United States Department of Labor
Employees' Compensation Appeals Board

A.N., Appellant	)	
	)	**Docket No. 08-1699**
and	)	**Issued: March 19, 2009**
	)	
U.S. DEPARTMENT OF AGRICULTURE, ANIMAL & PLANT HEALTH INSPECTION SERVICE, Fort Collins, CO, Employer	)	

Appearances:
Appellant, pro se
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 May 27, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated February 22, 2008, 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 merit decision dated July 12, 2006 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(d)(2).

ISSUE

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

FACTUAL HISTORY

On January 26, 2004 appellant, then a 54-year-old policy analyst, filed a traumatic injury claim alleging that, on January 2, 2004, after arriving at the employing establishment, he stepped

out of his vehicle and slipped and fell on ice, injuring his hip. He stopped work on January 26, 2004 and returned on February 2, 2004.

Appellant submitted a note from Dr. Pamela S. Webber, a Board-certified family practitioner, dated January 25, 2004, who noted that he was treated for an injury and was excused from work until January 29, 2004. A magnetic resonance imaging (MRI) scan of the lumbar spine dated June 17, 2004 revealed a disc protrusion at L2-3 with degenerative changes and a disc protrusion at L1-2. Appellant was also treated by Dr. Hans C. Coester, a Board-certified neurologist, on July 6, 2004, for low back pain which developed after a fall. Dr. Coester diagnosed L2-3 disc herniation with slight L2-3 retrolisthesis and recommended conservative treatment.

By letter dated April 12, 2005, the Office advised appellant that his claim was originally received as a simple, uncontroverted case which resulted in minimal or no time loss from work. It indicated that appellant's claim was administratively handled to allow medical payments up to $1,500.00; however, the merits of the claim had not been formally adjudicated. Because of his request for treatment, his claim would be formally adjudicated. The Office requested that appellant submit a comprehensive medical report from his treating physician, which included a reasoned explanation as to how the specific work factors or incidents identified by him had contributed to his claimed injury.

Appellant submitted physical therapy notes from March 10 to April 21, 2005.

In a May 25, 2005 decision, the Office denied appellant's claim finding that the medical evidence did not establish that his condition was caused by employment factors.

On May 11, 2006 appellant requested reconsideration. He submitted reports from Dr. C. Brad Sisson, a Board-certified neurologist, dated July 7, 2005 and February 9, 2006, who performed L2-3 lumbar epidural steroid injection and a left nerve root block at L5-S1. Dr. Sisson diagnosed lumbar degenerative disc disease with L2-3 moderate stenosis, facet arthrosis, chronic lumbago, left L5 radiculitis and L5-A1 intervertebral disc disruption. Appellant submitted a May 3, 2006 report from Dr. Webber, who noted that appellant had a recurrence of pain in March 2005 and underwent physical therapy and spinal injections. Dr. Webber opined that appellant's symptoms in March 2005 were due to the January 20, 2004 workplace accident. She diagnosed sacroiliac joint pain and low back pain.

In a decision dated July 12, 2006, the Office denied modification of the May 25, 2005 decision.

In a letter dated February 7, 2008, appellant wrote to the Office to inquire as to the status of a July 9, 2007 reconsideration request. He submitted a copy of a July 9, 2007 request for reconsideration that listed an address for the Office. The address on this letter listed the Office's zip code as 40724. The Office's address listed in the appeal rights accompanying the July 12, 2006 decision listed the correct zip code as 40742. In the July 9, 2007 letter, appellant noted that an inadvertent request by his medical provider for payment generated a new review of his case and subsequent denial of his claim. He indicated that he never intended that his medical bills which he incurred beyond the initial review be submitted for payment and the oversight by his

medical provider caused an unfavorable decision by the Office. Appellant requested time lost for his injury and rehabilitation. The reconsideration request was stamped as received on February 12, 2008.

In a letter dated February 14, 2008, the Office acknowledged receipt of appellant's letter dated February 7, 2008 requesting reconsideration of his claim. It advised appellant that the case was assigned to a claims examiner for a review of the evidence submitted.

By decision dated February 22, 2008, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error.

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."[1]

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.[2]

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.[3]

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

[3] *Id*. at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

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.[4]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[5] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[6] 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.[7] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[8]

ANALYSIS

On February 7, 2008 appellant asserted that he had previously requested reconsideration on July 9, 2007. However, the case record does not contain a copy of the request that accompanied the February 7, 2008 letter. On appeal, appellant argues that he timely filed a reconsideration request and that, due to administrative error, the Office did not receive the correspondence. The Board notes that, pursuant to the mailbox rule, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.[9] This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[10] The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.[11] This Board has held that this rule may apply to a claimant, provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing in the course of business.[12]

[4] *Annie L. Billingsley*, *supra* note 2.

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

[6] *Id.*

[7] *Id.*

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

[9] *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

[10] *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

[11] *See Larry L. Hill*, 42 ECAB 596 (1991).

[12] *Id.*

On February 7, 2008 appellant submitted a letter dated July 9, 2007, which requested reconsideration of the Office decision of July 12, 2006. However, he submitted no evidence that the July 9, 2007 letter was duly mailed in one ordinary course of business. There is no certified mail receipt or copy of the envelope to show whether appellant mailed this letter to the proper address or whether the envelope bore proper postage. Rather, the address on the July 9, 2007 letter reflected an incorrect zip code. Unlike the Office, law firms or other businesses, appellant is an individual and may not establish proper mailing by business use or custom. With no evidence of proper mailing, no presumption of receipt arises from the mailbox rule. Accordingly, the Board finds that appellant's February 7, 2008 request for reconsideration is untimely as appellant made the request more than one year following the last merit decision in his case, which was the Office's prior decision of July 12, 2006.[13]

The Board also finds that appellant has not established clear evidence of error on the part of the Office. The Board notes that appellant did not submit any evidence with his reconsideration request sufficient to *prima facie* shift the weight of the evidence in his favor and concludes that appellant has not established clear evidence of error. In the reconsideration request, received on February 12, 2008, appellant asserted that he never intended that his medical bills which he incurred beyond the initial review be submitted for payment and the oversight by his medical provider caused an unfavorable decision by the Office. He requested only time lost for his injury and rehabilitation for the initial fall be recognized. The Board notes that appellant's reconsideration request addressed his desire for compensation for time lost and for rehabilitation for the injury; however, it does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision which determined that he failed to establish a causal relationship of his diagnosed condition to his employment. Therefore, the Office properly found that his statement of February 7, 2008 and letter of July 9, 2007 did not establish clear evidence of error. It properly denied appellant's reconsideration request.

Appellant has not otherwise provided any argument or evidence sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of the Office's decision. Consequently, the Office properly denied appellant's reconsideration request as appellant's request does not establish clear evidence of error.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed.

[13] *See Joseph G. Cutrufello,* Docket No 97-2546 (issued June 21, 1999).

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2009
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