United States Department of Labor
Employees' Compensation Appeals Board

A.F., Appellant	)	
and	)	**Docket No. 09-1556**
	)	**Issued: February 23, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, 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 June 1, 2009 appellant filed a timely appeal from a February 24, 2009 decision of the Office of Workers' Compensation Programs' which denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated August 9, 1989 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 is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This is the third appeal before the Board. Appellant, a 23-year old mail clerk, filed a claim for traumatic injury on March 23, 1989, alleging that he sustained an injury to his lower back on March 20, 1989 when a coworker pushed him backward into a mail container. By decisions dated May 19 and August 9, 1989, the Office denied his traumatic injury claim on the

grounds that he had not established that the March 20, 1989 employment incident occurred as alleged. By decision dated January 3, 2005, the Office denied appellant's request for reconsideration as untimely and insufficient to show clear evidence of error. In a May 12, 2006 decision, the Board affirmed the Office's January 3, 2005 nonmerit decision.[1] The Board found that the medical evidence submitted by appellant was not relevant to the underlying issue of whether he had established the March 20, 1989 employment incident. The Board found that he failed to establish that the witnesses who provided statements pertaining to the March 20, 1989 work incident were biased.

By letters dated May 15 and 17, 2006, appellant requested reconsideration, contending that the Office erred in failing to develop the medical evidence. He submitted medical reports from Dr. Gunner Ek and Dr. V. Baldino which, he argued, established injury on March 20, l989. Appellant reiterated his previous contention that witness statements of record which pertained to the March 20, 1989 employment incident were inconsistent and self-serving. He alleged that personnel at the employing establishment told him to write on his Form CA-1 that he was pushed by a coworker into a mail cart as opposed to backing into the cart to avoid the coworker, which is what actually occurred. By decision dated August 10, 2006, the Office denied appellant's request for reconsideration as untimely and insufficient to show clear evidence of error. In a February 7, 2007 decision, the Board affirmed the Office's nonmerit decision.[2] The facts of this case are set forth in the Board's May 12, 2006 and February 7, 2007 decisions and are incorporated by reference.

By letters dated January 16 and February 9, 2009, appellant requested reconsideration. He contended that he was unable to file a timely appeal because of a mental illness which required him to be treated with impairing and mind-altering drugs. Appellant reiterated his contentions that the medical evidence of record established that he sustained an injury on March 20, l989. He submitted an August 10, 2007 report from Dr. Richard DeMonte, a family practitioner, and a December 5, 2008 report from Dr. Maurice Singer, a family practitioner, a December 22, 2008 report from Dr. William C. Hunter, a specialist in internal medicine. He also submitted the results of an October 23, 2007 magnetic resonance imaging (MRI) scan and a January 9, 2009 letter from Southwest Counseling Center advising that he had been treated since 2004.

Dr. DeMonte advised that appellant was last seen in 1989 for a lumbosacral strain. He opined that this type of injury typically took six to eight weeks to heal. The October 23, 2007 MRI scan report showed mild degenerative disease at L4-5 with annular fissure and a small posterior disc bulge, with a low T1 signal of all visualized bone marrow, likely secondary to hematopoietic conversion. Dr. Singer advised that he had reviewed records indicating that appellant was a patient at the West Philadelphia Medical Center on February 6, 1989. He was released to return to work on light duty on March 10, 1989 and reinjured his back and neck while at work on March 21, 1989.

[1] Docket No. 05-967 (issued May 12, 2006).

[2] Docket No. 06-2139 (issued February 7, 2007).

Dr. Hunter advised that he was currently treating appellant for musculoskeletal injuries that he sustained on March 20, 1989 after being pushed into a steel mail container by a coworker during an argument. He stated that imaging studies performed in November 2003, March 2004 and October 2007 demonstrated mild degenerative disease at L4-5, with annular fissure and small posterior disc bulge. Dr. Hunter stated that clinically, the pain appellant described was consistent with the L4-5 deformity shown on the MRI scan.

By decision dated February 24, 2009, the Office denied appellant's request for reconsideration without a merit review, finding that it was untimely and that he did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle an employee to a review of an Office decision as a matter of right.[4] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[6] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).[7]

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine

[3] 5 U.S.C. § 8128(a).

[4] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[5] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advances a relevant legal argument not previously considered by the Office, or (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

[6] 20 C.F.R. § 10.607(b).

[7] *See* cases cited *supra* note 2.

whether there is clear evidence of error pursuant to the untimely request.[8] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.[9]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] The Board makes an independent determination of whether an appellant 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.[15]

ANALYSIS

The Office properly determined that appellant failed to file a timely request for reconsideration. It issued its most recent merit decision in this case on August 9, 1989. Appellant requested reconsideration on January 16, 2009. Therefore, the request is untimely as it was outside the one-year time limit.

The Board finds that appellant's January 16, 2009 request for reconsideration failed to establish clear evidence of error. In order to establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office. As the Board previously noted, the issue on which the claim was denied concerned whether the March 20, 1989 employment incident occurred at the time, place and in the manner alleged. This issue is factual in nature. The medical evidence submitted by appellant does not address the issue of whether he established the occurrence of the March 20, 1989 employment incident. Appellant did not submit any new factual evidence with his request for reconsideration. His January 16 and February 9, 2009 letters merely restated arguments previously considered. In addition, his contention that prescription drugs prevented him from filing a timely request for reconsideration

[8] *Rex L. Weaver*, 44 ECAB 535 (1993).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[10] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[11] *See Leona N. Travis*, 43 ECAB 227 (1991).

[12] *See Jesus D. Sanchez, supra* note 4.

[13] *See Leona N. Travis, supra* note 11.

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

[15] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

is not established. His treatment in 2004 is not relevant to the 1989 merit decision on his claim. Appellant has failed to establish clear evidence of error on the part of the Office in denying further review.

CONCLUSION

The Board finds that appellant's reconsideration request was untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 23, 2010
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