United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 10-798**
	)	**Issued: November 16, 2010**
U.S. POSTAL SERVICE, MANASOTA PROCESSING & DISTRIBUTION CENTER, Manasota, FL, Employer	)	

Appearances:
Appellant, pro se
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 January 29, 2010 appellant timely appealed the August 10, 2009 nonmerit decision of the Office of Workers' Compensation Programs.[1] The last merit decision is dated July 16, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board's jurisdiction encompasses only the August 10, 2009 nonmerit decision.[2]

ISSUE

The issue is whether the Office properly determined that appellant's July 26, 2009 request for reconsideration was untimely filed and did not establish clear evidence of error.

[1] The record on appeal contains evidence received after the Office issued its August 10, 2009 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2009).

[2] For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

Appellant, a 38-year-old mail handler, has an accepted claim for aggravation of cervical degenerative disc disease, which arose on or about May 10, 2002. By decision dated May 25, 2004, the Office terminated appellant's entitlement to monetary compensation. The employing establishment had offered appellant a position as a modified mail handler, which the Office determined was suitable to his work capabilities.[3] Pursuant to 20 C.F.R. § 10.516, the Office issued a 30-day notice on March 16, 2004, followed by a 15-day notice on April 29, 2004. When appellant did not accept the limited-duty position within the allotted time frame, the Office terminated compensation benefits effective June 13, 2004.[4]

Appellant subsequently filed eight requests for reconsideration with respect to the Office's May 25, 2004 suitable work termination. The Office denied reconsideration on July 1, 2004, and subsequently denied modification by decisions dated December 10, 2004, January 24 and July 22, 2005, January 24, 2006, May 11, 2007 and July 16, 2008.

Appellant's most recent request for reconsideration was dated July 26, 2009. He argued that the Office's "August, 2008" decision did not address his July 8, 2008 letter.[5] Appellant did not submit any additional evidence with his July 26, 2009 reconsideration request or specifically challenge either the factual or legal basis for terminating his compensation benefits effective June 13, 2004. He did, however, express a willingness to submit "more information, documents or any other evidence" if needed.

By decision dated August 10, 2009, the Office found that appellant's July 26, 2009 request was untimely and he failed to present clear evidence of error.[6]

---

[3] The December 17, 2003 part-time, limited-duty job offer was based on a November 13, 2003 work capacity evaluation (Form OWCP-5c) provided by appellant's treating physician, Dr. Steven Y. Chun, a Board-certified anesthesiologist.

[4] Appellant's eligibility for continued medical benefits was not affected by the May 25, 2004 decision.

[5] The employing establishment submitted a June 5, 2008 response to appellant's May 5, 2008 request for reconsideration. The Office forwarded a copy of the response to appellant and afforded him 20 days to reply. It received his July 8, 2008 rebuttal letter on July 15, 2008. However, the July 16, 2008 decision incorrectly indicated that the Office had not received any comments from appellant regarding the employing establishment's June 5, 2008 response.

[6] Although appellant did not submit additional evidence with his July 26, 2009 request, the Office considered various medical reports received after the July 16, 2008 decision. The new evidence included: treatment notes from Dr. Chun covering the period November 13, 2007 through July 14, 2009, a March 24, 2009 report from Linda K. Erickson, a licensed clinical social worker, who indicated that appellant was suffering from severe clinical major depression and May 19, June 16 and July 14, 2009 treatment notes from Dr. Donald L. Erb, a Board-certified anesthesiologist specializing in pain medicine. The above-noted evidence documented appellant's ongoing medical treatment, but did not otherwise address any employment-related disability.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.[7] The Office has discretionary authority in this regard and it has imposed certain limitations in exercising its authority.[8] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[9] When a request for reconsideration is untimely, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office in its "most recent merit decision."[10]

ANALYSIS

Appellant's request for reconsideration was dated July 26, 2009, which is more than a year after the Office's July 16, 2008 merit decision. Because his request was untimely he must demonstrate clear evidence of error on the part of the Office in terminating compensation for failing to accept suitable work.[11] The sole argument appellant raised in his July 26, 2009 request for reconsideration was the Office's failure to consider his July 8, 2008 rebuttal letter. The gist of the July 8, 2008 letter was that the December 17, 2003 limited-duty position was essentially the same position appellant held when he was injured, except that it was part time rather than a full-time position. Appellant argued the same point in a prior May 5, 2008 request for reconsideration. The employing establishment refuted this contention in its June 5, 2008 response and further noted that the December 17, 2003 limited-duty position was within the restrictions provided by appellant's physician.

Appellant's July 8, 2008 rebuttal letter was largely a reiteration of his May 5, 2008 argument, which he had raised on numerous prior occasions. While the Office overlooked the July 8, 2008 response, this oversight was essentially harmless given that appellant had already raised the same argument in his May 5, 2008 request for reconsideration, as well as in prior reconsideration requests dating back to October 30, 2005. However, this is not genuine to establish clear error in the May 25, 2004 Office termination decision. Appellant has failed to

[7] This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a) (2006).

[8] 20 C.F.R. § 10.607.

[9] *Id*. at § 10.607(a).

[10] *Id*. at § 10.607(b).

[11] *Id*. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 *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 decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

demonstrate clear evidence of error on the part of the Office in terminating his compensation on May 25, 2004 for failing to accept suitable work.

A partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[12] An employee who refuses or neglects to work after suitable work has been offered or secured for him has the burden to show that this refusal or failure to work was reasonable or justified.[13] Whether an employee has the ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence.[14] In evaluating the suitability of a particular position, the Office must consider preexisting and subsequently acquired medical conditions.[15]

Appellant's July 26, 2009 request for reconsideration did not establish any substantive or procedural defects with the December 17, 2003 limited-duty job offer. The medical evidence received after the July 16, 2008 merit decision did not address the issue of disability as it pertained to the Office's suitability determination. Appellant did not identify any procedural defects with respect to the Office's 30-day and 15-day notices. The Board finds that appellant has not established clear evidence of error. As such, there is no justification for further merit review. Accordingly, the Office properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant's July 26, 2009 request for reconsideration was untimely and he failed to demonstrate clear evidence of error.

[12] 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.517.

[13] *Id*.

[14] *Gayle Harris*, 52 ECAB 319, 321 (2001).

[15] *Id*.; *Martha A. McConnell*, 50 ECAB 129, 132 (1998).

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 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