United States Department of Labor
Employees' Compensation Appeals Board

T.K., Appellant	)	
and	)	**Docket No. 08-2099**
	)	**Issued: May 6, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Saint Petersburg, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 23, 2008 appellant filed a timely appeal from September 21, 2007 and March 17, 2008 decisions of the Office of Workers' Compensation Programs denying his request for reconsideration of an October 3, 2006 schedule award decision. Because more than one year has elapsed from the last merit decision dated October 3, 2006 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's schedule award claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly denied appellant's timely request for reconsideration of an October 3, 2006 merit decision; and (2) whether the Office properly denied appellant's second request for reconsideration on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On July 13, 1999 appellant, then a 49-year-old letter carrier, filed a claim for a traumatic injury. On July 6, 1999 he experienced back and leg pain at home upon his return from work. The Office accepted his claim for spinal stenosis, sciatica and a herniated disc at L4-5 and L5-S1. On May 22, 2000 it granted appellant a schedule award for 12 percent impairment of the right leg. On April 24, 2006 appellant filed a claim for an additional schedule award.

In a February 14, 2006 report, Dr. Thomas C. Tolli, appellant's attending Board-certified orthopedic surgeon, stated that he had back pain but no leg symptoms. He opined that appellant had seven percent impairment based on the 1996 Florida Uniform Permanent Impairment Rating Schedule.

On June 9, 2006 Dr. Adam S. Bright, a Board-certified orthopedic surgeon and an Office referral physician, noted that appellant had chronic back pain. Findings on physical examination included bilateral lower extremity pain with straight leg maneuvers. Motor strength was good but there was some weakness in his legs, which appeared to be secondary to pain and voluntary. Dr. Bright calculated that appellant had six percent left lower extremity impairment and eight percent right lower extremity impairment for sciatic nerve deficit, based on Tables 17-37 and 16-10 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[1]

In an August 8, 2006 report, Dr. James W. Dyer, a Board-certified orthopedic surgeon and an Office medical adviser, noted that appellant had received a schedule award for 12 percent impairment of the right leg on December 7, 1999. The medical evidence did not support additional right leg impairment. Dr. Dyer stated that appellant had six percent impairment of his left leg for Grade 3 deficit of the sciatic nerve, based on Table 17-37 at page 552 of the A.M.A., *Guides* and Table 16-10 at page 482.

By decision dated October 3, 2006, the Office granted appellant a schedule award for six percent impairment of the left lower extremity for 17.28 weeks, from June 9 to October 7, 2006.[2]

By letter dated October 27, 2006, received by the Office on July 18, 2007, appellant requested reconsideration. On July 9, 2007 he asserted that the condition of his lower extremities had worsened. Appellant submitted a July 17, 2007 report from Dr. Tolli who noted complaints of back pain, bilateral leg symptoms and numbness and tingling in the feet. Dr. Tooli noted that appellant had no significant changes in his symptoms. Findings on physical examination included negative straight leg raising, 5/5 motor examination, positive paraspinous tenderness and slightly decreased sensation in both feet. Appellant also submitted physical therapy notes.

[1] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

[2] The Federal Employees' Compensation Act provides for 288 weeks of compensation for 100 percent loss or loss of use of a lower extremity. 5 U.S.C. § 8107(c)(2). Multiplying 288 weeks by six percent equals 17.28 weeks of compensation.

By decision dated September 21, 2007, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant further merit review.

By letter dated November 15, 2007, received by the Office on November 21, 2007, appellant requested reconsideration. He submitted a June 14, 2007 report, in which Dr. Tolli responded to a request for information on appellant's work restrictions. Appellant diagnosed low back pain with radiculopathy and indicated that the work restrictions were permanent.

By decision dated March 17, 2008, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to establish clear evidence of error in the last merit decision dated October 3, 2006.[3]

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of the Act[4] does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] It, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[6]

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[8] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[9] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[10]

[3] Subsequent to the March 17, 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.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Id*. at § 8128(a).

[6] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[7] Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application." 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.606(b)(2).

[9] *Id*. at § 10.607(a).

[10] *Id*. at § 10.608(b).

ANALYSIS -- ISSUE 1

By letter dated On October 27, 2006, received by the Office on July 18, 2007, appellant requested reconsideration of the October 3, 2006 schedule award decision. On July 9, 2007 he asserted that the condition of his lower extremities had worsened. In a July 17, 2007 report, Dr. Tolli noted complaints of back pain, bilateral leg symptoms and numbness and tingling in the feet. Findings on physical examination included negative straight leg raising, 5/5 motor examination, positive paraspinous tenderness and slightly decreased sensation in both feet. However, Dr. Tolli did not address the underlying issue of appellant's lower extremity impairment. Consequently, this report does not constitute relevant and pertinent new evidence not previously considered by the Office. Appellant also submitted physical therapy notes. A physical therapist does not qualify as a physician under the Act.[11] Registered nurses, licensed practical nurses, physician's assistants and physical therapists are not physicians as defined under the Act and their opinions are of no probative value.[12] Consequently, the physical therapist notes do not constitute relevant and pertinent new evidence not previously considered by the Office.

Appellant did not submit evidence or argument that showed that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered or constituted relevant and pertinent new evidence not previously considered by the Office. Therefore, the Office properly denied his request for reconsideration.

LEGAL PRECEDENT -- ISSUE 2

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.[13] As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[14]

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which, on its face, shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have

[11] *See* 5 U.S.C. § 8101(2) which provides: "'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law"; *see also Roy L. Humphrey*, 57 ECAB 238 (2005); *Jennifer L. Sharp*, 48 ECAB 209 (1996).

[12] *Id.*

[13] 5 U.S.C. §§ 8101-8193.

[14] 20 C.F.R. § 10.607.

created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.[15]

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.[16] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[17] To show clear evidence of error, the evidence submitted not only must 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.[18] 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.[19]

ANALYSIS -- ISSUE 2

The merits of appellant's case are not before the Board. His request for reconsideration was received by the Office on November 21, 2007, more than one year after the Office's October 3, 2006 merit decision and therefore is not timely. The issue to be determined is whether appellant demonstrated clear evidence of error in his untimely request for reconsideration.

The Office's merit decision on October 3, 2006 granted appellant a schedule award for six percent impairment of the left lower extremity. On November 21, 2007 appellant submitted a June 14, 2007 report in which Dr. Tolli diagnosed low back pain with radiculopathy and indicated that his work restrictions were permanent. Dr. Tolli did not address the underlying issue of appellant's left lower extremity impairment. Therefore, his report does not raise a substantial question as to the correctness of the Office's October 3, 2006 merit decision or establish clear evidence of error.

Because appellant's untimely request for reconsideration did not demonstrate clear evidence of error in the October 3, 2006 merit decision, the Office properly denied his request for reconsideration.

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (October 2005).

[16] *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004).

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

[18] *Id.*

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

CONCLUSION

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration in its September 21, 2007 decision. The Board further finds that, in its March 17, 2008 decision, the Office properly denied his request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error in the October 3, 2006 Office merit decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 17, 2008 and September 21, 2007 are affirmed.

Issued: May 6, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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