United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 09-2089**
	)	**Issued: July 26, 2010**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Coleman, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 14, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated July 30, 2009 denying his reconsideration request on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated May 13, 2008 to 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 refused to reopen appellant's claim on the grounds that the reconsideration request was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On April 30, 2007 appellant, then a 49-year-old cook supervisor, filed an occupational disease claim alleging lumbar degenerative disc disease aggravated by his work duties. He

stopped work on April 26, 2007. Appellant's work duties involved lifting heavy boxes and sacks of food items, pushing and pulling loaded pallets of food with a hydraulic floor jack, standing on his feet in one spot for extended periods of time, participating in random searches of inmates, which involved bending, stooping and squatting. He performed those duties up to 10 hours per day, five days a week and extended out over a number of years. The Office accepted the claim for an aggravation of preexisting degenerative disc disease at L4/5 and L5/S1. It also accepted that appellant sustained an onset of a mixed anxiety state. Appellant was placed on the periodic rolls for wage-loss compensation since April 26, 2007.

Appellant subsequently requested that an aggravation of his diabetes and hypertension conditions be accepted as a consequence of his accepted stress condition.

By decision dated May 13, 2008, the Office denied appellant's claim that his August 16, 2006 work injury aggravated his preexisting hypertension and diabetic conditions. It found that the medical evidence was insufficient to establish that the claimed hypertension and diabetic conditions were aggravated by medical conditions.

In a June 16, 2009 letter, appellant requested reconsideration of the Office's May 13, 2008 decision. He submitted progress reports from Dr. Walter I. Choung, a Board-certified orthopedic surgeon, dated May 29, 2008 to July 17, 2009. Dr. Choung listed an impression of degenerative joint disease of the lumbar spine and chronic lower back pain. He opined that appellant was totally disabled due to the lumbar degenerative joint disease. Dr. Choung noted that appellant elected to proceed with a right hip replacement surgery scheduled for June 3, 2009.

Progress reports from Dr. Walter E. Afield, a Board-certified psychiatrist, dated from July 8 to June 9, 2009 were also submitted. He noted that appellant had an epidural and cortisone injection to the hip, which caused his sugars to go up to 300. Dr. Afield noted that appellant had been seen since June 12, 2007 for chronic pain due to his lumbar discs, injury to his left ankle and severe depression, all related to his job. He found that appellant was totally disabled. Dr. Afield noted that appellant was on insulin and stated it was stress related.

In a June 15, 2009 progress note, Dr. Mark J. Knapp, a Board-certified internist, advised that appellant's diabetic medication had to be dramatically increased over the prior eight months concurrent with the duration of his steroid injections. Appellant was placed on Actos in October 2008 and needed to be placed on insulin in February 2009. Dr. Knapp stated, "[T]his confirms that some of his problems with diabetes are attributed with his concurrent steroid shots." On June 29, 2009 Dr. Afield reviewed Dr. Knapp's report. He advised that appellant's poor diabetes control had to do with the steroid injections to his neck, back and hip. Dr. Afield noted that appellant was on insulin from 40 units a day to 85 units a day in two divided doses.

In an April 7, 2009 report, Dr. Murali M. Angirekula, a Board-certified anesthesiologist and pain medicine specialist, advised that appellant received a series of nerve root injections with some relief of his work-related low back pain. Since appellant's hemoglobin blood sugars had increased in response to the cortisone, his primary care physician put him on Novolin. For the past one and a half months, this helped appellant's blood sugar, which was well controlled. Dr. Angirekula stated that, since appellant was on insulin, his blood sugars were better controlled and it was expected that he would be able to tolerate the injections better. In a May 19, 2009

report, he noted appellant's blood sugars were better controlled. A left L4-5 level transforaminal nerve root injection and fluoroscopy was performed. On June 25, 2009 Dr. Angirekula indicated that appellant wanted to wait on back surgery until his diabetes was better controlled and that his blood sugars still went very high.

Appellant submitted copies of physical therapy reports, magnetic resonance imaging (MRI) scan reports of the lumbar spine dated August 22, 2006 to June 26, 2009 and a March 20, 2009 total body bone scan of the lumbar spine.

By decision dated July 30, 2009, the Office denied appellant's request for further review of the merits of his claim on the grounds that it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] 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.[2] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[3] 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.[4] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).[5]

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.[6]

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

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Id*. at § 8128(a).

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

[4] 20 C.F.R. § 10.607(a); *see Alberta Dukes,* 56 ECAB 247 (2005).

[5] *Sean C. Dockery,* 56 ECAB 652 (2005); *Mohamed Yunis*, 46 ECAB 827, 829 (1995).

[6] *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

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.[7]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[11]

ANALYSIS

In its July 30, 2009 decision, the Office properly determined that appellant failed to file a timely application for review. It issued the most recent merit decision on May 13, 2008 when appellant's claim for a material aggravation to preexisting hypertension and diabetes was denied. Appellant's June 16, 2009 request for reconsideration was more than one year after the May 13, 2008 decision and was not timely filed.

The Board finds that appellant has not established clear evidence of error on the part of the Office in the denial of his claim. The reports from Dr. Afield and Dr. Angirekula do not establish that the Office clearly erred in its denial of his claim for an aggravation of preexisting hypertension and diabetes. Dr. Afield noted that appellant had been seen since June 12, 2007 for chronic lumbar pain, injury to his left ankle and severe depression all related to his job. He noted that appellant was on insulin and stated it was stress related. Dr. Afield stated that appellant's poor diabetes control was related to the steroid injections to his neck, back and hip. On April 7, 2009 Dr. Angirekula noted that appellant had been receiving a series of nerve root injections from his work-related low back pain, which radiated into his left lower extremity. Appellant's primary care physician put him on insulin as his blood sugar became high in response to the cortisone. While the reports of Dr. Afield and Dr. Angirekula note that appellant was placed on insulin after the steroid injections, they did not clearly explain how appellant's preexisting diabetic or hypertension conditions were aggravated by the accepted conditions. This evidence does not raise a substantial question concerning the correctness of the Office's decision. 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). The submission of a detailed well-rationalized medical

[7] *Annie L. Billingsley*, 50 ECAB 210 (1998).

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

[9] *Id.*

[10] *Id.*

[11] *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

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.[12]

On June 15, 2009 Dr. Knapp attributed appellant's diabetic problems in part to steroid injections. He did not adequately explain the causal connection between appellant's diabetic condition and the accepted lumbar degenerative disease. As noted, the submission of 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.[13] The Board finds that Dr. Knapp's report is not sufficient to manifests on its face that the Office committed an error by denying appellant's claim.[14] The reports of Dr. Choung are insufficient to show that the Office committed clear error. He did not address the issue of whether appellant's preexisting hypertension or diabetic conditions were aggravated by the accepted medical conditions. This evidence does not raise a substantial question concerning the correctness of the Office's decision.

The diagnostic studies do not constitute evidence relevant to the issue decided by the Office. They do not address the causal relationship of the claimed hypertension and diabetic conditions. The physical therapy reports are also insufficient to establish clear evidence of error as it has no probative medical value.[15]

The Board finds that the evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's prior decision.

On appeal, appellant contends that his prescribed treatment of cortisone injections caused the secondary increase of his diabetes. He also questioned whether the Office properly considered the evidence. As noted, the Office reviewed the evidence submitted in support of his untimely request for reconsideration. It properly found that the evidence was insufficient to establish clear error in the denial of his claim. It need not disprove appellant's claim with regard to conditions not accepted as being employment related.[16]

CONCLUSION

The Board finds that the Office properly determined that appellant's untimely request for reconsideration did not demonstrate clear evidence of error.

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[12] *D.G.,* 59 ECAB ___ (Docket No. 08-137, issued April 14, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

[13] *Id.*

[14] *See D.D.*, 58 ECAB 206 (2006).

[15] *See A.C.*, 60 ECAB ___ (Docket No. 08-1453, issued November 18, 2008) (records from a physical therapist do not constitute competent medical opinion in support of causal relation as a physical therapist is not a physician as defined under the Act); 5 U.S.C. § 8101(2) (defines the term "physician" as used within the Act).

[16] *See Alice J. Tysinger*, 51 ECAB 638, 646 (2000) (finding that appellant had the burden of proof to establish that her condition was work related; the Office had no burden to disprove any such relationship).

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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