United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	
DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND AFLOAT MANAGEMENT CENTER, Norfolk, VA, Employer	)	**Docket No. 10-133** **Issued: July 22, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2009 appellant filed a timely appeal from a June 12, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over this nonmerit decision.

ISSUE

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

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on May 15, 2007 in which it affirmed the February 9 and October 4, 2006 decisions of the Office finding that appellant did not submit sufficient medical evidence to establish that he sustained an injury due to work

factors as alleged.[1] The Board found that the medical reports of record did not contain adequate medical rationale in support of their opinions on causal relationship.[2] Appellant submitted a December 12, 2003 report[3] of Dr. Richard F. Barrett, an attending chiropractor, but the Board found that the Office had properly determined that he was not a physician within the meaning of the Federal Employees' Compensation Act because he had not diagnosed a spinal subluxation as demonstrated by x-ray testing.[4] The facts of the case are set forth in the Board's prior decision and are incorporated herein by reference.

On December 28, 2008 appellant filed a request for reconsideration of his claim. In a September 29, 2008 letter, he noted that his claim had been denied due to a lack of sufficient medical evidence. Appellant detailed the course of his medical treatment from several physicians, including Dr. Taylor, and asserted that his problems were primarily related to his 1996 accident. He advised that he tried to work on a part-time basis for a private employer, but had to stop work due to pain caused by standing for extended periods. Appellant discussed his financial difficulties and stated that he spoke to his congressional representatives.[5]

In a November 15, 2006 report, Dr. Barrett noted that the listed date of his December 12, 2003 report appeared to be inaccurate as he did not first treat appellant until May 16, 2006. He also stated that he inaccurately listed appellant's work injury as occurring in 1990 rather than 1996. He advised that x-ray testing from 2006 established multiple areas of misalignments, narrowed intervertebral disc spaces, vertebral wedging and pelvic misalignment. Dr. Barrett submitted a treatment plan which recommended spinal manipulations of the cervical, thoracic and lumbar vertebral segments to reduce subluxations and misalignments. He asserted that he had diagnosed subluxations as demonstrated by x-ray testing and therefore qualified as a physician under the Act.

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[1] Docket No. 07-367 (issued May 15, 2007). On June 24, 2004 appellant, a 64-year-old deck engineer/machinist filed an occupational disease claim alleging that he developed pain in his shin area, which he attributed to an "old accident." He later attributed his medical condition to both a November 12, 1996 accident at work and his work duties, including heavy lifting, continuous bending, climbing and standing for extended periods. The Office accepted that appellant sustained a work incident on November 12, 1996 when a door hit his left shoulder and he fell to the deck of a ship, but found that the medical records failed to provide a firm diagnosis related to the incident. Appellant claimed that his cervical degenerative changes, left thumb and forefinger parenthesis, hearing loss and cataracts were caused or aggravated by factors of his federal employment.

[2] In an April 9, 2004 attending physician's report, Dr. Flavia L. Thomas, an osteopath and Board-certified family practitioner, stated that appellant had a history of left arm parenthesis, that magnetic resonance imaging testing showed a cervical cord lesion and that an audiogram showed moderate hearing loss. She checked a "no" box in response to a question asking whether the patient's conditions were caused or aggravated by an employment activity. In an accompanying medical summary, Dr. Thomas diagnosed spinal cord lesion, left-sided weakness, moderate hearing loss and mild cataracts. She opined that appellant "should be permanently not fit for duty."

[3] The Board noted that the listed date of the report appeared to be inaccurate as the report indicated that Dr. Barrett did not treat appellant until May 16, 2006.

[4] Dr. Barrett indicated that abnormal wave shapes were noted at C1-7, T1-12, L1-5 and S1-5 which indicated the presence of one or more components of vertebral subluxation complex. The Board noted that this diagnosis was based on waveform analysis rather than the findings of x-ray testing. Dr. Barrett posited that appellant's diagnostic testing revealed a past trauma and stated that his spinal complaints and condition were "the results of the trauma he suffered in 1990."

[5] On May 5, 2009 the Office received a similar letter dated April 22, 2009.

In an August 30, 2007 report, Dr. Thomas noted that in November 2005 she had considered appellant to be permanently disabled due to left-sided weakness. She advised that when filling out a disability form for appellant she wrote that his injuries were not work related. Dr. Thomas stated:

> "I have been asked to further explain this medical opinion. The reason for this is that I treated, and have direct knowledge of, his primary care related conditions, not his work-related injuries sustained in 1996. It is possible that his work injury of 1996 is a contributing factor to his present day disabilities."

In a June 12, 2009 decision, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to establish clear evidence of error.[6]

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.[7] 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 Act.[8]

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."[9] 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.[10]

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[6] The Office found that appellant did not request reconsideration of his claim until he submitted an April 22, 2009 letter. However, appellant actually requested reconsideration on December 8, 2008 when he submitted a September 29, 2008 letter which was similar to his April 22, 2009 letter.

[7] 20 C.F.R. § 10.607(a). According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b (January 2004).

[8] 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

[10] 20 C.F.R. § 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.

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

Under section 8101(2) of the Act, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[16] The Office's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[17] The Board has held that the greater the delay in x-ray testing, the greater the likelihood that an event not implicated by the employee has worsened the injury claimed or has caused the condition for which the employee seeks compensation.[18]

ANALYSIS

In its June 12, 2009 decision, the Office properly determined that appellant filed an untimely request for reconsideration of the Office's denial of his claim for work-related conditions.[19] Appellant's reconsideration request was filed on December 28, 2008, more than one year after the most recent merit decision of record, the Board's May 15, 2007 decision.[20]

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

[12] 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991). The Board has found that reports containing equivocal or speculative opinions on causal relationship are of limited probative. *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956).

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

[14] *See Leona N. Travis*, *supra* note 12.

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

[16] 5 U.S.C. § 8101(2). *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

[17] 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121, 126 (1990).

[18] *See Linda L. Mendenhall*, 41 ECAB 532 (1990).

[19] Appellant claimed that his multiple medical problems were due to both a November 12, 1996 accident at work and his duties at work including engaging in heavy lifting, continuous bending, climbing and standing for extended periods. The Office accepted that appellant sustained a work accident on November 12, 1996 when a door hit his left shoulder and he fell to the deck of a ship, but found that the medical records failed to provide a firm diagnosis related to the incident.

[20] *See supra* note 7. The Office indicated that appellant's reconsideration request was filed on May 5, 2009 when it received his April 22, 2009 letter, but the request actually was filed earlier on December 28, 2008 when it received his September 29, 2008 letter.

Therefore, he must demonstrate clear evidence of error on the part of the Office in its prior decisions denying his claim.

Appellant has not demonstrated clear evidence of error on the part of the Office in its prior decisions. He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error. Appellant contended that his current medical condition was primarily related to a 1996 accident at work. This argument would not show clear evidence of error in the Office's prior decisions because the issue in the present case is medical in nature and can only be resolved by the submission of medical evidence.

In an August 30, 2007 report, Dr. Taylor, an attending osteopath and Board-certified family practitioner, indicated that when filling out a disability form for appellant she wrote that his injuries were not work related. She stated that she had no direct knowledge of "his work-related injuries sustained in 1996" but noted that it was "possible that his work injury of 1996 is a contributing factor to his present day disabilities." This report provides a speculative or equivocal opinion on the cause of appellant's present condition. It does not show clear error in the Office's denial of his claim.[21]

In a November 15, 2006 report, Dr. Barrett, an attending chiropractor, stated that x-ray testing from 2006 indicated multiple areas of misalignments, narrowed intervertebral disc spaces, vertebral wedging and pelvic misalignment and noted that he had recommended spinal manipulations of the cervical, thoracic and lumbar vertebral segments to reduce subluxations and misalignments.[22] He asserted that he had diagnosed spinal subluxations as demonstrated by x-ray testing and therefore qualified as a physician under the Act. The Board notes that even if it is accepted that Dr. Barrett diagnosed spinal subluxations as demonstrated by x-ray testing within the meaning of the Act,[23] the submission of his November 15, 2006 does not show clear error in the Office's prior decisions denying appellant's claim. Dr. Barrett took his x-rays approximately 10 years after the implicated 1996 accident at work. The Board has held that the greater the delay in x-ray testing, the greater the likelihood that an event not implicated by the employee may have caused or aggravated the condition for which compensation is sought.[24] The record does not contain a report of Dr. Barrett which provides a well-rationalized opinion explaining how the conditions observed on x-ray testing in 2006 related to the specific work accident in 1996.[25] This does not establish error in the Office's denial of the claim.

[21] *See supra* note 12.

[22] Dr. Barrett noted that the listed date of his previously submitted December 12, 2003 report appeared to be inaccurate as he did not first treat appellant until May 16, 2006. He also indicated that he inaccurately listed appellant's work injury as occurring in 1990 rather than 1996.

[23] As noted, under section 8101(2) of the Act, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist. *See supra* note 16.

[24] *See supra* note 18.

[25] Dr. Barrett did not describe the 1996 work accident or detail appellant's medical history between 1996 and 2006. He did not explain why nonwork-related causes would not have been responsible for appellant's spinal condition.

For these reasons, the evidence and argument submitted by appellant does not raise a substantial question concerning the correctness of the Office's prior decisions. The Board finds that appellant did not establish clear evidence of error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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