

**United States Department of Labor
Employees' Compensation Appeals Board**

W.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fayetteville, NC, Employer**

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**Docket No. 09-1588
Issued: May 7, 2010**

Appearances:
Daniel F. Read, Esq., for the appellant
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 June 5, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decisions dated March 3, 2009, November 3 and July 11, 2008 denying his reconsideration requests on the grounds that they were not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated August 17, 1993 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 for reconsideration of the merits on the grounds that his requests were untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

On September 18, 1987 appellant, then a 42-year-old letter carrier, was attacked by a dog while working. The Office accepted the conditions of lacerations to the left elbow, lacerations to

the right leg and a lumbar strain. Appellant returned to limited-duty work. On October 7, 1987 Dr. Louis P. Clark, Jr., a Board-certified orthopedic surgeon, released appellant to regular duty after noting there was good spinal range of motion and no tenderness over the sacroiliac joints or the lumbar spine.

On February 19, 1993 appellant claimed a recurrence of disability beginning September 6, 1988 asserting that his back condition was causally related to the September 18, 1987 work injury. The record reflects on September 5, 1988 that appellant was at home and had severe low back pain when bending to retrieve a rake from under the edge of the house. On September 13, 1988 he underwent back surgery for a herniated disc.

In an August 17, 1993 decision, the Office denied the recurrence claim on the basis that the medical evidence failed to establish that his disability was due to the accepted work injury.¹

In a June 26, 2008 letter, appellant's attorney requested reconsideration of the Office's August 17, 1993 decision. He argued that the nonwork-related intervening event of September 5, 1988 was not the cause of appellant's herniated disc and surgery. Rather, the accepted work injury caused the need for surgery. Counsel submitted multiple medical reports on file at the time of the Office's August 17, 1993 decision. He also submitted appellant's April 9, 2008 statement regarding the September 5, 1988 incident at home, medical reports from Dr. Michael M. Haglund, a Board-certified neurological surgeon, and an April 24, 2007 report from Dr. Christopher T. Aul, a Board-certified family practitioner.

On September 27, 1999 Dr. Haglund noted first seeing appellant on January 7, 1997 for complaints from two injuries, one in 1985, where he fell down a hill while at work and another in 1987, where he was attacked by a dog at work. He opined that appellant's back injury was due to the two work-related accidents. Dr. Haglund stated that appellant had back pain after the March 21, 1985 accident and had several visits for back pain and acute lumbar strain thereafter.² In a November 1, 2000 operative report, he, diagnosed L5-S1 recurrent disc herniation, lumbar spinal stenosis and lumbar disc degeneration. In a July 9, 2001 report, Dr. Haglund reviewed appellant's back history and prior September 27, 1999 note. He stated that appellant's back was injured on March 21, 1985 and since that time he experienced continuing back pain. Appellant had L5-S1 surgery as there was degenerative disc disease because of the March 1985 work injury. Dr. Haglund stated that the September 1987 work injury led to the final deterioration of appellant's back condition and required L5 decompression and fusion in November 2000. He opined it was more likely than not that appellant's November 2000 surgery was related to the previous injuries and surgery. In a January 2, 2007 report, Dr. Haglund reiterated that the deterioration of appellant's back condition and resultant surgeries were causally related to his work-related accidents.

¹ On January 9, 2008 appellant claimed a recurrence beginning September 6, 1988 due to his September 18, 1987 injury. In an April 3, 2008 letter, the Office advised appellant that no decision would be issued regarding the January 9, 2008 recurrence claim since the August 17, 1993 decision denied his recurrence claim.

² Dr. Haglund further opined that appellant's neck injury and subsequent C3-7 cervical laminectomy for severe cervical stenosis, which was present in 1989, was exacerbated by his work accidents.

Dr. Aul reviewed appellant's medical records and the treatment notes of Dr. Haglund. Based on the findings on examination and a review of magnetic resonance imaging (MRI) scan reports, appellant had progressive degenerative disease of the cervical and lumbar spine that worsened after his surgeries. Dr. Aul opined that appellant's cervical and lumbar conditions and resultant surgeries were secondary to the traumatic work-related injuries of 1985 and 1987.

By decision dated July 11, 2008, the Office denied appellant's request for reconsideration on the grounds it was untimely and failed to establish clear evidence of error.

On August 29 and October 9, 2008 appellant's attorney requested reconsideration. He submitted treatment records dated April 28 to August 13, 1988 from Dr. C. Cooley, appellant's family physician, to show that he had symptoms of low back pain and was diagnosed with chronic low back pain syndrome prior to September 1988. Counsel argued that this evidence, which was not previously reviewed by the Office, corroborated appellant's statement that his back pain did not suddenly reappear in September 1988, when he sustained the nonwork-related injury while at home. He contended that appellant had ongoing back pain between the work incident of September 1987 and the September 1988 nonwork incident and that nothing new or strenuous had occurred in 1988 as the damage to appellant's back had occurred in September 1987. The treatment notes indicated that appellant's symptoms of low back pain were diagnosed with chronic low back pain syndrome prior to the claimed recurrence of September 6, 1988.

By decision dated November 3, 2008, the Office denied appellant's reconsideration request as untimely and failing to establish clear evidence of error.

On February 16, 2009 appellant's attorney requested reconsideration and submitted a January 30, 2009 report from Dr. Aul. He opined that the trauma that occurred on September 18, 1987 caused injury to appellant's lumbar area which resulted in the September 1988 surgery. Dr. Aul stated that there was no separate injury that occurred while at home in September 1988; rather appellant had a bulging disc with stenosis which had ruptured. He advised that sequestration, the process of when a disc breaks or ruptures, happened in September 1988 when appellant bent to pick up an object at home. Dr. Aul noted that the act of bending alone would not have caused the disc to rupture. He explained that x-rays supported that the trauma to appellant's back occurred when he fought off the dog. The subsequent bending in September 1988 caused the already damaged disc to rupture. Dr. Aul opined that appellant's x-rays in September 1987 were not reported correctly and, had they been, appellant should not have been allowed to return to his regular work duties as it increased the overall risk of a herniated disc. Although his findings showed that the disc had herniated while at home on September 5, 1988, Dr. Aul opined it was a clear recurrence of his work injury of September 18, 1987.

By decision dated March 3, 2009, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretion 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 anytime 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, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.⁴

However, 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.⁵

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 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.⁶

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish 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 the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁹ The Board makes an independent

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁵ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁶ *Annie L. Billingsley*, *supra* note 4.

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

⁹ *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of the Office.¹⁰

ANALYSIS

The Office issued a merit decision in appellant's claim on August 17, 1993. Appellant requested reconsideration on June 26, August 29 and October 9, 2008 and February 16, 2009. Each reconsideration request was more than one year after the Office's August 17, 1993 decision. Thus, the requests were untimely. Appellant must therefore demonstrate clear evidence of error on the part of the Office in the August 17, 1993 decision.

The Board finds that the evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's 1993 decision denying his claim.

In support of appellant's June 26, 2008 reconsideration request, he submitted medical reports from Dr. Haglund and Dr. Aul. Both physicians opined that appellant's cervical and lumbar conditions and need for surgery were secondary to the traumatic work-related injuries in 1985 and 1987. However, neither physician mentioned the September 5, 1988 incident at home, which resulted in a herniated disc requiring surgery, or provided an opinion explaining why the herniated disc and resultant surgery were the result of the September 18, 1987 work injury. Furthermore, the physicians fail to explain why the September 5, 1988 nonwork-related injury was merely a triggering event, as appellant's attorney argued, and not the cause of the herniated disc and resultant surgery. Thus neither the medical reports submitted nor the attorney's argument is sufficient to establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's August 17, 1993 decision denying appellant's recurrence claim on the grounds that causal relationship was not established.

In the second reconsideration request, appellant submitted medical notes from Dr. Cooley which showed he had symptoms of low back pain and was diagnosed with chronic low back pain syndrome prior to September 1988. This evidence is insufficient to establish clear evidence of error as Dr. Cooley's reports predate the alleged recurrence of September 6, 1988 and fail to address the critical issue of causal relationship. Thus, his reports and the attorney's argument that the damage to appellant's back had been done in 1987 as he had an ongoing problem with back pain from the September 1987 work incident do not raise a substantial question as to the correctness of the Office's August 17, 1993 decision.

In his most recent reconsideration request, appellant submitted Dr. Aul's January 30, 2009 report. Dr. Aul opined that, while appellant's disc had herniated at home on September 5, 1988, it was a recurrence of the September 18, 1987 work injury and explained that the act of bending on September 5, 1988 would not cause appellant's disc to rupture. He asserted that x-rays in September 1987 were not reported correctly and supported that appellant's disc was already damaged and that the act of bending on September 5, 1988 caused the already damaged disc to rupture. While Dr. Aul's opinion contains some reasoning and is supportive of appellant's claim, the Board notes that clear evidence of error is intended to represent a difficult

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

standard. 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 and would not require reopening the case.¹¹ The Board finds that Dr. Aul's report is not the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.¹² Thus, the Office properly determined appellant's untimely reconsideration request did not demonstrate clear evidence of error in its March 3, 2009 decision.

On appeal, appellant's representative argues that the newly submitted medical evidence was sufficient to establish that appellant sustained a recurrence of his work injury on September 5, 1988 and not a separate nonwork-related event. As discussed, however, when an application for review of a merit decision is not timely filed, the Office will consider the application only if it demonstrates clear evidence of error. To establish clear evidence of error, the evidence submitted must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹³ The evidence appellant submitted on reconsideration fails to meet this standard.

CONCLUSION

The Board finds that the Office properly determined that appellant's untimely request for reconsideration did not demonstrate clear evidence of error in its July 11 and November 3, 2008 and March 3, 2009 decisions.

¹¹ See *Joseph R. Santos*, 57 ECAB 554 (2006); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

¹² See *D.D.*, 58 ECAB 206 (2006).

¹³ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2009 and November 3 and July 11, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 7, 2010
Washington, DC

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