United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 08-1155**
	)	**Issued: September 19, 2008**
U.S. POSTAL SERVICE, MORGAN GENERAL MAIL FACILITY, New York, NY, Employer	)	

Appearances:
Paul Kalker, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 11, 2008 appellant filed a timely appeal from a February 5, 2008 decision of the Office of Workers' Compensation Programs, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On June 14, 2004 appellant, a 43-year-old mail handler, filed a traumatic injury claim alleging that, on December 2, 2003, while he was separating parcel post packages from a bin and moving them to another container, his left knee buckled, he struggled to maintain his balance and he felt a "popping" in his back which caused pain in his neck, lower back and left side of his body. By decision dated August 17, 2004, the Office denied his claim on the grounds that the

evidence failed to establish that the claimed December 2, 2003 incident occurred at the time, place and in the manner alleged and the medical evidence did not establish that he sustained a work-related medical condition on December 2, 2003.[1]

Appellant requested reconsideration. By decision dated November 7, 2005, the Office denied modification of the August 17, 2004 decision.

On November 3, 2007 appellant requested reconsideration and submitted a July 9, 2007 report from Dr. Eileen S. Debbi, an attending Board-certified physiatrist, who reviewed the history of appellant's December 2, 2003 condition and provided findings on physical examination. Dr. Debbi stated that appellant sustained a previous employment injury on July 15, 1999 when he tripped and fell and tore his left knee lateral meniscus. Appellant underwent arthroscopic surgery in 2001. He did not return to work until the December 2, 2003 claimed injury. Dr. Debbi stated:

> "[Appellant] has a chronic left knee inflammation secondary to both work-related injuries on [July 15, 1999] and [December 2, 2003]. I can say this because there was no history of pain in this joint prior to either of these incidents. In addition, it is clear that his cervical and lumbar conditions are related to the work-related injury on [December 2, 2003], as neither of these existed prior to that injury. He has consequential injuries which have developed in the right shoulder, the right knee and the left ankle. The mechanism by which these have developed is simply the altered biomechanics due to his neck [and] back injuries placing strain on other parts of the body that were initially not affected."
>
> "It is my contention that the injuries are permanent due to the length of time that he has had them, and that he is disabled from his job…. I can say this because of the physical demands that are required of him at this job and the fact that he did return to work and then suffered further injuries."

By decision dated February 5, 2008, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed within one year of the last merit decision on November 7, 2005 and the evidence failed to show clear evidence of error.[2]

[1] Appellant has a separate claim accepted for a torn lateral meniscus of the left knee and sprains and strains of the left knee and leg sustained on July 15, 1999. He missed work intermittently but returned to full duty on September 16, 2002.

[2] Subsequent to the February 5, 2008 Office decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.[6] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[8] To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[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 a claimant has submitted clear evidence of error on the part of the

[3] 5 U.S.C. § 8128(a).

[4] *Thankamma Mathews*, 44 ECAB 765 (1993).

[5] *Id.* at 768.

[6] 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB 247 (2005).

[7] *Thankamma Mathews*, *supra* note 4 at 769.

[8] 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB 241 (2004).

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

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

[11] *Darletha Coleman*, 55 ECAB 143 (2003).

[12] *Leona N. Travis*, *supra* note 10.

[13] *Darletha Coleman*, *supra* note 11.

Office such that the Office abused its discretion in denying merit review in the face of such evidence.[14]

ANALYSIS

The merits of appellant's case are not before the Board. His request for reconsideration was dated November 3, 2007, more than one year after the Office's November 7, 2005 merit decision. Therefore, it was not timely.[15] The issue to be determined is whether appellant demonstrated clear evidence of error in his untimely request for reconsideration.

On November 3, 2007 appellant requested reconsideration and submitted a July 9, 2007 report from Dr. Debbi who noted that, prior to the claimed injury on December 2, 2003, he sustained a July 15, 1999 employment injury accepted for a torn left knee lateral meniscus. She stated that appellant had a chronic left knee inflammation secondary to "both work-related injuries." However, her opinion is not based upon a complete and accurate factual background as the December 2, 2003 injury has not been accepted as work related. Dr. Debbi stated that appellant's cervical and lumbar conditions were related to the December 2, 2003 work incident because "neither of these existed prior to that injury." The Board has held that the opinion of a physician that a condition is causally related to an employment injury simply because the employee was asymptomatic before the injury is insufficient, without supporting medical rationale, to establish causal relationship.[16] Dr. Debbi stated that appellant had consequential injuries to the right shoulder, right knee and left ankle due to altered body mechanics resulting from his neck and back injuries. The fact that the medical evidence has failed to establish that his neck and back conditions are causally related to the December 2, 2003 work incident also precludes any consequential conditions as being related to that incident. For these reasons, the July 9, 2007 report from Dr. Debbi does not raise a substantial question concerning the correctness of the Office's November 7, 2005 merit decision and the evidence submitted is insufficient to establish clear evidence of error.

The Board finds that the Office properly denied appellant's untimely request for reconsideration on the grounds that the evidence failed to demonstrate clear evidence of error in the November 7, 2005 merit decision.

[14] *Pete F. Dorso*, 52 ECAB 424 (2001).

[15] Appellant asserts that he did not receive a copy of the Office's November 7, 2005 decision until January 11, 2007. However, the record reflects that a copy of the November 7, 2005 decision was mailed to the correct address of record for appellant and was not returned as undeliverable. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the "mailbox rule." As the record reflects that the Office mailed a copy of the November 7, 2005 decision to appellant's address of record, it is presumed that it arrived at his mailing address. *See Jeffrey M. Sagrecy*, 55 ECAB 724 (2004); *James A. Gray*, 54 ECAB 277 (2002).

[16] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 5, 2008 is affirmed

Issued: September 19, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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