United States Department of Labor
Employees' Compensation Appeals Board

T.D., Appellant	)	
and	)	**Docket No. 07-1009**
	)	**Issued: November 26, 2007**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADNINISTRATION MEDICAL CENTER, Montrose, NY, Employer	)	

Appearances:
Jan Hudgins Riley, Esq., for the appellant
Office of Solicitor, for the Director

Oral Argument October 17, 2006

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 27, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs decision dated January 3, 2007 which denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated May 20, 1999 and the filing of this appeal on February 27, 2007 the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This is the second appeal before the Board. Appellant, a 44-year-old nursing assistant, injured his right leg and lower back on March 17, 1989. The Office accepted a claim for right leg and right hip strain; he has not returned to work since his injury. It paid appropriate compensation for temporary total disability and placed him on the periodic rolls. By decision dated April 15, 1997, the Office terminated appellant's compensation, effective April 18, 1997. In a May 20, 1999 decision,[1] the Board affirmed the Office's April 15, 1997 termination decision. The complete facts of this case are set forth in the Board's May 20, 1999 decision and are herein incorporated by reference.

By letter received May 19, 2006, appellant's attorney requested reconsideration of the April 15, 1997 Office decision. Counsel stated that she had obtained medical evidence subsequent to the Board's 1999 decision which indicated that appellant had traumatic osteoarthritis. She asserted that this evidence had not been available to appellant for the Office and the Board to review prior to the issuance of their previous decisions. Counsel contended that because this evidence had not been available prior to the issuance of these decisions, the Office should consider this evidence with appellant's reconsideration request. This evidence included:

(a) A March 4, 1976 x-ray report;

(b) An August 15, 1997 report from Dr. Robert Prestiano, Board-certified in internal medicine, who stated that appellant was never treated for arthritis of the right hip and did [not] walk with a cane prior to his March 17, 1989 work injury;

(c) A June 15, 1998 report from Dr. Robert H. Feldman, Board-certified in orthopedic surgery, who stated that he had treated appellant and reviewed x-ray results dated March 4, 1976 which indicated a normal joint architecture of the hips with no evidence of osteoarthritis in both hips. These x-ray results did not indicate arthritis and demonstrated only mild scoliosis of the lumbar spine;

(d) A July 7, 2000 report from Dr. Joseph Hickey, Board-certified in internal medicine, who stated:

"There is some question as to the dating of when [appellant's] right hip injury occurred and when he started having trouble and required the use of a cane. X-rays done in 1976 did not reveal any significant arthritis in my opinion but they did reveal some mild scoliosis, but he was completely asymptomatic. [Appellant] had his diabetes and hypertension followed all those years and never once did I here any mention of any hip pain. On March 17, 1989 he slipped and fell while pushing a heavy woman at [the employing establishment]. [Appellant] fell on his right side and injured his right hip. From that time on he has been basically limping and using a cane. Prior to that injury [appellant] did not complain to me

[1] Docket No. 98-250 (issued May 20, 1999).

at all about hip pain or difficulty. I have no doubt that the injury caused his hip pain. There was no cane use or complaints of hip pain prior to 1989."

(e) A November 7, 2000 report from Dr. Feldman, who stated:

"On March 17, 1989 [appellant] injured his right hip on the job. X-rays were not taken until one month after the injury on April 25, 1989. They were negative for arthritis of the hips. X-rays of March 4, 1976 showed that [appellant] did not have arthritis of either hips, only a mild scoliosis of the lumbosacral spine. I, therefore disagree with Dr. Small's findings that [appellant] had osteoarthritis preexisting before March 17, 1989. Therefore[,] between March 4, 1976 and April 25, 1989 [he] has no history of symptoms or radiographic evidence of arthritis of either hip prior to March 17, 1989, on March 4, 1976 or at any other time. Therefore[,] it is logical to conclude that [appellant's] injury to his right hip is causally related solely to his work[-]related injury of March 17, 1989."

(e) An April 26, 2001 surgical report from Dr. Richard E. Pearl, who performed right hip replacement surgery on appellant.

(f) A May 8, 2001 radiographic report which indicated bilateral osteoarthritis of the hips, right worse than left, right coxa vara probably related to old trauma.

(g) An April 15, 2002 report from Dr. Feldman, who essentially reiterated the findings and conclusions he presented in his November 7, 2000 report and stated that the April 25, 1989 report were reviewed on April 4, 2002 showing a fracture of the right femur;

(h) An October 14, 1998 statement from Dr. Robert A. Lois, a chiropractor, who stated that he was personally acquainted with appellant since 1958 and that appellant was physically active and fully ambulatory until March 17, 1989;

(i) An April 2, 1989 affidavit from appellant's coworkers at the employing establishment which attested that from 1981 through 1989 appellant was employed at the employing establishment and during that period he was fully ambulatory with no physical disabilities.

By decision dated January 3, 2007, the Office denied appellant's request for reconsideration without a merit review finding that he had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that she was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle an employee to a review of an Office decision as a matter of right.[3] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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 --
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> > (1) end or increase the compensation awarded; or (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it 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.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).[5]

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[6] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

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[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[4] 20 C.F.R. § 10.607(b).

[5] *See* cases cited *supra* note 2.

[6] *Rex L. Weaver*, 44 ECAB 535 (1993).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[8] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[9] *See Leona N. Travis*, 43 ECAB 227 (1991).

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.[11] 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.[12] 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.[13] The Board makes an independent determination of whether an appellant 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.[14]

ANALYSIS

The Board finds that the Office properly determined in this case, that appellant failed to file a timely application for review. The Office issued its most recent merit decision in this case on May 20, 1999. Appellant requested reconsideration on May 19, 2006; thus, his reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's May 19, 2006 request for reconsideration failed to establish clear evidence of error. The medical reports that appellant submitted from Drs. Prestiano, Feldman, Hickey and Pearl indicated that he had findings and symptoms of osteoarthritis of the right hip subsequent to his 1989 work injury. However, they were of limited probative value as they did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether appellant had any continuing disability or residuals from his accepted work injury as of April 18, 1997. The March 4, 1976 x-ray report is not relevant because it was issued 11 years prior to the date the Office terminated appellant's compensation. The October 14, 1998 statement from Dr. Lois, a chiropractor, does not constitute medical evidence as it does not contain a diagnosis of subluxation based on x-ray as required by section 8101(2). Likewise, the April 2, 1989 affidavit from appellant's coworkers attesting to his ambulatory ability from 1981 to 1989 does not present any additional medical evidence as it does not contain an opinion from a physician. Therefore, none of the new evidence appellant submitted addressed the underlying issue of whether he was totally disabled as of April 18, 1997. He resubmitted a number of reports which were previously considered by the Office in prior decisions; these reports are cumulative and repetitive of reports previously rejected by the Office. No other evidence was received by the Office. Therefore, appellant has failed to demonstrate clear evidence of error on the part of the Office.

[10] *See Jesus D. Sanchez, supra* note 3.

[11] *See Leona N. Travis, supra* note 9.

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

[13] *Leon D.Faidley, supra*, note 3.

[14] *Gregory Griffin, supra* note 3.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration request dated May 19, 2006. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on January 3, 2007.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 26, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board