United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 10-348**
	)	**Issued: September 3, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 18, 2009 appellant, through his representative, filed a timely appeal from the Office of Workers' Compensation Programs' October 23, 2009 nonmerit decision denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's October 22, 2004 decision denying appellant's request for a schedule award. Because more than one year has elapsed between the last merit decision and the filing of this appeal on November 18, 2009, the Board lacks jurisdiction to review the merits of the case.[1]

ISSUE

The issue is whether 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.

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

Appellant, through his attorney, filed this appeal contending that the decision was contrary to fact and law.

FACTUAL HISTORY

On July 16, 1999 appellant, then a 49-year-old mail handler, filed a traumatic injury claim alleging that on July 11, 1999 he sustained a lumbar strain in the performance of duty. Specifically, he alleged that "driving standup is hard on (bad back) from 1976 injury" and "long distance delivery of mail aggravated old injury." On November 2, 1999 the Office accepted appellant's claim for lumbar strain with radiculopathy. On June 13, 2002 it accepted appellant's claim for a recurrence on March 18, 2002. The Office also expanded appellant's claim to include aggravation of degenerative disc disease. It paid appropriate compensation and medical benefits.

On July 24, 2003 appellant filed a claim for a schedule award. By decision dated October 22, 2004, the Office denied his claim for a schedule award for the reason that the medical evidence did not demonstrate permanent, measurable schedule impairment. On November 8, 2004 appellant requested an oral hearing. He did not appear at his April 24, 2005 hearing and in a decision dated June 3, 2005 the hearing representative found that appellant had abandoned his request for a hearing.

On April 27, 2007 appellant filed another claim for a schedule award. By letter dated May 8, 2007, the Office noted that it had previously denied appellant's claim.

On March 13, 2009 appellant, through his attorney, filed a claim for a schedule award. In support thereof, appellant submitted an August 11, 2008 magnetic resonance imaging (MRI) scan which was interpreted by Dr. Kenneth Weiss, a Board-certified diagnostic radiologist, as evincing multilevel degenerative changes. A November 17, 2008 MRI scan was interpreted by Dr. Thomas Tomsick, a Board-certified diagnostic radiologist, as evincing multilevel degenerative changes at the C4-5 level with moderate cord compression and bilateral foraminal stenosis.

By letter dated March 24, 2009, the Office provided a status update regarding his March 13, 2009 schedule award claim. It indicated that it will not further process this schedule award claim as a determination was made in the past. The Office explained that appellant "was required to pursue any disagreement" with the October 22, 2004 denial of his schedule award claim by exercising the appeal rights contained therein.

By letter dated August 18, 2009, appellant's attorney noted that a claim for a schedule award had been filed, and he proceeded to submit an impairment rating by Dr. Martin Fritzhand,

a Board-certified urologist. In a July 28, 2009 report, Dr. Fritzhand opined that appellant had sustained a partial impairment to both the left and right lower extremities of 22 percent.[2]

By letter dated October 13, 2009, appellant, through his attorney, requested reconsideration. Counsel argued that the report of Dr. Fritzhand showed clear evidence of error and that the October 24, 2004 decision denying a schedule award should be vacated and the claim now approved.

By decision dated October 23, 2009, the Office denied appellant's request for reconsideration as it was not filed within one year of the last merit decision and did not show clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.[3] 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 Federal Employees' Compensation Act.[4]

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.[5] 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.[6]

---

[2] Dr. Fritzhand noted that he applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008):

> "I used peripheral nerve impairment -- sciatic nerve (Figure 16-4). Table 16-11 indicates a Severity 1 impairment. Table 16-12 sciatic nerve indicates a mild to moderate sensory deficit as well as a mild motor deficit Class 1. Table 16-6 FHA GM2 (AAOS Lower Limb Inventory raw score of 24); Table 16-8 CSA GM2. Thus, the C impairment moves to E. It is my medical opinion that the patient has sustained a permanent partial impairment to the right lower extremity of 22 percent. In addition, it is my medical opinion that he has sustained a permanent partial impairment to the left lower extremity of 22 percent."

[3] 20 C.F.R. § 10.607(a).

[4] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

[6] *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.d (January 2004).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[7] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] 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.[11] 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.[12]

ANALYSIS

The Board notes that the last merit decision in this case was the October 22, 2004 decision denying appellant's request for a schedule award. Appellant filed his request for reconsideration by letter dated October 13, 2009. Accordingly, as this request was filed over one year after the decision from which he requested reconsideration, this request was not timely filed from the merit decision of the Office.

The Office properly proceeded to review appellant's request under the clear evidence of error standard and determined that he had not established clear evidence of error. None of the evidence submitted is sufficient to establish clear evidence of error. The MRI scans conducted on August 11 and November 17, 2008 did not provide an impairment rating. The report of Dr. Fritzhand, opining that appellant had an impairment of each lower extremity of 22 percent, is also insufficient. Dr. Fritzhand did not adequately explain why appellant should now be entitled to 22 percent impairment of each lower extremity despite the fact that no impairment of these extremities was found at the time of the October 22, 2004 decision. The Board finds that this evidence is insufficient to establish that the Office's denial of appellant's claim was clearly erroneous or raised a substantial question as to the correctness of the Office's determination. The term clear evidence or 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

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

[8] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

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

[10] *See Leona N. Travis, supra* note 8.

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

[12] *Leon D. Faidley, Jr., supra* note 4.

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.[13]

The Board finds that the evidence submitted by appellant on reconsideration 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 a schedule award.

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 not timely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 23, 2009 is affirmed.

Issued: September 3, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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