United States Department of Labor
Employees' Compensation Appeals Board

T.H., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Phoenix, AZ, Employer	)	**Docket No. 08-2382** **Issued: July 6, 2009**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2008 appellant filed a timely appeal from an August 14, 2008 Office of Workers' Compensation Programs' decision which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the most recent Office merit decision dated June 6, 2007 and the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On July 1, 2002 appellant, then a 46-year-old supervisory transportation security screener, felt his right knee pop when he bent down to wand a passenger. He stopped work on August 15, 2002 and worked intermittently thereafter. Appellant was approved for disability

retirement on January 3, 2006. An August 22, 2002 magnetic resonance imaging (MRI) scan of the right knee revealed a degenerative tear to the anterior horn and body of the medial meniscus. The Office accepted appellant's claim for aggravation of the right knee medial meniscus tears and authorized arthroscopic surgery on September 12, 2002, a total right arthroplasty on February 18, 2003 and arthroscopy on August 27, 2004.[1]

Appellant was treated by Dr. Brad R. Bruns, a Board-certified orthopedic surgeon, for right knee pain and locking that was aggravated by prolonged standing at work. Dr. Bruns subsequently performed the surgeries on appellant's right knee. Appellant submitted a work capacity evaluation from Dr. Bruns dated March 8, 2006. He noted that appellant reached maximum medical improvement and could return to work subject to permanent restrictions. Dr. Bruns noted that appellant could sit up to eight hours per day, walking and standing were limited to two hours per day, repetitive movements for up to eight hours per day, pushing and pulling were limited to 80 pounds, lifting was limited to 10 pounds and no squatting, kneeling or climbing.

On March 14, 2006 the employing establishment offered appellant a full-time limited-duty assignment as a logistics supervisor of uniform operations subject to the restrictions set forth by Dr. Bruns on March 8, 2006, effective April 2, 2006. Appellant rejected the job offer on March 27, 2006. In a note dated March 26, 2006, he advised that his disability retirement was approved on January 9, 2006. In an April 6, 2006 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that he had 30 days to accept the position or provide reasons for refusing it, otherwise, he risked termination of his compensation benefits. On April 10, 2006 he noted that he was approved for disability retirement and was self-employed. On May 10, 2006 the Office advised appellant that the position of a limited-duty assignment as a logistics supervisor of uniform operations was suitable work. It considered the reasons given by appellant for refusing the position and found then to be unacceptable. The Office afforded appellant 15 additional days to accept the job offer. In letters dated May 3 and 23, 2006, appellant rejected the job offer and noted that he did not have enough information to make an informed decision on accepting the job offer in light of his disability retirement.

In a May 26, 2006 decision, the Office terminated appellant's compensation benefits effective that date on the grounds that he refused an offer of suitable work.

[1] In an April 11, 2005 decision, the Office granted appellant a schedule award for 50 percent impairment of the right leg. The award ran from February 21, 2004 to August 24, 2007.

Appellant requested an oral hearing which was held on February 21, 2007. In a decision dated June 6, 2007, an Office hearing representative affirmed the May 26, 2006 decision.[2]

In an undated letter received on June 12, 2008, appellant's attorney requested reconsideration of the June 6, 2007 Office decision. Counsel asserted that the reconsideration request was made within one year of June 6, 2007. Appellant submitted an April 16, 2008 report from Dr. Bruns, who opined that appellant, could perform sedentary work with no kneeling, squatting, crawling or climbing. Dr. Bruns noted that it was brought to his attention that some of the physical duties performed on screening training day would involve activities beyond appellant's sedentary restrictions. He opined that the activities required for a screening training day would be against his medical advice and should be included in his permanent restrictions. Appellant also submitted a June 17, 2008 e-mail and advised that the job offer was beyond his physical capabilities as it did not list the duties to be performed during the training day that occurred one day per week. He noted that the job offer noted that he would be working at a check point in order to maintain his certification but failed to list duties to be performed on those days.

By decision dated August 14, 2008, the Office denied reconsideration on the grounds that the request was not timely filed and that appellant did not present clear evidence of error by the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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 --
>
> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[3]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[4]

[2] In a decision dated September 24, 2007, the Office denied appellant's claim for disability for the period June 25 to August 8, 2005 on the grounds that he received a schedule award payment for the same period and was not entitled to dual compensation for the same injury. It also denied appellant's claim for leave buyback for the period June 6 to 24, 2005 because his claim was incomplete. Appellant did not appeal this decision to the Board.

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[5]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.[6]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[9] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[10]

ANALYSIS

On August 14, 2008 the Office denied reconsideration of its June 6, 2007 decision on the grounds that appellant's undated reconsideration request, received on June 12, 2008, was untimely filed. The Board finds that the reconsideration request received on June 12, 2008 was untimely. The one-year time limitation begins to run on the day following 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] The Board notes that the Office's procedures, at Chapter 2.1602.3(b)(1), provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope. The procedures provide that timeliness is determined by the postmark on the envelope, if available. Otherwise,

[5] 20 C.F.R. § 10.607(b); *Fidel E. Perez,* 48 ECAB 663, 665 (1997).

[6] *Annie L. Billingsley*, *supra* note 4.

[7] *Jimmy L. Day*, 48 ECAB 652 (1997).

[8] *Id.*

[9] *Id.*

[10] *Cresenciano Martinez,* 51 ECAB 322 (2000); *Thankamma Mathews,* 44 ECAB 765,770 (1993).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

[12] *Id.*; *Larry J. Lilton*, 44 ECAB 243 (1992).

the date of the letter itself should be used.[13] The Board notes that, while the envelope containing the request was not retained in the record, the reconsideration request was undated and not received by the Office until June 12, 2008. Appellant's attorney asserted that the reconsideration request was made within one year of June 6, 2007 but appellant did not submit any evidence establishing a mailing date within one year of June 6, 2007.[14] The Board finds that the reconsideration request was untimely as it was not made within one year of June 6, 2007.

The Board also finds that appellant did not submit any evidence with his reconsideration that raises a substantial question concerning the correctness of the Office's decision and establishes clear evidence of error. Appellant submitted a June 17, 2008 e-mail asserting that the job offer was beyond his physical capabilities and failed to list the duties to be performed during the training day that occurred once per week. The Board notes that appellant's assertions regarding the description of job duties do not raise a substantial question as to the correctness of the Office's decision which affirmed the termination of his compensation because he refused suitable work. There is no evidence establishing that the job duties of the offered position were outside of his physical restrictions or medically unsuitable when the Office terminated benefits. Appellant's assertion that the job duties were outside his restrictions is inadequate to establish clear evidence of error.

In an April 16, 2008 report, Dr. Bruns noted that appellant reported that some of the duties performed would involve certain activities that were beyond his sedentary restrictions. He indicated that these activities would be against his medical advice and should be included in his permanent restrictions. This evidence is insufficient to raise a substantial question as to the correctness of the Office's June 6, 2007 decision. Dr. Bruns addressed the physical duties of the position as reported to him by appellant and did not specifically address the suitability of the offered position. The Board notes that the term "clear evidence of error" is intended to represent a difficult standard. Evidence such as a detailed, well-rationalized report, which if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.[15] Consequently, the Office properly found that appellant's reconsideration does not establish clear evidence of error.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004). *See* 20 C.F.R. § 10.607(a).

[14] *See* 20 C.F.R. § 10.607(a).

[15] *Annie L. Billingsley*, *supra* note 4; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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