

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

WILLIAM G. RICHARDSON, Appellant

and

**U.S. POSTAL SERVICE, CAMERON VILLAGE
STATION, Raleigh, NC, Employer**

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**Docket No. 05-1130
Issued: June 27, 2006**

Appearances:
William G. Richardson, pro se
Thomas G. Giblin, Esq., for the Director

Oral Argument June 6, 2006

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 25, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' nonmerit decision dated January 19, 2005, denying his request for reconsideration on the grounds that the request was untimely filed and did not demonstrate clear evidence of error. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant's appeal was filed on April 25, 2005, the Board has no jurisdiction to consider the December 9, 2003 denial of his claim for a recurrence of total disability.² Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the January 19, 2005 nonmerit decision.

ISSUE

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

¹ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

² See *Algimantas Bumelis*, 48 ECAB 679 (1997); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

FACTUAL HISTORY

On May 6, 1996 appellant, then a 30-year-old letter carrier filed a traumatic injury claim alleging that he strained his back while carrying a heavy volume of mail. The Office initially accepted a low back strain and later, a herniated disc at L5-S1. Appellant underwent surgery on November 26, 1996 consisting of a right L5-S1 partial hemilaminectomy and removal of a central right herniated disc. He returned to work on March 21, 1997 in a modified letter carrier position.

On May 16, 2003 appellant filed a claim for a recurrence of total disability on July 13, 2002.

By decision dated December 9, 2003, the Office denied appellant's claim for a recurrence of total disability on the grounds that the evidence did not establish that his accepted condition had worsened or that his duties had changed such that he was totally disabled.

Appellant requested reconsideration on January 4, 2005 and submitted additional evidence. In a May 24, 2004 report, Robert E. Peoples, a physician's assistant, provided a history of appellant's condition and findings on physical examination. He diagnosed multilevel disc disease with some stenosis at L5-S1.

In notes dated December 23, 2004, Mr. Peoples stated his opinion that appellant was able to work eight hours a day in a back-supported chair performing light office work. He provided test results, indicating that they supported appellant's claim for chronic severe back pain. A May 24, 2004 x-ray report of the lumbosacral spine was noted as unremarkable with the exception of some narrowing of lumbosacral interspace. A July 1, 2004 magnetic resonance imaging (MRI) scan report noted findings of multilevel degenerative disc changes and indicated that appellant had not worked for several years due to back pain. An August 3, 2004 report of an electromyogram (EMG) and a nerve conduction study indicated evidence of right-sided radiculopathy at or near S1.

Appellant also submitted evidence previously of record.³

By decision dated January 19, 2005, the Office denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error.⁴

³ He also submitted a March 17, 1998 duty status report. This 1998 report is not relevant to the issue of his claimed recurrence of total disability on July 13, 2002 which was denied in the December 9, 2003 decision.

⁴ Appellant submitted additional evidence subsequent to the Office decision of January 19, 2005. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁷ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration 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 the Office under 5 U.S.C. § 8128(a).⁹

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.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ The Board makes an independent determination of

⁵ 5 U.S.C. § 8128(a).

⁶ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁷ *Id.* at 768.

⁸ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

⁹ *Thankamma Mathews*, *supra* note 6 at 769.

¹⁰ 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

¹¹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003).

¹⁴ *Leona N. Travis*, *supra* note 12.

¹⁵ *Darletha Coleman*, *supra* note 13.

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.¹⁶

ANALYSIS

Since more than one year elapsed between the December 9, 2003 Office decision and appellant's January 4, 2005 reconsideration request, the request for reconsideration of the Office's denial of his claim for a recurrence of total disability was untimely. Consequently, appellant must demonstrate clear evidence of error by the Office in denying his claim for compensation.¹⁷

In notes dated May 24, 2004, Mr. Peoples, a physician's assistant, provided a history of appellant's condition and findings on physical examination. He diagnosed multilevel disc disease with some stenosis at L5-S1. As Mr. Peoples is a physician's assistant, he is not a physician as defined under the Act.¹⁸ Consequently, his notes are of no probative value on the issue of appellant's claimed recurrence of total disability and are not sufficient to demonstrate clear evidence of error in the December 9, 2003 decision.

In notes dated December 23, 2004, Mr. Peoples stated his opinion that appellant was able to work eight hours a day in a back-supported chair performing light office work. As noted, Mr. Peoples is not a physician under the Act and his opinion is of no probative value on the issue of appellant's claimed recurrence of total disability. Therefore, his opinion is not sufficient to demonstrate clear evidence of error in the December 9, 2003 decision. Mr. Peoples provided test results, indicating that they supported appellant's claim for chronic severe back pain. A May 24, 2004 x-ray report of appellant's lumbosacral spine was noted as unremarkable with the exception of some narrowing of lumbosacral interspace. The report did not address the issue of appellant's claimed recurrence of total disability on July 13, 2002. Therefore, it does not demonstrate clear evidence of error in the December 9, 2003 decision. A July 1, 2004 MRI scan report noted findings of multilevel degenerative disc changes and indicated that appellant had not worked for several years due to back pain. However, the report did not contain a rationalized medical opinion addressing the issue of appellant's claimed recurrence of total disability on July 13, 2002. Therefore, this report does not demonstrate clear evidence of error in the December 9, 2003 merit decision. An August 3, 2004 report of an EMG and a nerve conduction study indicated evidence of right-sided radiculopathy at or near S1. The report did not address the issue of appellant's claimed recurrence of total disability on July 13, 2002. Therefore, it does not demonstrate clear evidence of error in the December 9, 2003 decision.

¹⁶ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁷ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹⁸ Registered nurses, licensed practical nurses and physicians assistants are not physicians as defined under the Act and their opinions are of no probative value. See 5 U.S.C. § 8101(2) which provides: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law"; see also *Roy L. Humphrey*, 57 ECAB ____ (Docket No. 05-1928, issued November 23, 2005).

The Board finds that appellant failed to demonstrate clear evidence of error in the December 9, 2003 merit decision. Therefore, the Office did not abuse its discretion in denying his request for reconsideration in its January 19, 2005 decision.

CONCLUSION

The Board finds that the Office did not abuse its discretion, in its January 19, 2005 decision, in denying appellant's request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error in its December 9, 2003 decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 19, 2005 is affirmed.

Issued: June 27, 2006
Washington, DC

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

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