United States Department of Labor
Employees' Compensation Appeals Board

RUDY WILLIAM RIVERS, Appellant	)	
and	)	**Docket No. 06-488**
	)	**Issued: May 10, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Pleasanton, CA, Employer	)	

Appearances:
Rudy William Rivers, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 27, 2005 appellant filed a timely appeal of a September 30, 2005 nonmerit decision of the Office of Workers' Compensation Programs, which found that his August 31, 2005 request for reconsideration was untimely filed and failed to establish clear evidence of error. The last merit decision of record is dated December 29, 2003.[1] Because more than one year elapsed between this decision and the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board only has jurisdiction to review the September 30, 2005 nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

[1] According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including, *inter alia*, any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (June 2002).

FACTUAL HISTORY

On March 12, 2003 appellant, a 56-year-old modified letter carrier, filed an occupational disease claim alleging that on February 11, 2003 he first realized his cervical disc disease with nerve compromise was employment related.

The Office received reports dated February 11 and March 4, 2003 by Dr. Jeffrey B. Randall, a treating Board-certified neurological surgeon, a statement by appellant, an April 3, 2003 witness statement by Gurjant Khusa and an April 3, 2003 controversion by the employing establishment. Dr. Randall diagnosed "cervical spondylosis with symptoms of root and spinal cord irritation." On March 4, 2003 Dr. Randall diagnosed "significant stenosis between the C4-5 and C6-7 levels" and recommended decompression.

In an undated statement, appellant related sustaining "several injuries of which I feel caused, aggravated or accelerated the injury my doctor revealed to me on February 11, 2003." He described the various injuries he sustained during his employment as well as his duties which he believed aggravated or caused his neck condition.

In a letter dated April 18, 2003, the Office informed appellant that the evidence of record was insufficient to support his claim and advised him as to the medical and factual evidence required.

On May 20, 2003 the Office received a February 12, 2003 precomplaint counseling information form; information for filing a workers' compensation claim; an April 23, 2003 statement by appellant; a request for sick leave for the period March 17 to 31, 2003; a March 6, 2000 news article on the employing establishment ousting injured workers; an April 25, 2003 report by Dr. Randall; a September 18, 2001 preliminary report by Dr. Gregg T. Pottorff, a Board-certified orthopedic surgeon. Dr. Randall opined that, based upon the information available, "that his cervical spine problems are appropriately treated on a cumulative trauma basis, related to the physical requirements of his work" for the employing establishment "dating back to the 1970's."

By decision dated May 21, 2003, the Office denied appellant's claim on the grounds that fact of injury had not been established.

Appellant requested reconsideration on May 27, 2003, and resubmitted a February 12, 2003 precomplaint counseling information form; a March 6, 2000 news article on the employing establishment ousting injured workers; a request for sick leave for the period March 17 to 31, 2003 and information for filing a workers' compensation claim.

By decision dated August 21, 2003, the Office denied appellant's request for modification on the grounds that the evidence failed to establish that his medical condition was causally related to factors of his employment.

Appellant requested reconsideration on October 21, 2003 and submitted a September 26, 2003 report by Dr. Randall and September 18, 2001 progress report by Dr. Pottorff. Dr. Randall noted appellant's employment history and diagnosed cervical spondylosis with stenosis. He noted that there are people who are predisposed to this condition which "can be worsened by

repetitive movements or specific injuries." As to the issue of causation, Dr. Randall stated that he "could not say with a reasonable degree of medical certainty that" the cervical stenosis condition was specifically caused by appellant's employment. However, he concluded that it would "be reasonable to attribute an aggravation" to appellant's employment.

On November 17, 2003 the Office received a November 6, 2003 rotator cuff operative report by Dr. Pottorff.

By decision dated December 29, 2003, the Office denied modification of the August 21, 2003 decision.

In a letter dated September 2, 2004, appellant requested reconsideration. In support of his request, appellant submitted treatment notes for the period November 13 to December 18, 1996; a medical article on lumbar stenosis surgery; and a September 6, 1997 cardiac consultation report by Dr. John Rampulla, a Board-certified emergency physician.

In a nonmerit decision dated October 28, 2004, the Office denied appellant's request for reconsideration.

On August 10, 2005 the Office received a June 16, 2005 occupational disease claim; an undated narrative report; an August 5, 2005 letter from the employing establishment; information regarding anterior cervical decompression by appellant; a March 1, 1994 report by Dr. Gerald Lee, a treating physician; an April 25, 2003 letter from the employing establishment challenging his claim; a February 22, 2005 report by Dr. Thomas Mapalam, a Board-certified neurological surgeon; an April 25, 2003 report by Dr. Randall; one page of a November 19, 1993 report; and a November 19, 1993 report and progress notes dated February 22, 2004 and April 5, 2005 by Dr. Pottorff.

Dr. Pottorff diagnosed cervical disc disease with myelopathy and radiculopathy and bilateral rotator cuff tears, which were secondary to the cervical disc condition. On April 5, 2005 he discussed appellant's continued neck and upper extremity problems which he stated "are related to his cervical spine injury, which I feel is industrial."

Dr. Mapalam diagnosed spondylosis, disc herniations at C4-5 and C6-7 and severe stenosis at L3-4. He opined that appellant's "cervical and lumbar findings are likely accelerated by and aggravated by his years of work as a postal mail handler, city carrier and postal supervisor."

On August 31, 2005 appellant requested reconsideration and submitted reports dated November 19, 1993 and March 1, 1994 and an April 5, 2005 progress note by Dr. Pottorff; a February 22, 2005 report by Dr. Mapalam and additional factual evidence in support of his claim.

By decision dated September 30, 2005, the Office found that appellant's reconsideration request was dated August 31, 2005 and, therefore, filed more than one year after the most recent merit decision of December 29, 2003 and was untimely. The Office also found that appellant did not submit any evidence establishing clear evidence of error in the prior decisions denying his claim.

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.[2] 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.[3] 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.[4] 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.[5] 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.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[7] The evidence must be positive, precise and explicit and must manifested on its face that the Office committed an error.[8] 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.[10] 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.[11] To show clear

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[2] 5 U.S.C. §§ 8101-8193. To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision. *See* 20 C.F.R. § 10.607(a). When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act. *See Joseph A. Brown, Jr.*, 55 ECAB ___ (Docket No. 04-376, issued May 11, 2004). The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB ___ (Docket No. 04-208, issued March 18, 2004).

[3] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[4] *Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[5] *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 merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

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

[7] *See Darletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

[8] *See Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

[9] *See Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Jesus D. Sanchez supra* note 4.

[10] *See Leona N. Travis*, *supra* note 8.

[11] *See Nelson T. Thompson*, *supra* note 6.

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 decision.[12] 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.[13]

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[14]

The most recent merit decision in this case was issued on December 29, 2003, and denied modification of the finding that appellant failed to establish that his cervical condition was caused or aggravated by his federal employment. As his August 31, 2005 letter requesting reconsideration was made more than one year after the December 29, 2003 decision, the Board finds that it was untimely filed.

The issue for purposes of establishing clear evidence of error in this case, is whether appellant established error in the Office's determination that his cervical condition was not caused or aggravated by his employment. The Board notes that this issue is medical in nature. Appellant submitted evidence previously considered by the Office as well as new medical evidence, which included reports dated November 19, 1993 and March 1, 1994 and progress notes dated February 22 and April 5, 2005 by Dr. Pottorff; a February 22, 2005 report by Dr. Mapalam. Dr. Pottorff, in an April 5, 2005 progress note, stated that he believed appellant's upper extremity and back problems were due to an industrial cervical spine injury. Dr. Pottorff diagnosed cervical disc disease with myelopathy and radiculopathy and bilateral rotator cuff tears. Dr. Pottorff's progress notes are irrelevant as they do not provide any medical rationale explaining how appellant's cervical condition was caused or aggravated by his federal employment, and as such is insufficient to establish clear evidence of error.[15] Dr. Mapalam's February 22, 2005 report opined that appellant's lumbar and cervical conditions were "likely accelerated and aggravated by" his employment duties. Although Dr. Mapalam noted that it was likely that appellant's current condition was caused by his employment, he couched his opinion

[12] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[13] *See George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[14] *Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005).

[15] *Jaja K. Asaramo*, 55 ECAB ___ (Docket No. 03-1327, issued January 5, 2004) (where the issue of whether appellant had continuing disability from his accepted employment injury was medical in nature, appellant needed to submit relevant medical evidence to reopen the claim on reconsideration).

in speculative terms.[16] The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in appellant's favor. The Board finds that this evidence does not demonstrate clear evidence of error on the part of the Office in the issuance of its merit decision.

The Board, therefore, finds these records are insufficient to raise a substantial question as to the correctness of the Office's merit decision and the Office properly denied appellant's reconsideration request.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 30, 2005 is affirmed.

Issued: May 10, 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

[16] *See Cecelia M. Corley*, 56 ECAB ___ (Docket No. 05-324, issued August 16, 2005); *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).