United States Department of Labor
Employees' Compensation Appeals Board

L.Y., Appellant	)	
and	)	**Docket No. 09-1376**
	)	**Issued: January 22, 2010**
U.S. POSTAL SERVICE, PROCESSING & DELIVERY CENTER, Kansas City, MO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 5, 2009 appellant, through counsel, filed a timely appeal from the February 2, 2009 nonmerit decision of the Office of Workers' Compensation Programs that denied his request for reconsideration as untimely filed and failing to establish clear evidence of error. The most recent merit decision of record is an October 1, 2007 decision denying compensation for intermittent periods from August 1 through November 30, 2005. Because more than one year elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this case, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

Appellant, through his attorney, contends that the Office's denial was contrary to fact and law.

FACTUAL HISTORY

On July 7, 2005 appellant, then a 48-year-old clerk, filed a traumatic injury claim alleging that on July 1, 2005 he injured his back. Dr. Cedric B. Fortune, a Board-certified family practitioner, diagnosed lumbar strain and found that appellant was totally disabled from July 6 through 18, 2005, but could resume regular duties on July 20, 2005. By letter dated November 18, 2005, the Office accepted his claim for lumbar strain.

In a letter dated May 8, 2006, Dr. W. Cheng, a Board-certified internist, advised that appellant was disabled from July 20, 2005 through February 13, 2006 due to low back pain and degenerative changes in his back. On a May 22, 2006 he opined that appellant's low back pain was a natural consequence of his discogenic disease, which likely first started after a work-related motor vehicle accident on March 1, 1996. Dr. Cheng opined that the chronic low back pain was due to the heavy nature of his work and a worn out back.

On December 12, 2006 appellant filed claims for wage-loss compensation for intermittent periods from July 9 through November 30, 2005.

In a February 28, 2007 medical report, Dr. Cheng discussed appellant's motor vehicle accident. He also noted that on July 6, 2005 appellant was transferred to a position that required heavy repetitive lifting and caused severe back pain. Dr. Cheng opined that appellant's low back pain was a natural consequence of his July 6, 2005 work injury and not just a progression of his discogenic disease, which was quiescent until his second injury. He stated that appellant has been disabled from July 20, 2005 through February 21, 2007.

By decision dated April 26, 2007, the Office denied appellant's claim for compensation from August 1 through November 30, 2005. It found that the medical evidence did not establish disability causally related to the accepted lumbar strain of July 6, 2005. The Office noted that appellant received continuation of pay for the period July 9, 2005 through 19, 2005.

Appellant requested review of the written record. In an October 1, 2007 decision, an Office hearing representative affirmed the April 26, 2007 decision, finding that appellant had not met his burden of proof to establish that he was disabled for work.

In a pain management report dated September 24, 2008, Dr. Curtis D. Johnson, a Board-certified anesthesiologist, stated that he saw appellant on that date and that he was having low back pain, which had been fairly consistent since 2005 after a work-related injury. In an October 8, 2008 report, he noted that he gave appellant a lumbar epidural steroid injection.

On October 3, 2008 appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine which was interpreted as showing a small disc protrusion without impingement at L5-S1; right-sided facet hypertrophy at L5-S1; narrowing of left neural foramina due to disc bulging at L4-5 and narrowing of both neural foramina due to broad-based disc bulge at L3-4.

In a November 4, 2008 note, Dr. James Scowcroft, a Board-certified anesthesiologist, listed an impression of lumbar facet syndrome and degenerative disc disease.

On November 29, 2008 appellant requested reconsideration. He contended that he only received $50.00 in compensation for his job injury; that the employing establishment terminated his employment and that it never honored his physicians' recommendations for time from work. The employing establishment responded on December 23, 2008 asserting that it had accommodated appellant's restrictions. Appellant returned to work on July 20, 2005 at full duty and received continuation of pay from July 9 through 19, 2005.

In a January 19, 2009 note, Dr. Scowcroft indicated that he administered diagnostic medial branch blocks on appellant.

By decision dated February 2, 2009, the Office denied appellant's request for reconsideration as it was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.[1] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[2]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[3] Office regulations and procedure provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

[1] 20 C.F.R. § 10.607(a).

[2] 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[3] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[4] *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, 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 that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3c.

[5] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[6] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] 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.[9] To show clear evidence of error, the evidence submitted must not only 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[10]

ANALYSIS

As noted the most resent merit decision was the October 1, 2007 decision by the hearing representative denying appellant's claim for intermittent periods of disability from August 1 through November 30, 2005 due to his July 6, 2005 lumber strain. Appellant filed his request for reconsideration on November 29, 2008. As this request was filed over one year after the Office's October 1, 2007 decision, the request was not timely filed.

The Office properly reviewed appellant's request under the clear evidence of error standard and determined that he failed to establish clear evidence of error. Appellant did not submit any medical evidence with his request for reconsideration. The evidence submitted since the hearing representative's October 1, 2007 decision is not sufficient to establish clear evidence of error. Appellant's claim for compensation was denied for intermittent periods from August 1 and November 30, 2005. Dr. Scowcroft discussed his treatment of appellant in November 2008 and January 19, 2009; he did not address appellant's disability in 2005. Dr. Johnson's statement that appellant's low back pain had been consistent since his 2005 work injury does not establish disability in 2005 and is not sufficient to show clear evidence of error. The October 3, 2008 MRI scan does not address disability or appellant's condition in 2005. The evidence submitted is not probative as it does not address the issue on which the claim was denied.

Appellant's request for reconsideration failed to demonstrate clear evidence of error in the Office's most recent decision. The Board finds that the Office properly refused to reopen his case for a review on the merits. The Board will affirm the February 2, 2009 decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of the claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

[7] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[8] *See Leona D. Travis, supra* note 6.

[9] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[10] *Leon D. Faidley, Jr., supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 2, 2009 is affirmed.

Issued: January 22, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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