

FACTUAL HISTORY

This case is before the Board for the fourth time. In the first appeal, the Board affirmed the Office's December 22, 1992 and October 5, 1993 decisions terminating appellant's compensation effective January 10, 1993. It found that the weight of the medical evidence was represented by the opinion of Dr. George H. Rubin, a Board-certified orthopedic surgeon who performed an impartial medical examination, and established that appellant had no further disability due to his accepted employment conditions of a left hand contusion, ecchymosis and an aggravation/acceleration of left hand rheumatoid arthritis.¹ On appeal for the second time, the Board affirmed a May 28, 2002 Office decision denying appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.² In the third appeal, the Board found that it was unable to determine whether the Office reviewed the merits of appellant's claim in its April 13, 2004 decision. The Board remanded the case for an appropriate decision.³ The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On remand, the Office again considered appellant's November 3, 2003 request for reconsideration. In support of his request for reconsideration, appellant submitted a report dated September 8, 2003 from Dr. Brian Peck, a Board-certified internist specializing in rheumatology. He discussed appellant's work history and the progressive worsening of his rheumatoid arthritis. Dr. Peck stated:

“[Appellant] has severe lumbar spondylosis which with reasonable medical probability is due to injuries sustained at work and unrelated to rheumatoid arthritis.

“In my opinion, [he] is permanently impaired and unable to pursue the work of a postal worker due to his lumbar spondylosis and lumbar stenosis which was caused by work[-]related injuries and is unrelated to his rheumatoid arthritis.

“In addition, he is disabled due to his rheumatoid arthritis which was clearly aggravated and worsened by his work as a postal carrier for 25 years.”

Dr. Peck questioned how any physician could have found that appellant was no longer disabled after he received disability benefits for 16 years.

In a report dated September 22, 2003, Dr. Robert J. Porzio, a chiropractor, noted that x-rays of appellant's lumbar spine showed “degenerative disc changes with spurring and spondylosis throughout the lumbar spine.” He opined that appellant's low back pain was due to arthritis which was “accelerated by multiple dramatic injuries over the course of his employment.” Dr. Porzio found that appellant was totally disabled.

¹ Docket No. 94-357 (issued October 24, 1995).

² Docket No. 02-1944 (issued January 14, 2003).

³ Order Remanding Case, Docket No. 04-1776 (issued December 9, 2004).

Appellant submitted an x-ray of his lumbar spine which showed degenerative disc disease at L2 to S1.

By decision dated February 28, 2005, the Office denied appellant's claim on the grounds that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, 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 The Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁷ 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.⁹ 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 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.¹⁰ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

⁶ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁷ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁸ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Dorletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003).

¹⁰ *Id.*

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹¹

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins the date following an original Office decision.¹² A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ In this case, appellant's November 3, 2003 letter requesting reconsideration was submitted more than one year after the last merit decision of record and, thus, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.¹⁴

Appellant submitted a report dated September 8, 2003 from Dr. Peck who found that he was disabled from employment due to lumbar spondylosis causally related to his work injuries. He further opined that appellant was "disabled due to his rheumatoid arthritis which was clearly aggravated and worsened by his work as a postal carrier for 25 years." To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion, 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.¹⁵ Dr. Peck's report, while generally supportive of appellant's claim, is insufficient to overcome the weight accorded the impartial medical examiner or to raise a substantial question as to the correctness of the Office's termination decision and thus does not establish clear evidence of error.¹⁶

In a report dated September 22, 2003, Dr. Porzio, a chiropractor, diagnosed degenerative disc disease of the lumbar spine by x-ray. He attributed appellant's back pain to arthritis from employment injuries and found that he was totally disabled. Dr. Porzio, however, is not considered a physician under the Act as he did not diagnose a subluxation as demonstrated by x-ray to exist. Section 8101(2) provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual

¹¹ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹² 20 C.F.R. § 10.607(a). See *Debra McDavid*, 57 ECAB ____ (Docket No. 05-1637, issued October 18, 2005).

¹³ *Robert F. Stone*, 57 ECAB ____ (Docket No. 04-1451, issued December 22, 2005).

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

¹⁵ *George C. Vernon*, 54 ECAB 313 (2003).

¹⁶ The opinion of an impartial medical specialist, if sufficiently well rationalized and based upon a proper factual and medical background must be given special weight. *David W. Pickett*, 54 ECAB 272 (2002).

manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.¹⁷ Consequently, his report is of no probative value.¹⁸

Appellant further submitted an x-ray of his lumbar spine which showed degenerative disc disease at L2 to S1. The x-ray report, however, is not relevant to the issue of whether the Office properly terminated his compensation effective January 10, 1993 based on its finding that he had no further employment-related disability. Consequently, the x-ray report is insufficient to establish clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's request for reconsideration of the merits of his claim on the grounds that his request was not timely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 28, 2005 is affirmed.

Issued: June 14, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁷ 5 U.S.C. § 8101(2); *Robert S. Winchester*, 54 ECAB 191 (2002).

¹⁸ *Michelle Salazar*, 54 ECAB 523 (2003).