United States Department of Labor
Employees' Compensation Appeals Board

C.R., Appellant	)	
and	)	**Docket No. 09-984**
	)	**Issued: January 5, 2010**
DEPARTMENT OF THE AIR FORCE, McCLELLAN AIR FORCE BASE, CA, 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 March 9, 2009 appellant filed a timely appeal of a September 23, 2008 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration without conducting a merit review. Because more than one year has elapsed between the most recent merit decision dated February 28, 2006, and the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On June 26, 1989 appellant, then a 40-year-old sheet metal equipment operator, filed an occupational disease claim alleging that factors of his federal employment caused his bilateral carpal tunnel syndrome. He indicated that he first became aware of the injury and its relation to

his work on June 9, 1989. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and bilateral thumb carpometacarpal (CMC) joint arthritis. Appellant underwent a left carpal tunnel release on September 15, 1989, and a right carpal tunnel release on July 12, 1990. He returned to work in January 1991 and had a left thumb arthrodesis in June 2000.

On September 28, 2000 appellant left federal employment as the employing establishment base was closed. He had a left thumb arthroplasty on June 9, 2003. On April 6, 2004 the Office referred appellant to vocational rehabilitation. The record reflects that appellant began a training program in hospitality management; however, he stopped based on the recommendation of his treating physician, Dr. David Evans, a Board-certified orthopedic surgeon. In reports dated November 1, 2004, Dr. Evans diagnosed bilateral wrist degenerative joint disease, noted appellant's prior surgeries and indicated that appellant could not lift over five pounds.

On November 22, 2004 the Office referred appellant for a second opinion examination with Dr. John R. Chu, a Board-certified orthopedic surgeon. In a report dated December 9, 2004, Dr. Chu advised that appellant reached maximum medical improvement and indicated that appellant had permanent restrictions, which included a 10-pound lifting restriction.

On November 26, 2004 the Office referred appellant along with a statement of accepted facts, and the medical record to Dr. Howard Shortley, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Drs. Chu and Evans regarding the resolution of appellant's accepted condition and work restrictions. On September 15, 2005 Dr. Shortley noted appellant's history of injury which included a nonindustrial automobile accident on December 31, 1985. He examined appellant and determined that his only limitations resulting from the work-related conditions related to his thumbs. Dr. Shortley advised that there were no residuals of the carpal tunnel syndrome. Furthermore, he added that he did not believe that the bilateral carpal tunnel syndrome or the subsequent surgeries caused permanent pain. Dr. Shortley prescribed appellant's limitations which included a 10-pound lifting restriction on lifting, pushing or pulling on a repetitive basis for eight hours a day and to 20 pounds on an occasional basis. He noted that appellant could easily lift 10 pounds without difficulty. Dr. Shortley indicated that appellant had excellent strength in his hands. He noted that appellant had restrictions which were not work related. Dr. Shortley noted restrictions on bending, walking, standing, squatting, kneeling, climbing, lifting, pushing and pulling as well as prolonged sitting due to the degeneration in appellant's lumbar spine. He indicated that conservative treatment of appellant's osteoarthritis would be needed but was not work related. Dr. Shortly indicated that appellant had an excellent result from the arthrodesis of the left first CMC joint, the arthroplasty in the right first CMC joint and the bilateral carpal tunnel releases.

In a December 1, 2005 report and closure memorandum and November 12, 2005 labor market survey, the rehabilitation counselor noted that appellant was unable to obtain employment. He determined that appellant had the capacity to work as a storage facility rental clerk and that such positions were reasonably available in his commuting area. The rehabilitation counselor noted the entry pay level for this position.

On February 28, 2006 the Office reduced appellant's compensation for wage loss effective March 19, 2006. It noted that the medical evidence established that appellant was no longer totally disabled but rather partially disabled. The Office determined that appellant had the capacity to earn wages as a storage facility rental clerk at the rate of $296.40 per week.

On September 5, 2006 appellant requested that the Office add a shoulder and ankle condition to his claim. He submitted a June 26, 2006 report from Dr. Allen Hassan, a Board-certified family practitioner and treating physician, who indicated that he did not have all the records that were necessary regarding appellant's inability to work for the past six years. However, Dr. Hassan indicated that appellant worked for the Federal Government for 26 years including a tour of Vietnam. He noted that appellant had chronic degenerative disc disease of the cervical spine, thoracic spine, lumbosacral spine and bilateral shoulder impingement. Dr. Hassan stated that he was "not too impressed with a job that puts a man who has given the best years of his life to the United States to be placed in a position to be a rental clerk in a storage facility."

On September 14, 2006 the Office advised appellant that, if he wished to appeal the February 28, 2006 decision, he must follow his appeal rights. It also advised appellant that his claim was not accepted for a shoulder condition.

On August 16, 2007 appellant's representative requested reconsideration. He indicated that the impartial medical examiner was not properly selected as there were several physicians listed on the directory of physicians who were much closer to appellant's residence. Appellant's representative also argued that the statement of accepted facts was inaccurate and that Dr. Shortley's opinion was not based on all the medical evidence in file.

In an August 31, 2007 decision, the Office denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.[1]

On September 3, 2008 appellant again requested reconsideration. He alleged that the impartial medical examiner failed to recognize other job-related injuries that he sustained to his right ankle and right shoulder. Appellant submitted a copy of a retainer agreement and billing statements from his former representative and several letters related to his "representation" of appellant. He alleged that his representative did not properly represent him. Appellant also provided a copy of a complaint related to the allegation and a copy of the prior request for reconsideration. The Office received a copy of Dr. Evans November 1, 2004 report advising that appellant could not lift over five pounds and a copy of Dr. Hassan's June 26, 2006 report. Appellant also submitted several treatment notes. These included a September 18, 1985 patient progress record noting an injured right ankle, right shoulder and elbow. In an October 11, 1990 report, appellant related pain in the left shoulder after helping a woman. An August 28, 1991 treatment noted advised that he sustained a whiplash injury with shoulder, neck and back pain. In treatment notes dated February 16 and 20, 1996 treatment note, appellant complained of right

[1] On September 10, 2007 appellant's representative filed an appeal with the Board. On March 20, 2008 the Board dismissed the appeal, as neither a person adversely affected by an Office decision or a duly authorized representative, had filed an appeal. Docket No. 07-2368 (issued March 20, 2008).

shoulder and foot pain. A treatment note dated June 5, 1996 reveals that appellant injured his shoulders, neck and back after pulling out commodes from hospital shelters.

In a September 23, 2008 decision, the Office denied appellant's request for reconsideration finding that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] 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."[3]

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[4] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provides that an application for reconsideration must be sent 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 Office's decision was, on its face, erroneous.[6]

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 manifest on its face that the Office committed an error. Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear

[2] 5 U.S.C. §§ 8101-8193.

[3] *Id.* at § 8128(a).

[4] *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[5] 20 C.F.R. § 10.607(a).

[6] *Id.* at § 10.607(b).

evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.[7] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. 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.[8]

ANALYSIS

In its September 23, 2008 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on February 28, 2006. Appellant's September 3, 2008 letter requesting reconsideration was submitted more than one year after the February 28, 2006 merit decision and was, therefore, untimely. Appellant's request did not allege any change in his condition, but alleged that errors were made in the February 28, 2006 determination of his wage-earning capacity.

In accordance with internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether the Office on February 28, 2006 properly reduced appellant's compensation for wage loss effective March 19, 2006 on the grounds that he was no longer totally disabled but partially disabled. The issue at hand is primarily medical in nature.

On reconsideration, appellant made several arguments. However, they were not sufficient to establish that the prior decision was erroneous. Appellant's arguments included that the report of the impartial medical examiner was not properly selected and that this report was based on an improper statement of accepted facts. However, other than making allegations, he did not submit any evidence to support these contentions. Furthermore, appellant alleged that he had other conditions which were not accepted, which included a right ankle and shoulder condition. However, he did not submit any medical evidence to support these contentions and he did not otherwise establish that these contentions raised a substantial question as to the

[7] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

[8] *Id.*

correctness of the Office's February 28, 2006 decision. Thus, these arguments are not sufficient to establish clear evidence of error. Likewise, appellant's arguments concerning the quality of his attorney's representation or lack of credentials are irrelevant to the issue of whether the Office erred in its February 28, 2006 decision which was decided on the medical evidence of record.

The Office received a copy of Dr. Evans November 1, 2004 report advising that appellant could not lift over five pounds and a copy of Dr. Hassan's June 26, 2006 report. The Board notes that Dr. Evans was on one side of the conflict, and this report was part of the original conflict.[9] In any event, these reports were previously of record and appellant has not otherwise explained how they raise a substantial question as to the correctness of the Office's decision. Likewise, appellant submitted various other treatment records that predate the Office's February 28, 2006 decision. However, these reports are insufficient to establish clear evidence of error. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed, well-rationalized report which, if submitted prior to the Office's merit decision might require additional development of the claim, is insufficient to establish clear evidence of error.[10]

The Board finds that the evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in reducing appellant's compensation and benefits effective March 19, 2006. Therefore, the Board finds that appellant has not presented clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

[9] *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict).

[10] *See E.R.*, 60 ECAB ___ (Docket No. 09-599, issued June 3, 2009).

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

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