

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

JOHN D. HALL, JR., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Merrifield, VA, Employer**

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**Docket No. 05-1846
Issued: March 17, 2006**

Appearances

*Douglas E. Sapp, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 6, 2005 appellant filed a timely appeal of an August 5, 2005 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated February 2, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

ISSUE

The issue is 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 August 15, 1984 appellant, then a 35-year-old maintenance control worker, filed a traumatic injury claim alleging that he sustained an injury to his neck and head on August 13, 1984 when his motor vehicle was struck from behind by a postal vehicle while in the

performance of duty. He stopped work on August 15, 1984 and returned to work periodically thereafter. The Office accepted appellant's claim for displacement of cervical intervertebral disc without myelopathy on February 19, 1987.¹

Appellant filed a recurrence of disability claim on January 22, 2001. By decision dated October 30, 2003, the Office denied his claim.

Appellant requested reconsideration on November 1, 2003 and submitted the April 11, 2002 report, of Dr. Charles B. Jackson, a Board-certified orthopedic surgeon, who reviewed appellant's history of injury and treatment and noted that he began treating him in 1992. He stated that appellant had a serious chronic debilitating problem with his neck, related to a herniated disc at C6-7 proven in 1986 by a test not available in 1984. Dr. Jackson explained that a magnetic resonance imaging (MRI) scan done in 1984, if it were possible, would have demonstrated a herniated disc because the disc was caused by the accident in 1984. He opined that appellant's current disability was complicated by a serious infection in his neck with secondary abscess and epidural destruction which would not improve.

In a May 14, 2002 report, Dr. Jackson advised that appellant was seen for incapacitating pain about his neck and low back and inability to return to work following a severe infection with epidural abscess at the C1-2 interspace requiring emergency decompression and spinal fusion at C2. Appellant was recovering and his signs of cord decompression were nearly resolved with the exception of "incapacitating pain about the neck and back that date back to injuries at work." Dr. Jackson conducted a physical examination and opined that appellant had residuals of spinal cord compression that had almost completely resolved as the result of an epidural abscess that required emergency decompression with spinal fusion. He opined that appellant was left with degenerative changes about his neck at C5-6 and C6-7 as well as a herniated disc at C6-7 and the L4-5 lumbar region. Dr. Jackson advised that, despite his recovery from the epidural abscess, appellant was unable to return to work because of persistent problems that plagued him prior to his infection, "namely cervical spondylosis with radiculitis and lumbar spondylosis with herniated disc and radiculitis." He opined that appellant was disabled and unable to return to work.

In an undated statement received by the Office on November 3, 2003, appellant described the circumstances surrounding his August 1984 employment injury and noted that the injury was to his C6-7 disc. He continued to have flare-ups and was treated. Appellant contended that the constant bending, twisting, climbing and lifting of heavy objects when retrieving parts for the mechanics in the performance of his job duties aggravated his prior injury. He worked in the maintenance control office and part of his job included stocking parts and issuing parts to the mechanics, with some motors weighing up to 40 pounds.

By decision dated February 2, 2004, the Office denied appellant's request for reconsideration. The Office found that there was insufficient medical evidence to support that his recurrence of disability on January 22, 2001 was causally related to the work injury sustained

¹ Appellant filed a recurrence of disability claim on September 7, 1984 which was denied by decision dated October 28, 1985.

on August 13, 1984. The Office determined that he had alleged a new occupational disease because he attributed his current neck conditions to factors of his federal employment over an extended period of time. The Office advised him that, since he had already completed and submitted the proper forms, he would soon be advised of the new case number and the additional information needed to process his claim.

By letters dated April 8, 29 and October 29, 2004, appellant's representative requested the status of appellant's occupational disease claim.

In a letter dated February 4, 2005, received on February 8, 2005, appellant's representative requested reconsideration.

By letter dated February 27, 2005, appellant's representative again requested reconsideration and enclosed a February 20, 2005 report from Dr. Charles B. Jackson, who opined that appellant's current disability, which included a herniated cervical disc at C6-7, was related to the August 13, 1984 employment injury because he never recovered and continued with symptoms due to that injury. He noted that appellant related that he experienced pain in his neck radiating into his arm, consistent with a herniated disc at C6-7, with "varying degrees of severity waxing and waning, aggravated with stressful activity that occurred with his daily work routine and associated with no other trauma outside his work situation that could account for such symptoms." Dr. Jackson also noted that appellant related stress when lifting objects weighing as much as 40 pounds in awkward positions, as well as bending, twisting, climbing and lifting in the performance of his job duties. He explained that appellant sustained an aggravation of symptoms, which he believed was related to his herniated disc at C6-7, which was so intense that a new MRI scan was ordered in early 2000, which confirmed further degeneration at the C6-7 level.

Dr. Jackson noted that appellant related that his bronchitis and coughing aggravated his chronic symptoms dating back to August 13, 1984 and that shortly thereafter his symptoms became so severe that he could not sleep or hold his head up. He advised that this was due to an epidural abscess at C2. Dr. Jackson opined that appellant had recovered from the epidural abscess and no longer experienced severe pain, but continued to have chronic pain and disability which was related to the degenerative changes above and below the C6-7 level, as well as the spinal stenosis, which directly resulted from the herniated disc at C6-7 and the subsequent stress of his job duties. He opined that appellant would not "suffer with disabling neck and extremity pain had he not suffered a herniated cervical disc at C6-7 on [August 13, 1984]." Dr. Jackson further explained that the epidural abscess would have been diagnosed earlier had appellant not had chronic neck pain related to the disc at C6-7. He opined that there was "no other trauma or stress to account for recurrent symptoms and findings well recorded and certainly consistent with his work-related herniated disc. The work-related stress appellant describes following the initial injury certainly could and in my medical opinion did, cause recurrent deterioration resulting in his present disabled state. The only other significant factor, other than time itself, his epidural abscess, was complicated by his work-related accident to the extent it too is related."

In a decision dated August 5, 2005, the Office denied appellant's request for reconsideration, finding that it was not timely filed and failed to present clear evidence of error.²

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ 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 --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁴

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).⁵ 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 regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶

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.⁷

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

² The Office also advised appellant that a separate claim had been set up under No. A250572771 for the notice of occupational disease claim.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8128(a).

⁵ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ 20 C.F.R. § 10.607(b).

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.⁸ To show clear 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.⁹

ANALYSIS

In its August 5, 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 February 2, 2004. Appellant's February 4, 2005 letter requesting reconsideration was submitted more than one year after the February 2, 2004 merit decision and was, therefore, 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 his 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 underlying issue is whether the Office properly denied appellant's claim for a recurrence of disability on January 22, 2001 causally related to the work injury sustained on August 13, 1984.

With the February 5, 2005 request for reconsideration, appellant's representative submitted the February 20, 2005 report of Dr. Jackson. Dr. Jackson opined that appellant's current disability was related to the August 13, 1984 injury. He posited that he never recovered from the accepted injury and continued to have symptoms. Dr. Jackson also addressed recent factors of appellant's employment and opined that these caused stress to his cervical conditions. However, Dr. Jackson did not provide a specific opinion to suggest a recurrence on or after January 22, 2001.

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

⁸ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

⁹ *Id.*

such as a detailed, well-rationalized medical 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.¹⁰

As noted above, none of the aforementioned reports addressed whether appellant had a recurrence of disability on January 22, 2001 causally related to the work injury sustained on August 13, 1984 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 he did not have a recurrence of disability on January 22, 2001 causally related to the work injury sustained on August 13, 1984.

The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in denying his claim for a recurrence of disability on January 22, 2001 causally related to the work injury sustained on August 13, 1984.¹¹ Therefore, the Board finds that appellant has not presented clear evidence of error.¹²

CONCLUSION

The Board 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.

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹¹ *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

¹² The Board notes that appellant has submitted documentation which appears relevant to his occupational disease claim. He is not precluded from submitting documentation pursuant to his occupational disease claim.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 17, 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