United States Department of Labor
Employees' Compensation Appeals Board

A.F., Appellant	)	
and	)	**Docket No. 08-977**
	)	**Issued: September 12, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Canoga Park, CA, Employer	)	

Appearances:
Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 19, 2008 appellant, through his representative, filed a timely appeal from a November 16, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration 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 April 22, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the November 16, 2007 nonmerit decision.

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 March 12, 1998 appellant, then a 41-year-old letter carrier, filed an occupational disease claim alleging that he developed upper extremity and lower back conditions as a result of employment activities. He stopped working on April 20, 1998. The Office accepted the claim for right trapezius strain, bilateral medial epicondylitis, bilateral wrist tendinitis and low back strain. Appellant returned to work without restrictions on September 23, 1998.

On December 12, 2003 appellant filed a claim for a recurrence of disability.[1] He stated that he was unsure of the date of the alleged recurrence because his accepted conditions had never resolved, and he had worked in "chronic pain always." Appellant indicated that he was no longer working at the employing establishment and that he attended El Camino College.

On April 22, 2004 the Office denied appellant's recurrence claim, finding that the evidence did not establish that his claimed disabling condition was causally related to his accepted work injury.

Appellant submitted a June 22, 2004 report from Dr. Mark Goldstein, a Board-certified osteopath, specializing in the area of family practice. Dr. Goldstein stated that appellant was "alert, oriented x4, and in no acute distress." He described the history of the occupational work injury, as related to him by appellant, noting his complaints of cumulative trauma to his wrists, hands, elbows, feet, ankles, shoulder and low back. Dr. Goldstein diagnosed fibromyalgia, bilateral bunions, left knee cyst, scoliosis and chronic left index mallet finger, and indicated that all of the diagnosed conditions were nonoccupational. He opined that appellant's symptoms were attributable to his fibromyalgia and that there was no causal relationship between appellant's diagnoses and his prior work as a letter carrier.

On July 11, 2007 appellant, through his representative, requested reconsideration. The representative acknowledged that appellant's request was submitted more than a year after the last merit decision, but contended that the time limitation should be tolled under 5 U.S.C. § 8122, due to his mental incapacity, and stayed due to the filing of his December 12, 2003 emotional condition claim. The representative cited as error the Office's failure to process appellant's occupational disease claim for stress.

Appellant submitted a September 6, 2006 report from Dr. Louis Ragonetti, a Board-certified psychiatrist, who stated that he had been treating appellant since 1995 for "severe depression and anxiety," which he opined was caused "by a variety of circumstances including work stress and personal issues such as the death of a young daughter." Dr. Ragonetti also opined that appellant "was too dysfunctional in the year 2004 to respond appropriately and in a timely way to correspondence related to his workers' compensation case."

In a decision dated November 16, 2007, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. It found that the evidence was insufficient to establish that appellant was incompetent

[1] Appellant also filed an occupational disease claim on December 12, 2003 alleging work-related stress (No. 132095069). The emotional condition claim was denied by the Office in a decision dated February 23, 2004.

within the meaning of 20 C.F.R. § 10.607(c), so as to toll the one-year time limitation. The Office also found appellant's emotional condition claim was properly developed and therefore his contention that the Office committed error in that regard was without merit.

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] 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.[4]

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.[5] 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.[6] 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.[7]

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.[8] 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

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[2] 5 U.S.C. §§ 8101-8193.

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

[4] *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

[5] *Id.*

[6] *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).

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

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

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.[9] 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.[10]

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[11] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[12] As appellant's July 11, 2007 request for reconsideration was submitted more than one year after April 22, 2004, the date of the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his recurrence claim.[13]

Medical evidence submitted subsequent to the April 22, 2004 decision consists of a June 22, 2004 report from Dr. Goldstein and a September 6, 2006 report from Dr. Ragonetti. Neither report is sufficient to establish clear evidence of error on the part of the Office.

On June 22, 2004 Dr. Goldstein diagnosed fibromyalgia, bilateral bunions, left knee cyst, scoliosis and chronic left index mallet finger. He did not address whether appellant was disabled, but he opined that there was no causal relationship between appellant's diagnosed conditions and his prior work as a letter carrier. The Board finds that Dr. Goldstein's report does not establish error, but rather supports the Office's decision denying appellant's claim that he experienced a recurrence of disability causally related to his accepted injury.

On September 6, 2006 Dr. Ragonetti opined that appellant's "severe depression and anxiety" was caused "by a variety of circumstances including work stress and personal issues such as the death of a young daughter." He also opined that appellant "was too dysfunctional in the year 2004 to respond appropriately and in a timely way to correspondence related to his workers' compensation case." Dr. Ragonetti's report does not contain an opinion on the relevant issue, namely, whether appellant was disabled as a result of his accepted injury. Rather, it addresses his depression, a condition which was not accepted in this case.[14] Therefore, the report lacks probative value and is not sufficient to establish error on the part of the Office.

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[9] *Id.*

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

[11] 20 C.F.R. § 10.607(a).

[12] *Robert F. Stone*, 57 ECAB 292 (2005).

[13] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[14] Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value. *Michael E. Smith*, 50 ECAB 313 (1999).

The term "clear evidence of error" is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.[15] The evidence must *prima facie* shift the weight of the evidence in favor of appellant.[16] None of the medical reports submitted manifests on its face that the Office committed an error in denying appellant's recurrence claim. Moreover, none contains an opinion that appellant was disabled as a result of his accepted conditions. Thus, the reports are insufficient to establish clear evidence of error.

Appellant's representative acknowledged that his reconsideration request was submitted more than a year after the last merit decision, but contended that the time limitation should be tolled under 5 U.S.C. § 8122, due to appellant's mental incapacity and lack of representation.[17] The Board finds this argument to be without merit. There is no medical evidence of record that contains an opinion that appellant was mentally incompetent during the period in question. Dr. Ragonetti stated that he suffered from severe depression and anxiety. He also opined that appellant was too dysfunctional in the year 2004 to respond appropriately and in a timely way to correspondence related to his workers' compensation case. However, Dr. Ragonetti did not indicate that appellant's condition rendered him mentally incompetent. Moreover, Dr. Goldstein's June 22, 2004 report reflects that appellant was "alert, oriented x4, and in no acute distress" at that time. Appellant was able to describe the history of his occupational work injury, noting his complaints of cumulative trauma to his wrists, hands, elbows, feet, ankles, shoulder and low back. There was no evidence that he was unable to communicate, or that he was otherwise incompetent and unable to satisfy the time requirements for requesting reconsideration within one year of the Office's decision.[18]

Appellant's representative also contended that the Office erred by failing to process appellant's December 12, 2003 emotional condition claim and argued that the time limitation for filing a reconsideration request in the instant case should be stayed due to the filing of his other claim. Procedures in appellant's emotional condition claim are not relevant to the issues in this case and the filing of his emotional condition claim, without actual evidence of appellant's actual mental incompetence, is insufficient to stay the time limitation for filing a reconsideration request.[19]

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[15] *Joseph R. Santos*, 57 ECAB 554 (2006).

[16] *See Darletha Coleman, supra* note 8.

[17] Time limitations for filing claims for compensation under the Act do not run against an incompetent individual while he is incompetent and has no duly appointed legal representative. 5 U.S.C. § 8122(d)(2).

[18] Office regulations provide that the one-year time limit to file a reconsideration request does not include any time following the decision that the claimant can establish (through medical evidence) an inability to communicate and that his testimony would be necessary. *See* 20 C.F.R. § 10.607(c). The Board notes that appellant has not provided any probative medical evidence establishing that he was unable to communicate, or any evidence that his testimony would be necessary for a proper determination of his case.

[19] Office records reflect that appellant's emotional condition claim was processed and a final decision was issued on February 23, 2004 denying the claim.

As the evidence submitted by appellant is insufficient to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's last merit decision, he has not established clear evidence of error.[20]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[20] *See Veletta C. Coleman, supra* note 4.