United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 07-191**
	)	**Issued: June 6, 2007**
U.S. POSTAL SERVICE, POST OFFICE, West Milford, CT, Employer	)	

Appearances:
Thomas R. Uliase, Esq., 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 27, 2006 appellant, through his attorney, filed a timely appeal from an October 27, 2005 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 October 27, 2005 nonmerit 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

On March 14, 1997 appellant, then a 33-year-old rural letter carrier, filed a traumatic injury claim alleging that on that date he strained his right knee in the performance of duty. The Office accepted the claim for right knee strain and authorized two right knee arthroscopic surgeries and an arthroscopy of the left knee, which were performed on December 28, 1998, October 1, 1999 and March 31, 2000. On January 22, 1998 appellant filed a claim for a recurrence of disability which the Office accepted. By letter dated June 4, 1998, the Office placed appellant on the periodic rolls for temporary total disability effective May 24, 1999.

On March 31, 2000 Dr. Vincent K. McInerney, a treating Board-certified surgeon, noted that appellant underwent right knee arthroscopy that date. He opined that appellant would "most likely be able to resume most of his normal activities within three to four weeks."

In a letter dated May 2, 2001, appellant informed the Office that he was "officially putting the Office" on notice that if it issued a decision that was negative in nature or punitive that he was "now informing you that this type of decision is being disputed as of today Wednesday May 2, 2001."

On May 3, 2001 Dr. David Rubinfeld, a second opinion Board-certified orthopedic surgeon, concluded that appellant was capable of returning to a modified carrier position working eight hours per day. A physical examination of the right knee revealed normal range of motion, no effusion, generalized tenderness, no ligamentous laxity, a negative Lachman's sign, no instability and a negative McMurray's sign. Dr. Rubinfeld opined that appellant's "complaints were excessive." He also concluded that there were "no objective findings of disability residuals of the accepted conditions of right knee strain, left and right knee multiple arthroscopies" and that the accepted condition had resolved.

In a supplemental report dated May 25, 2001, Dr. Rubinfeld concluded that appellant was capable of performing his date-of-injury position based on the "paucity of true objective signs" he found on examination.

In a June 13, 2001 notice of proposed termination of compensation, the Office informed appellant that it proposed to terminate his wage-loss benefits based upon Dr. Rubinfeld's opinion. Appellant was given 30 days to submit evidence or argument. He did not respond within the time allotted.

By decision dated July 13, 2001, the Office finalized the termination of appellant's wage-loss compensation and medical benefits effective July 15, 2001.

In a letter dated March 14, 2003, appellant, through counsel, requested reconsideration. It was noted that he had filed a request for a hearing with no response from the Office.

In letters dated August 13 and November 4, 2003, appellant's counsel requested that the Office conduct a merit review. In the August 13, 2003 request, he contended that Dr. Rubinfeld's report was insufficient to support termination and that reports by appellant's treating physician showed that he continued to suffer from residuals of his accepted employment

injury.[2] Appellant also contends that the notice of proposed termination was deficient as it failed to discuss reports from appellant's treating physicians. At the least he contends that the reports by these physicians establishes an unresolved conflict in the medical opinion evidence, which the Office ignored.

In a letter dated August 5, 2003, the Office noted that three types of appeal rights were provided with the July 13, 2001 decision and that he "did not request any of these avenues of appeal." Lastly, appellant was informed that "the Director's own motion is not subject to a request or petition and none shall be entertained."

On March 23, 2004 appellant's counsel submitted a February 29, 2004 report by Dr. Kenneth A. Levitsky, an examining Board-certified orthopedic surgeon, in support of appellant's claim for continuing disability. A physical examination revealed full range of motion in the right knee with some crepitation and some right calf tenderness.

By decision dated August 5, 2004, the Office informed appellant that he had no rights of appeal under 20 C.F.R. § 10.610. The Office's August 5, 2004 decision rejected appellant's request for a merit review as "the Director's determination to review or not to review an award is not reviewable."

By nonmerit decision dated September 30, 2004, the Office provided appeal rights to the August 5, 2004 decision.

Appellant appealed to this Board. In a decision dated June 10, 2005, the Board set aside the September 30, 2004 decision and remanded to the Office.[3] The Board noted that the Office failed to make any determination regarding whether or not appellant filed a timely request for reconsideration and that no explanation was provided for the basis of the decision. It failed to explain the precise defect and the type of evidence necessary to overcome.

Upon return of the case record, in a decision dated October 27, 2005, the Office found appellant's request for reconsideration was untimely and that he failed to establish clear evidence of error.[4]

[2] On September 11, 2003 appellant filed a claim for a recurrence of disability beginning November 16, 2001 due to his accepted March 14, 1997 employment injury. The employing establishment controverted the claim noting appellant "was separated disability retirement effective May 28, 1999." In a letter dated February 3, 2004, the Office noted that a decision had been issued finding appellant's condition had resolved and "[o]ur records will reflect that the recurrence was filed in error."

[3] Docket No. 05-617 (issued September 30, 2004).

[4] The Board notes that, following the October 27, 2005 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB ___ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

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.[5] 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.[6] 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.[7] 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.[8] 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.[9]

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.[10] 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.[11] 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.[12]

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[5] 5 U.S.C. §§ 8101-8193.

[6] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[7] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[8] *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).

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

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

[11] *Id.*

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

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. The Office procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[13] The Office issued its last merit decision in this case on July 13, 2001. Initially, the Board notes that appellant's May 2, 2001 letter "officially putting the Office" on notice that he was requesting review of an adverse decision cannot be considered a timely request for reconsideration as no adverse decision had been issued at that point in time and said letter predates the issuance of the July 13, 2001 Office decision. As appellant's March 14, 2003 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]

The Board notes that appellant's attorney did not submit new evidence in support of his March 14, 2003 request for reconsideration. In his March 14, 2003 letter, appellant advised that he was seeking reconsideration of an Office decision dated July 13, 2001, which terminated his compensation benefits. In the letter appellant's counsel argued that the July 13, 2001 termination decision was erroneous as the second opinion physician's opinion was not rationalized and thus insufficient to meet the Office's burden of proof. He also argued that appellant's treating physicians opined that appellant continued to suffer from residuals of his employment injury, which was not mentioned by the Office in the July 13, 2001 decision. The most recent medical report from a treating physician at the time of the July 13, 2001 decision was a March 31, 2000 report from Dr. McInerney opining that appellant would "most likely be able to resume most of his normal activities within three to four weeks." While appellant addressed his disagreement with the Office's decision to terminate his compensation benefits, he did not establish clear evidence of error as his arguments do not raise a substantial question as to the correctness of the Office's decision. He also noted his disagreement with the findings of Dr. Rubinfeld, a second opinion Board-certified orthopedic surgeon. Appellant's disagreement does not establish clear evidence of error as it does not raise a question as to the correctness of the Office's most recent merit decision which found that appellant did not have any residuals from his accepted work-related injury. The issue for purposes of establishing clear evidence of error is whether appellant has established that the Office erred in terminating his compensation benefits on July 13, 2001 as he had no continuing disability related to the accepted injury. Appellant submitted no new medical evidence to establish that the Office erred in terminating his compensation benefits on July 13, 2001. Therefore, the Office properly found that appellant's statement and letter of March 13, 2003 did not establish clear evidence of error. The Office properly denied appellant's reconsideration request.

[13] 20 C.F.R. § 10.607(a).

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

On March 23, 2004 appellant's counsel submitted that he had continuing disability due to his accepted employment injury and submitted a February 29, 2004 report by Dr. Levitsky in support of appellant's claim for continuing disability. Dr. Levitsky reported full range of motion in the right knee with some crepitation and some right calf tenderness. This evidence is insufficient to establish clear evidence of error as the physician.

Appellant's counsel's March 23, 2006 letter asserted that the medical evidence was sufficient to establish that appellant had continuing disability due to his accepted employment injury. The Board finds that this letter does not raise a substantial question as to whether the Office's July 13, 2001 decision was in error or *prima facie* shift the weight of the evidence in appellant's favor. Therefore, it is insufficient to establish clear evidence of error. The February 29, 2004 report by Dr. Levitsky does not contain medical rationale addressing the critical issue of causal relationship and is thus irrelevant to the claim. Therefore, it is insufficient to raise a substantial question as to the correctness of the Office's July 13, 2001 decision.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of his March 14, 2003 and March 23, 2004 requests for reconsideration do not *prima facie* shift the weight of the evidence in his favor or raise a substantial question as to the correctness of the Office's July 13, 2001 decision and are thus insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board, therefore, finds that the Office properly determined that appellant's request for reconsideration dated March 14, 2003 was untimely 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 October 27, 2005 is affirmed.

Issued: June 6, 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