United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 08-2184**
	)	**Issued: May 6, 2009**
DEPARTMENT OF VETERANS AFFAIRS, CENTRAL ALABAMA VETERANS HOSPITAL, Montgomery, AL, 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 August 5, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated March 20, 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 Office merit decision, dated July 7, 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.

ISSUE

The issue on appeal 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 17, 2001 appellant, then a 27-year-old plastics worker filed a traumatic injury claim alleging that on July 10, 2001 he injured his back when lifting a mold at work. He stopped work on July 10, 2001 and returned on July 17, 2001 and worked intermittently thereafter. A

July 21, 2000 magnetic resonance imaging scan of the lumbar spine revealed minimal disc bulge at L4-5 and an annular disc bulge at L5-S1. The Office accepted appellant's claim for a lumbar sprain/strain and paid appropriate benefits including wage-loss compensation for intermittent periods.

Appellant came under the treatment of Dr. Harvey C. Jenkins, a Board-certified orthopedic surgeon, for lumbar pain which developed after the lifting incident. Dr. Jenkins diagnosed chronic musculoligamentous strain, minimal disc bulge at L4-5 and L5-S1 and cervical spine strain with probable lumbar stenosis. On March 8 and June 1, 2006 he treated appellant for intravertebral disc disorder of the lumbar spine. Dr. Jenkins advised that appellant was unable to work since November 10, 2004 and his disability was due to his work injury. Appellant was also treated, from April 2, 2004 to July 28, 2005, by Dr. Darryl D. Robinson, a Board-certified anesthesiologist, who administered several epidural injections at L4-5 and L5-S1 in 2006. Appellant was treated on September 10, 2004 by Dr. Stephen B. Hopper, a Board-certified psychiatrist, for anxiety and depression starting in 2004.

On April 14, 2006 appellant filed a Form CA-7, claim for compensation, for the period beginning November 10, 2004. In a June 9, 2006 statement, he contended that his claims examiner was unprofessional.

In a decision dated July 7, 2006, the Office denied appellant's claim for compensation for the period beginning December 1, 2004. The decision was sent to appellant's address of record.

In a letter dated October 9, 2007, appellant wrote to the Office to inquire as to the status of a December 23, 2006 reconsideration request. He noted speaking with a claims examiner who had no record of his reconsideration request and allegedly told appellant that there were problems dealing with the prior claims examiner. Appellant alleged that the claims examiner instructed him to resubmit his reconsideration request. He submitted a copy of a December 23, 2006 request for reconsideration. Also submitted was a partial copy of a July 6, 2006 decision which noted an address which was crossed out and replaced with appellant's current address of record and a copy of a portion of an envelope addressed to the Office. Appellant submitted a Form CA-7, claim for compensation, for the period beginning November 10, 2004 and reports from Dr. Jenkins previously of record.

On January 3, 2007 Dr. Jenkins noted treating appellant for intravertebral disc disorder of the lumbar spine. He advised that appellant was temporarily totally disabled beginning November 10, 2004 due to his back condition. Dr. Jenkins had treated appellant since 2001 for problems related to the work injuries.

By decision dated March 20, 2008, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and 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 --
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> (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]

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

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[1] 5 U.S.C. § 8128(a).

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

[3] 20 C.F.R. § 10.607(b); *Fidel E. Perez,* 48 ECAB 663, 665 (1997).

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

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

[6] *Id.*

[7] *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[8]

ANALYSIS

The Office denied appellant's claim for compensation in a July 7, 2006 decision. In an October 9, 2007 letter, appellant requested reconsideration and asserted that he had previously requested reconsideration on December 23, 2006. The Board has reviewed the case record and notes that no request dated December 23, 2006 was submitted prior to appellant's October 9, 2007 letter. On appeal, appellant argues that he timely filed his reconsideration request and that it was error by the Office that it did not receive the correspondence and that it could have gotten lost in the holiday mail. 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 in the ordinary course of business.[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 applies equally to claimants and the Office alike, 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]

On October 9, 2007 appellant submitted an appeal form dated December 23, 2006 requesting reconsideration of an Office decision of July 6, 2006.[13] However, he submitted no evidence that the December 23, 2006 appeal form was duly mailed. 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. 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 October 9, 2007 request for reconsideration was

[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.*

[13] The Board notes that the July 6, 2006 partial Office decision appellant submitted with his October 9, 2007 reconsideration request appears to be identical to the July 7, 2006 decision in the record. It appears as though the July 6, 2006 decision was originally addressed to appellant at 2424 Knox Road; however, this address was crossed out and appellant's current address was noted as 4325 SE 12. It is unclear who made the address change but appellant noted receiving the decision at his current address. In any event, the record indicates that, on July 7, 2006, the decision was issued and sent to appellant's correct address.

untimely. Appellant made this request more than one year following the Office's merit decision of July 7, 2006.[14]

The Board also finds that appellant has not established clear evidence of error on the part of the Office. In the reconsideration request received on October 17, 2007, he asserted that he timely filed his reconsideration request. These assertions do not purport to show clear evidence of error in the underlying Office decision which determined that appellant did not establish work-related disability beginning December 1, 2004.

Appellant submitted reports from Dr. Jenkins dated March 8 and June 1, 2006; however, the Office had previously considered this evidence in its July 7, 2006 decision. He did not explain how this evidence was positive, precise and explicit in manifesting on its face that the Office committed an error. The submission of such cumulative material is not sufficient to raise a substantial question as to the correctness of the Office's decision. The January 3, 2007 report from Dr. Jenkins noted treating appellant for intravertebral disc disorder of the lumbar spine and opined that appellant was totally disabled since November 10, 2004 due to his work-related back condition. However, this evidence is insufficient to establish that the Office erred in its denial of his claim on July 7, 2006. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed, well-rationalized medical report which, if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.[15] Dr. Jenkins' reports do not raise a substantial question as to the correctness of the Office's July 7, 2006 merit decision or demonstrate clear evidence of error. 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.

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

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602.3(c) (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 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