. West, he wished to have a new treating physician.

In a June 17, 2005 report, Dr. Lovell noted that appellant returned for follow-up with a magnetic resonance imaging (MRI) scan[3] and advised that there were no "frank disc herniations" noted. He recommended a left C7 selective nerve root block.

By decision dated July 7, 2005, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error. The Office determined that the evidence submitted did not raise a substantial question concerning the correctness of the Office's decision and was insufficient to warrant a merit review of the August 2, 2001 decision. The Office specifically noted that appellant did not present medical evidence that linked his disability from 2001 to his claim.

In a July 25, 2005 decision, the Office determined that appellant was recently employed as a modified mail handler effective April 30, 2005 with wages of $835.81 per week. It determined that the position fairly and reasonably represented appellant's wage-earning capacity. The Office also indicated that, since appellant had demonstrated the ability to do the duties of the position for two months or more, it was suitable to his partially disabled condition. Furthermore, the Office determined that the actual earnings met or exceeded the current wages of the job he held when injured. Appellant was informed that his entitlement to wage-loss compensation ended on the date he was reemployed with no loss in earning capacity.

By decision dated July 27, 2005, the Office granted appellant a schedule award for a total of 51.16 weeks of compensation for a nine percent permanent impairment of both the right and left upper extremities.

On August 4, 2005 the Office issued a preliminary overpayment finding due to appellant's receipt of total disability compensation for a period in which he had only partial wage

[3] A June 16, 2005 MRI scan of the spine read by Dr. Timothy Donovan, a Board-certified radiologist, revealed postoperative changes at C6-7 and possible foraminal stenosis on the left at C7-T1.

loss. In a January 27, 2006 decision, the Office finalized the preliminary finding and determined that appellant received an $880.30 overpayment of compensation for which he was at fault.[4]

By letter dated February 2, 2006, appellant requested that he be allowed authorization to treat with Dr. Rommel G. Childress, a Board-certified orthopedic surgeon.

In a letter dated February 8, 2006, the Office advised appellant that it was unable to approve his request to change physicians. It noted that appellant was under the care of Dr. Lovell. The Office indicated that appellant should provide a detailed account, explaining his reasons for requesting a change in physicians.

In a letter dated February 16, 2006, appellant explained that he wished to change physicians from Dr. Lovell to Dr. Childress because Dr. West provided him with permanent restrictions, while Dr. Lovell concluded that he could be released to full-duty status.

By decision dated March 31, 2006, the Office denied appellant's request for authorization to change physicians.[5] The Office noted that Dr. Lovell had been appellant's attending physician for many years and provided ongoing medical treatment for the accepted spine conditions. The Office also noted that Dr. Lovell had documented his reports with current objective findings and subsequent treatment relative to those findings and concluded that there was nothing to support that his treatment or his findings concerning appellant were in error.

LEGAL PRECEDENT -- ISSUE 1

Under section 8103(a) of the Federal Employees' Compensation Act,[6] an employee is permitted the initial selection of a physician. However, Congress did not restrict the Office's power to approve appropriate medical care after the initial choice of a physician. The Office has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing the means to achieve this goal within the limitation of allowing an employee the initial choice of a doctor. An employee who wishes to change physicians must submit a written request to the Office fully explaining the reasons for the request. The Office may approve the request in its discretion if sufficient justification is shown.[7] The only limitation on the Office's authority is that of reasonableness.[8] Abuse of discretion is generally shown

[4] Appellant has not appealed this decision to the Board.

[5] The Office did not initially issue a decision on this matter. In a memorandum of telephone call dated March 23, 2006, the Office advised appellant that a difference in opinion regarding his restrictions between the treating physician and the second opinion physician were not sufficient to justify a change in physicians. The Office noted that appellant wished a written decision on his request to change physicians. By letter also dated March 23, 2006, appellant requested a written decision on the denial of his request to change physicians.

[6] 5 U.S.C. § 8103(a).

[7] *See Elizabeth Stanislav*, 49 ECAB 540 (1998); 20 C.F.R. § 10.316(b).

[8] *Daniel J. Perea*, 42 ECAB 214 (1990); *Pearlie M. Brown*, 40 ECAB 1090 (1989).

through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[9] It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[10]

Requests that are often approved include those for transfer of care from a general practitioner to a physician who specializes in treating conditions like the work-related one, or the need for a new physician when an employee has moved.[11]

ANALYSIS -- ISSUE 1

Appellant generally alleged that he wished to change physicians, from his treating physician, Dr. Lovell, a Board-certified neurological surgeon, to Dr. Childress, a Board-certified orthopedic surgeon. However, he did not provide any evidence that his treating physician provided inadequate treatment. Appellant generally asserted that Dr. Lovell had operated on him on two occasions, but that he did not wish to undergo a third surgical procedure from the same physician. He alleged that his reasons for wanting to change from his treating physician to Dr. Childress, included that Dr. West, the second opinion physician, had provided him with permanent restrictions; whereas Dr. Lovell had found that he had reached maximum medical improvement and returned him to full duty. Appellant expressed his contention that the physicians did not agree on the status of his health. He did not indicate that he had moved to a new area or alleged that Dr. Lovell, who as noted, was a specialist, provided inadequate or improper care which could be construed as insufficient for treating his work-related condition.

The Board finds that the Office adequately explained its reasons for not approving the change in treatment. The Office informed appellant that Dr. Lovell had provided ongoing care as needed for his accepted spine conditions. It noted that Dr. Lovell had documented his reports with current objective findings and had treated appellant in response to those findings. The Office concluded that there was nothing to support that Dr. Lovell's treatment or his findings concerning appellant were in error. Appellant has failed to provide medical evidence that Dr. Lovell's diagnosis or treatment was inadequate. Therefore, he has not demonstrated that the Office abused its discretion in denying his request. Appellant has failed to establish that the Office abused its discretion by refusing to authorize a change of physicians on the basis of inadequate treatment or improper care.

Based on the evidence of record, the Office acted reasonably in determining that a change of physicians was not necessary to treat appellant's accepted conditions.

[9] *Id.*

[10] *C.N.*, 57 ECAB ___ (Docket No. 06-1245, issued September 12, 2006); *Rosa Lee Jones*, 36 ECAB 679 (1985).

[11] 20 C.F.R. § 10.316(b).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[12] vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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 --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[13]

The Office's 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).[14] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). 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 decision for which review is sought.[15]

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of 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.[16]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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 that 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.[17] To show clear

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[12] 5 U.S.C. §§ 8101-8193.

[13] 5 U.S.C. § 8128(a).

[14] *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[15] 20 C.F.R. § 10.607(a).

[16] 20 C.F.R. § 10.607(b).

[17] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

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. 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.[18]

ANALYSIS -- ISSUE 2

In its July 7, 2005 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on the recurrence of disability issue on February 4, 2002. In a February 4, 2002 Office hearing representative's decision, the Office affirmed the denial of appellant's claim for a recurrence of disability on or after February 3, 2001 causally related to his employment injury.[19] Since appellant's June 7, 2005 letter requesting reconsideration was submitted more than one year after the hearing representative's February 4, 2002 decision, the request was untimely.

In accordance with 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 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 his 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 in this case is whether the Office on August 2, 2001 properly denied appellant's claim for a recurrence of disability on February 3, 2001, which was affirmed by the Office hearing representative on February 4, 2002.

In support of his request, the Office received several medical reports.

In a March 9, 2001 treatment note, Dr. Lovell indicated that appellant was off work and was awaiting surgery with an approximate date of March 23, 2001. This report is insufficient to establish clear evidence of error as it does not address whether appellant had any disability after February 3, 2001 causally related to appellant's employment injury. Appellant also provided a copy of Dr. Lovell's June 19, 2001 report which indicated that appellant could return to work on June 20, 2001 without restrictions. This report is insufficient to establish clear evidence of error as it does not provide any support that appellant was disabled due to his work injury on or after February 3, 2001. In a May 24, 2005 report, Dr. Lovell determined that appellant had left upper

[18] *Id.*

[19] Appellant's claim for a recurrence of disability on February 3, 2001 was denied by an Office decision dated August 2, 2001. A subsequent claim for a recurrence of disability was accepted by the Office in a decision dated June 30, 2004.

extremity pain of an unclear etiology, which was not work related. This report is insufficient to establish clear evidence of error as it addresses a nonwork-related condition and does not explain how the claimed period of disability was due to the accepted employment injury.

The Office also received diagnostic reports from January 15, 1999, February 16, 2001, May 24 and June 16, 2005, hospital admission records from January 15, 1999, vocational rehabilitation reports and requests for authorization for treatment. However, these reports also did not address the issue of whether appellant had any disability for the period February 3, 2001 which was causally related to appellant's employment injury.

As noted above, none of the aforementioned reports addressed whether appellant had any disability on or after February 3, 2001 causally related to appellant's employment injury, and thus they are insufficient to show that the Office's denial of the claim was erroneous or raise a substantial question as to the correctness of the Office's determination that appellant did not have any disability on or after February 3, 2001 which was causally related to appellant's employment injury.

Office procedures provide that 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which 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 would not require a review of a case.[20]

The Board finds that this evidence is insufficient to raise a substantial question as to the correctness of the Office's decision denying appellant's claim for a recurrence of disability on or after February 3, 2001. Therefore, the Board finds that appellant has not presented clear evidence of error.

CONCLUSION

The Board finds that the Office acted reasonably in determining that a change of physicians was not necessary to treat appellant's accepted condition. The Board also finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

[20] *Annie L. Billingsley*, 50 ECAB 210 (1998).

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2006 and July 7, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 4, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board