United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 07-109**
	)	**Issued: April 19, 2007**
DEPARTMENT OF ENERGY, ENVIRONMENTAL MEASUREMENTS LABORATORY, New York, NY, 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 October 16, 2006 appellant filed a timely appeal from a July 12, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration as it was untimely and did not establish clear evidence of error. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the July 12, 2006 decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration of the merits of his claim on the grounds that it was not timely filed and did not establish clear evidence of error.

[1] 5 U.S.C. § 501.2(c).

FACTUAL HISTORY

This case is before the Board for the third time. In the first appeal, the Board affirmed a January 8, 1997 decision denying reimbursement of travel expenses for the period 1989 to 1994.[2] In a decision dated January 5, 2004, the Board affirmed a February 12, 2003 decision terminating appellant's compensation and entitlement to medical benefits effective February 23, 2003.[3] The Board found that the opinion of the impartial medical examiner, Dr. Joseph John Estwanik, a Board-certified orthopedic surgeon, represented the weight of the medical evidence and established that appellant had no further employment-related condition or disability due to his accepted conditions of lumbosacral strain and paraspinous muscle spasm. The Board further affirmed an April 9, 2003 decision denying appellant's request for reconsideration under 5 U.S.C. § 8128.

Appellant requested assistance from his congressional representative in a letter dated April 11, 2006. On May 23, 2006 the Office informed the representative that appellant should follow his appeal rights.

On July 5, 2006 appellant requested reconsideration based on newly submitted medical evidence. He referenced the April 11, 2006 letter he sent to his congressional representative. In the April 11, 2006 letter, appellant contended that the Office did not meet its burden of proof to show that his employment injury ceased. He asserted that the statement of accepted facts provided to Dr. Estwanik inaccurately indicated that he slipped and fell rather than twisted his back. The Office and Board also erred in finding that the reports of appellant's attending physician were not of equal weight to the impartial medical examiner. Dr. Estwanik did not determine that appellant's degenerative disc disease was not related to his employment injury.

Appellant submitted a report dated May 23, 2006 from Dr. John J. Hanna, a chiropractor, who listed findings of muscle spasm in the cervical and lumbar spine and right trapezius. Dr. Hanna found that x-rays revealed degenerative changes but "no evidence of dislocation, fracture or gross osseous pathology as visualized." He diagnosed cervical brachial syndrome, cervical and lumbar spondylosis, myospasms, sciatic nerve injury, lumbar disc degeneration and cervical, lumbar and sacral segmental dysfunction. Dr. Hanna opined that appellant's condition resulted from his twisting injury.

By decision dated July 12, 2006, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish 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]

[2] *Jaja K. Asaramo*, Docket No. 97-1442 (issued June 15, 1999). The decision is not contained in the case record.

[3] *Jaja K. Asaramo*, 55 ECAB 200 (2004). The Board also denied appellant's petition for reconsideration. *Denying Petition for Reconsideration*, Docket No. 03-1327 (issued April 12, 2005).

[4] 5 U.S.C. §§ 8101-8193.

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 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 on the date of the original Office decision.[12] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including a

[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] *Dorletha Coleman*, 55 ECAB 143 (2003); *Leon J. Modrowski*, 55 ECAB 196 (2004).

[10] *Id*.

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

[12] 20 C.F.R. § 10.607(a).

decision of the Board.[13] The Board issued the last merit decision in this case on January 5, 2004. As appellant's July 5, 2006 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.[14]

Appellant asserted that the Office failed to meet its burden of proof to terminate his compensation benefits. He argued that the opinion of the impartial medical examiner was based on an inaccurate history of injury and failed to address whether his degenerative disc disease was employment related. Appellant additionally maintained that the reports of his attending physician should be accorded equal weight with the impartial medical examiner. The Board, however, affirmed the Office's termination of appellant's compensation based on the opinion of the impartial medical examiner in its January 5, 2004 decision.[15] Appellant did not submit any evidence to the Office in support of his contentions sufficient to warrant consideration by the Office.[16]

In support of his request for reconsideration, appellant submitted a report dated May 23, 2006 from his chiropractor, Dr. Hanna. Section 8101(2) of the Act provides that the "term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist…."[17] A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence.[18] Dr. Hanna interpreted that x-rays showed degenerative changes but "no evidence of dislocation, fracture or gross osseous pathology as visualized." As he did not diagnose a subluxation as demonstrated by x-ray, he is not considered a "physician" under the Act and his report is of no probative value.[19] Consequently, it is insufficient to establish clear evidence of error.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the evidence to ascertain whether it demonstrated clear evidence of error. The Office correctly determined that it did not and thus, properly denied appellant's untimely request for reconsideration of the merits of his claim.

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

[14] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB ___ (Docket No. 05-1637, issued October 18, 2005).

[15] *See Jaja K. Asaramo*, *supra* note 2.

[16] The subject matter adjudicated by the Board in its January 5, 2004 decision is *res judicata* and is not subject to consideration by the Board absent further review by the Office. *See Robert G. Burns*, 57 ECAB ___ (Docket No. 06-380, issued June 26, 2006).

[17] 5 U.S.C. § 8101(2); *see also Mary A. Ceglia*, 55 ECAB 626 (2004).

[18] The Office's regulation, at 20 C.F.R. § 10.5(bb), defines subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See Mary A. Ceglia*, *supra* note 17.

[19] *Isabelle Mitchell*, 55 ECAB 623 (2004).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 12, 2006 is affirmed.

Issued: April 19, 2007
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