

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

A.N., Appellant)	
)	
and)	Docket No. 10-806
)	Issued: November 10, 2010
U.S. POSTAL SERVICE, HILLCREST POST)	
OFFICE, San Diego, CA, Employer)	
)	

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

DECISION AND ORDER

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

JURISDICTION

On February 1, 2010 appellant filed a timely appeal from the November 4, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated May 7, 1996 and the filing of this appeal on February 1, 2010, the Board lacks jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

¹ For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

On appeal, appellant contends that the medical evidence submitted in support of his request for reconsideration is sufficient to establish that his current condition is causally related to his November 1, 1978 employment injury.

FACTUAL HISTORY

The Office accepted that on November 1, 1978 appellant, then a 28-year-old letter carrier, sustained herniated or bulging discs at L4-5 and L5-S1 and spinal stenosis while in the performance of duty.²

By decision dated April 6, 1995, the Office granted appellant schedule awards for four percent impairment of each leg. The period of the awards ran for 23.04 weeks, from February 9 to July 20, 1995.

In a May 7, 1996 decision, the Office terminated appellant's compensation for wage-loss and medical benefits with regard to his accepted employment-related injuries. It found that the weight of the medical opinion evidence rested with Dr. Benjamin G. Cox, Jr., an Office referral physician, who found that appellant no longer, had any residuals of his accepted November 1, 1978 employment injuries. The Office rescinded its acceptance of his claim for herniated discs at L4-5 and L5-S1 based on Dr. Cox's finding that there was no objective evidence to establish a causal relationship between the herniated discs and the November 1, 1978 employment incident.

On February 19, 2009 appellant requested an oral hearing before an Office hearing representative regarding the Office's May 7, 1996 decision.

In a May 5, 2009 decision, the Office Branch of Hearings and Review denied appellant's oral hearing request, finding that it was not filed within 30 days from the May 7, 1996 decision. It exercised its discretion and further denied his request on the basis that the issue in the case could be addressed by requesting reconsideration before the Office and submitting evidence not previously considered which established that he was entitled to compensation benefits.

By letter dated October 18, 2009, appellant requested reconsideration of the Office's termination May 7, 1996 decision. He also requested a schedule award, contending that his worsening condition was causally related to his November 1, 1978 employment injury.³ In a January 3, 2007 note, Dr. Steven R. Garfin, a Board-certified orthopedic surgeon, obtained a history of appellant's November 1, 1978 employment injury, medical treatment and social and family background. He noted appellant's current complaint of worsening low back and right leg pain. Dr. Garfin listed findings on physical examination and reviewed x-rays and a magnetic resonance imaging (MRI) scan report. He found that appellant had back and radiating right leg pain related to his November 1, 1978 employment injury. Appellant also had degenerative

² The record reveals that appellant retired from the employing establishment based on a January 22, 1994 settlement agreement regarding a proposal to remove him due to unsatisfactory conduct/obstruction of official mail and unacceptable off-duty misconduct. Appellant elected to receive retirement benefits from the Office of Personnel Management.

³ The issue of any additional permanent impairment is not before the Board in the present appeal. The Office did not issue a final decision on this aspect of his case. See 20 C.F.R. § 501.2(c).

changes at L4-5 and L5-S1 and spondylolisthesis at L3-4 which was consistent with spinal stenosis. Dr. Garfin stated that the current degree of appellant's weakness was most likely related to stenosis at L3-4 and other changes that may have occurred at the L4-5 or L5-S1 level.

By decision dated November 4, 2009, the Office denied appellant's October 18, 2009 request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error on the part of the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶

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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

To show clear evidence of error, 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.¹³ 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.¹⁴

ANALYSIS

The merits of appellant's case are not before the Board. His request for reconsideration was dated October 18, 2009, more than one year after the Office's most recent merit decision of May 7, 1996 and, therefore, is not timely. Appellant must demonstrate clear evidence of error on the part of the Office in issuing the May 7, 1996 decision, which terminated his wage-loss compensation and medical benefits and rescinded the acceptance of his claim for herniated discs at L4-5 and L5-S1 because the weight of the medical opinion evidence rested with the April 25, 1996 opinion of Dr. Cox, an Office referral physician.

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 termination decision and is of insufficient probative value to shift the weight of the evidence in favor of appellant's claim.

Dr. Garfin reported that appellant's back and radiating right leg pain were causally related to his November 1, 1978 employment injury. He further advised that appellant had degenerative changes at L4-5 and L5-S1 and spondylolisthesis at L3-4 which was consistent with spinal stenosis. Dr. Garfin stated that the degree of his weakness was "most likely" related to stenosis at L3-4 and other changes that occurred at the L4-5 or L5-S1 level. He did not explain how appellant's current back and right leg pain were due to the accepted employment-related condition of spinal stenosis. Dr. Garfin's report is almost 30 years after the fact and did not provide a fully-rationalized opinion on causal relationship between appellant's current degenerative changes at L4-5 and L5-S1 and spinal stenosis at L3-4 or the November 1, 1978 employment injury. Further, his opinion regarding the causal relationship between appellant's lumbar weakness and the diagnosed lumbar conditions is of limited probative value as it is couched in speculative terms.¹⁵ Dr. Garfin did not provide an unequivocal opinion explaining the reasons the stenosis at L3-4 and changes at L4-5 or L5-S1 would cause appellant's lumbar weakness.

Appellant contention that he is entitled to compensation benefits due to residuals of his November 1, 1978 employment injury based on Dr. Garfin's medical opinion has not been

¹³ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁵ *Kathy Kelley*, 55 ECAB 206 (2004) (the Board has held that opinions such as, the implant may have ruptured and that the condition is probably related, most likely related or could be related are speculative and diminish the probative value of the medical opinion).

established. As stated, this evidence does not provide an unequivocal and rationalized medical opinion addressing the causal relationship between appellant's current lumbar conditions and the accepted employment injury.

CONCLUSION

The Board finds that appellant's October 18, 2009 request for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

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

Issued: November 10, 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