United States Department of Labor
Employees' Compensation Appeals Board

W.G., Appellant	)	
and	)	**Docket No. 08-2340**
	)	**Issued: June 22, 2009**
U.S. POSTAL SERVICE, MIAMI INTERNATIONAL SERVICE CENTER, Miami, FL, Employer	)	

Appearances:
Ana M. Frexes, Esq., for the appellant
No appearance, for the Director

Oral Argument March 5, 2009

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 26, 2008 appellant, through counsel, filed a timely appeal of a May 28, 2008 nonmerit decision of the Office of Workers' Compensation Programs that denied his request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated December 2, 2003 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On June 20, 2003 appellant, then a 61-year-old mail handler, fell to the floor and struck the left side of his head. On June 25, 2003 a traumatic injury claim (Form CA-1) was filed by

Pete Trim, a union steward. He noted that appellant had stated that he felt dizziness prior to falling to the workroom floor. Robert Person, a supervisor, noted that he was unable to determine all the facts surrounding the fall but that appellant had felt dizzy and fell. He related that the cause of appellant's fall was unknown and could have been due to nonwork-related factors. Appellant was transported to a local hospital on June 20, 2003 where he fell into a coma for 42 days and spent 64 days in the hospital.

In a June 21, 2003 statement, Robert Schmidt, a supervisor, related that a postal clerk signaled him that an employee needed medical attention. He saw appellant standing next to a general purpose mail container (GPMC, GPC) with a large bump on the left side of his head. Mr. Schmidt stated that appellant told him that he did not know what happened. In a June 21, 2003 statement, Carlos Rodriguez, a coworker, related that, at the start of the tour on June 20, 2003, he noticed that appellant appeared fatigued and weak. He stated that it was hard for appellant to relax as he had moved into a new house and was undertaking several projects. Appellant told Mr. Rodriguez that he was tired on June 20, 2003 because he hardly slept the night before. Subsequently, Mr. Rodriguez heard something and saw appellant on the workroom floor. He stated that Mark Strysick assisted appellant to his feet and he hung onto a GPC. Mr. Rodriguez was unaware how long appellant had been on the floor but, from the nature of the bruise to the head, he had fallen backwards adjacent to a GPC.

In an undated statement, Mr. Strysick related that on June 20, 2003 he heard a loud wailing sound coming from the area of the letter mail labeling (LML) machine. When he reached the area, he saw appellant trying to stand up by pulling onto a GPC. Mr. Strysick stated that Nelson Pabon, a Navy employee, was trying to prevent him from falling. He stated that appellant appeared to be very weak and he was sweating and disoriented. Mr. Strysick related that, after Mr. Schmidt and Mr. Person arrived, a chair was provided to appellant and 911 was called. In a June 23, 2003 memorandum, Mr. Pabon stated that on June 20, 2003 he heard cries for help coming from the area near the LML machine. He noticed appellant kneeling down in pain between the GPC and LML machines. Mr. Pabon stated that his safety and regular glasses were on the floor close to the LML machine, which was on the left side of his body. Appellant's hat and hairpiece were on the right side of his body. Mr. Pabon and another coworker helped appellant into a chair. He did not see how appellant sustained his injuries or know what might have caused them. In an undated accident report, Mr. Person stated that Mr. Pabon discovered appellant lying on the workroom floor between the LML machine and strapping machines. Mr. Person observed appellant standing on his feet slumped over at the waist. Appellant was breathing heavily, sweating profusely and hyperventilating. Mr. Person noted a large contusion on the left side of appellant's head. He stated that appellant apparently sustained a head injury from the fall which no one witnessed. Ben Vidal, an acting manager, directed Mr. Person to call 911. He subsequently accompanied appellant to the hospital by ambulance. In a June 23, 2003 memorandum, Mr. Vidal stated that appellant sustained a concussion on the left side of his head. He related that appellant appeared very confused and disoriented while being evaluated by emergency response personnel.

Hospital treatment records dated June 20 through 23, 2003 listed a history that appellant fell at work and was found on the floor in a confused state. Appellant was diagnosed with a closed head trauma injury, subachroid hemorrhage/hematoma, rib fracture, right parietal contusion and left traumatic severe aplastic anemia. He was also status post syncope of

unknown etiology. A June 23, 2003 treatment note stated that appellant suffered from probable delirium tremors associated with ethyl alcohol abuse. On June 27, 2003 Ingrid Petrakis, an occupational health nurse, reviewed the hospital records and advised the injury compensation specialist that appellant was being treated for a subarachnoid hemorrhage, probable delirium tremors, rule out hepatic encephalopathy and possible Wernicke's encephalopathy. She noted that appellant's treatment apparently was for alcohol withdrawal.

By letter dated July 8, 2003, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional factual and medical evidence. In a letter dated July 14, 2003, the employing establishment controverted the claim.

Hospital records dated June 30 through August 20, 2003 addressed appellant's treatment. Appellant underwent several surgeries, including one on July 9, 2003, which involved the placement of a tracheostomy because he had become comatose after arriving at the hospital. A June 26, 2003 authorization for examination and/or treatment (Form CA-16) of Dr. Luis Diaz-Secades, an internist, stated that the cause of appellant's closed head trauma, contusion, subarchroid hemorrhage, left rib cage fracture, pneumothorax and syncope, which he sustained on June 20, 2003 was unknown. In an August 27, 2003 hospital discharge summary report, Dr. Diaz-Secades again listed appellant's diagnoses. He stated that appellant sustained respiratory failure, bilateral pneumonia with bacteremia, hypertension by history, seizure disorder and dysphagia. Appellant was status post left rib fracture, Wernicke's encephalopathy secondary to chronic alcohol abuse with delirium tremors, tracheostomy and pneumoencephalography tube insertion.

On July 26, 2003 appellant's brother, responded to the Office's July 8, 2003 letter. He stated that appellant tripped and fell to the ground while entering the break room on June 20, 2003. Appellant's brother related that appellant caught his toe on the floor and fell straight to the floor. He contended that the fall was not caused by any preexisting medical condition.

In an October 31, 2003 letter to the employing establishment, appellant's attorney requested that the description of appellant's June 20, 2003 incident be amended and forwarded to the appropriate authorities. Counsel contended that appellant's fall was not due to dizziness. Rather, appellant tripped and fell on a piece of machinery while on the workroom floor, resulting in a severe head injury that required hospitalization. By letter dated November 17, 2003, the employing establishment denied counsel's request. It noted that the CA-1 form was completed by Mr. Trim on appellant's behalf and that he should contact the Office to make any amendment to the description of the June 20, 2003 incident.

In a December 2, 2003 decision, the Office denied appellant's claim, finding that the medical evidence established that his fall on June 20, 2003 was due to delirium tremors as a side effect of a preexisting nonwork-related condition. Moreover, the evidence did not establish that appellant struck any intervening object before falling to the floor. The Office noted that the witness statements did not list any obstruction causing him to fall to the floor.[1] It determined

[1] Attached to the December 2, 2003 decision, the Office notified appellant as to his appeal rights under the Federal Employees' Compensation Act.

that appellant sustained an idiopathic fall as opposed to an unexplained fall based on the witness statements.

In an April 20, 2007 letter, appellant, through counsel, requested a review of the written record before an Office hearing representative. By decision dated May 30, 2007, the Branch of Hearings and Review denied appellant's request as it was not timely filed and he was not entitled to a hearing as a matter of right. The Branch of Hearings and Review advised appellant that he could pursue his claim by requesting reconsideration before the Office and submitting additional evidence.

On March 20, 2008 appellant requested reconsideration of the December 2, 2003 decision. Counsel described the after effects of the June 20, 2003 injury, noting that appellant was hospitalized for two months, 42 days of which were spent in a coma. A chronology of 23 "correspondence and events" related to the claim was presented, including number 3 which stated:

> "October 31, 2003 letter from undersigned to [employing establishment] Injury Compensation Office notifying of inaccuracy in the Form CA-1 description of accident wherein accident was described as a result of [c]laimant's dizziness. **This is untrue and a misstatement of fact -- [c]laimant fell to the floor as a result of a piece of machinery on the floor and which [c]laimant tripped over and fell on."** (Emphasis in the original.)

On May 28, 2008 the Office denied appellant's request for reconsideration finding that it was not made within one year of the December 2, 2003 merit decision and failed to establish clear evidence of error. It noted counsel's argument on reconsideration that appellant tripped over a piece of equipment but found that it was inconsistent with the contemporaneous evidence of record and statements from witnesses.[2] The Office found:

> "You have apparently stated that you tried to sit on a chair which rolled out from under you. The record shows that there was no chair in the area of the fall -- one was brought in after you fell. You also said that you caught your toe and fell -- but that history is not consistent with the other contemporary evidence. Prior to the fall you told people at work that you felt dizzy and medical records show you lost consciousness.
>
> "Your attorney's assertion that you tripped over a piece of equipment is not of sufficient probative value to 'shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.'
>
> "Your attorney also provides a chronology of events from June 20, 2003 to May 30, 2007. For the most part, the chronology is merely a list of

[2] On appeal, appellant has submitted additional evidence. The Board may not consider evidence for the first time on appeal, which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

correspondence which was sent to the [p]ost [o]ffice or to the Department of Labor. The chronology has no evidentiary value to establish that the decision of December 2, 2003 was in error."

LEGAL PRECEDENT

Section 8128(a) of the Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provide that an application for reconsideration must be submitted within one year of the date of the Office decision for which review is sought.[5]

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 decision was, on its face, erroneous.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[7] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[8] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] 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.[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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[3] 5 U.S.C. § 8128(a).

[4] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] 20 C.F.R. § 10.607(a).

[6] *Id.* at § 10.607(b); *see also Alberta Dukes*, 56 ECAB 247 (2005).

[7] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[8] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

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

[10] *Leona N. Travis*, *supra* note 8.

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

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

ANALYSIS

The Board finds that appellant failed to file a timely application for review of the December 2, 2003 merit decision. 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.[13]

The most recent merit decision was issued by the Office on December 2, 2003. It denied appellant's claim for compensation on the grounds that the evidence established that he sustained an idiopathic fall on June 20, 2003 due to delirium tremors that were related to a preexisting nonwork-related condition and that he did not strike an intervening object in falling to the floor. Accompanying this decision was a copy of appellant's appeal rights, informing him that a request for reconsideration must be made within one year of the date of the decision. Appellant did not seek further review until 2007 and 2008. The Board does not have jurisdiction to review the merits of the claim as no appeal was taken within one year of the Office's decision. As his March 20, 2008 letter requesting reconsideration was made more than one year after the December 2, 2003 decision, it was not timely filed.

Moreover, appellant has not presented evidence sufficient to establish clear error on the part of the Office in the denial of his claim. His argument of error presented in the 2008 reconsideration request focused solely on the allegation that he tripped on a piece of machinery and fell. Counsel first raised this contention in an October 31, 2003 letter to the employing establishment, which was part of the record before the Office prior to the December 2, 2003 decision.

It was first contended by appellant's brother in July 2003 that appellant "tripped and fell to the ground while entering the break room" on June 20, 2003. His brother argued that the fall was not caused by any preexisting medical condition. As noted, counsel for appellant presented argument in the October 31, 2003 letter that he tripped over a piece of equipment and fell to the floor. Her argument in 2008 is identical to that made in 2003 over the facts in evidence. The Office made a factual determination, as noted, finding that the evidence of record supported an idiopathic condition. Under the clear evidence of error standard, the Board has held that it is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. The evidence presented must manifest that the Office committed error in 2003 in denying the claim. Appellant's argument raised in the 2008 reconsideration request merely reiterated the factual contention of October 31, 2003, a contention that was not accepted by the Office.

Moreover, counsel's reliance on the Board's case precedent, as cited at oral argument, does not establish clear error on the part of the Office. There was conflicting factual evidence of record concerning the fall. The fact that the Office relied on evidence pertaining to a preexisting nonwork-related condition does not establish a misapplication or misinterpretation of the Board precedent. While a fact finder could construe the evidence to find that appellant sustained an

[13] *Larry L. Litton*, 44 ECAB 243 (1992).

unexplained fall on the merits of the claim; under the clear evidence of error standard such a contrary factual conclusion does not warrant further merit review by the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as it was untimely filed and did not establish clear evidence of error in the December 2, 2003 decision.

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2008 decision of the Office of Workers' Programs is affirmed.

Issued: June 22, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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