United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 10-423**
	)	**Issued: June 29, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Charleston, WV, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument May 5, 2010

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 30, 2009 appellant filed a timely appeal from the June 4, 2009 decision of the Office of Workers' Compensation Programs denying his request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated November 27, 2007 and the filing of this appeal on November 30, 2009, the Board lacks jurisdiction to review the merits of this claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.[1]

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.

[1] For Office decisions dated November 19, 2008 or later, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

On July 12, 2007 appellant, then a 54-year-old manager of customer service, filed an occupational disease claim alleging that he sustained a cervical spine condition in the performance of duty. He first became aware of his condition and its relation to his work on September 29, 2007. Appellant stopped work on July 16, 2007.

In a decision dated November 27, 2007, the Office denied appellant's occupational disease claim. It found that the medical evidence did not demonstrate that the claimed cervical condition was related to the accepted work-related activities.[2]

Appellant contacted the Office on November 29, 2007 and was advised that his claim was denied and that he would receive the decision shortly. In a memorandum of telephone call dated December 3, 2007, he contacted the Office regarding the denial of his claim. The Office advised appellant that he should request an appeal if he disagreed with the decision.

Appellant contacted the Office again on December 9, 2008. The Office noted that he was calling regarding an "oral hearing request" that was sent on December 10, 2007. It noted that no request for an oral hearing was in the record.

In a memorandum of telephone call dated February 27, 2009, the Office noted that appellant stated that he submitted an oral hearing request in December 2007. Appellant contacted the Office in December 2008 requesting the status of his request. The Office advised appellant that his request was not in the file. It noted that appellant advised that he had copies of his paperwork and would contact his congressional office.

On March 30, 2009 appellant requested reconsideration of the Office's November 27, 2007 decision. He contended that he submitted an appeal request to the Branch of Hearings and Review on December 10, 2007. Appellant provided a copy of an appeal form request requesting an oral hearing dated December 10, 2007. It was marked received by the Branch of Hearings and Review on April 7, 2009.

In a May 5, 2009 decision, the Office denied appellant's request for a hearing. It found that he was not entitled to a hearing as a matter of right because his request was not made within 30 days of the November 27, 2007 decision. The Office also denied a discretionary hearing as the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence.

The Office received a January 29, 2009 report from Dr. Robert Lowe, a Board-certified orthopedic surgeon, who diagnosed status post cervical fusion at two levels and chronic back

[2] The Office noted that appellant's claim was for a cervical condition only. It noted that the carpal tunnel syndrome should be treated under a separate claim.

pain. Dr. Lowe also provided an impairment rating.[3] He provided a "conceptual" opinion that a portion of appellant's condition was work related.

In a decision dated June 4, 2009, the Office denied appellant's request for reconsideration for the reason 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[4] 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."[5]

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).[6] 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 provide that an application for reconsideration must be sent within one year of the date of the Office's decision for which review is sought.[7]

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.[8]

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

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[3] The Office also received a disc with medical documents to include an x-ray from May 25, 2007 and a magnetic resonance imaging scan dated November 15, 2006.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Id*. at § 8128(a).

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

[7] 20 C.F.R. § 10.607(a).

[8] *Id*. at § 10.607(b).

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 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.[9] 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 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.[10]

ANALYSIS

In its June 4, 2009 decision, the Office properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on November 27, 2007. Appellant's March 30, 2009 letter requesting reconsideration was submitted more than one year after the November 27, 2007 decision and was untimely.

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 underlying issue in this case is whether the Office properly denied his occupational disease claim.

Appellant contended that he submitted an appeal request to the Branch of Hearings and Review on December 10, 2007. He provided a copy of a request for a hearing dated December 10, 2007. It contained a receipt postmark of April 7, 2009. The Board notes that while appellant's request is dated December 10, 2007, the record indicates it was received on April 7, 2009. The Board notes that he contacted the Office on several occasions with regard to his hearing request. On December 3, 2007 appellant was advised that he should request an appeal if he disagreed with the denial of his claim; but he did not contact the Office again until December 9, 2008. He was advised that no request for a hearing was of record. The Board finds that appellant's contention does not raise a substantial question as to the correctness of the Office's November 27, 2007 decision and is insufficient to establish clear evidence of error.

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

[10] *Id.*

The Office received a January 29, 2009 report from Dr. Lowe who diagnosed status post cervical fusion at two levels and chronic back pain. Dr. Lowe provided an impairment rating. The Board finds that this evidence is insufficient to establish that the Office's denial of appellant's claim was clearly erroneous or raise a substantial question as to the correctness of the Office's determination. 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). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.[11]

The Board finds that this 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 denying his claim for an occupational disease.[12]

On appeal, appellant contended that his hearing request might have been placed in the wrong file as he had two claims before the Office. However, the Board notes that its review of the record is limited to the present claim which does not contain a timely request.

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.

[11] *D.O.*, 60 ECAB ___ (Docket No. 08-1057, issued June 23, 2009); *E.R.*, 60 ECAB ___ (Docket No. 09-599, issued June 3, 2009).

[12] *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 29, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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