United States Department of Labor
Employees' Compensation Appeals Board

W.S., Appellant	)	
and	)	**Docket No. 10-1009**
	)	**Issued: January 6, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Hamilton, 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:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 1, 2010 appellant through counsel filed a timely appeal from a February 8, 2010 nonmerit decision of the Office of Workers' Compensation Programs denying his untimely request for reconsideration and finding that it failed to establish clear evidence of error. As over one year has passed between the last merit decision in this case, dated January 30, 2007 to the filing of this appeal, the Board lacks jurisdiction over the merits of this 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 decisions of the Office issued prior to November 19, 2008, a claimant had one year to file an appeal. 20 C.F.R. § 501.3(d)(2). An appeal of a final adverse Office decision issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On April 24, 1991 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim alleging that on April 22, 1991 he sustained a thoracic sprain/strain as a result of casing mail. On March 6, 1992 the Office accepted the claim for dorsal lumbar strain, permanent aggravation of Scheuermann's disease and scoliosis.[2] It accepted a January 27, 1996 recurrence claim and placed appellant on the periodic rolls in receipt of temporary total disability.

In a November 1, 2000 decision, the Office finalized a September 21, 2000 proposal to terminate appellant's compensation benefits on the grounds that he no longer had any residuals or disability due to his accepted conditions. It found that, the weight of the medical evidence rested with the impartial medical examiner, Dr. Robert J. Roman, a Board-certified orthopedic surgeon, who reported that the accepted conditions of lumbar/dorsal strain and aggravation of the preexisting Scheuermann's disease condition had ceased.

By decision dated October 11, 2000, an Office hearing representative reversed the November 1, 2000 decision. She found that Dr. Roman's opinion did not constitute the weight of the evidence as a conflict did not arise as to whether the accepted aggravation of the preexisting Scheuermann's disease was temporary or permanent. On this issue, the hearing representative found an unresolved conflict in the medical opinion evidence between Dr. Roman and Dr. Daniel Fox, a treating physician.

The Office referred appellant to Dr. Edward V.A. Lim, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion. In a December 28, 2001 report, Dr. Lim concluded that the accepted conditions of thoracic and lumbar strain and aggravation of Scheuermann's disease had ceased. He found no continuing residuals or disability due to the accepted employment injuries. Dr. Lim advised that any continuing disability was due to the degeneration from appellant's preexisting permanent Scheuermann's disease condition and was no longer employment related.

On January 10, 2002 the Office proposed to terminate appellant's compensation benefits on the grounds that he no longer had any residuals or disability due to his accepted employment conditions.

By decision dated February 20, 2002, the Office finalized the proposed termination of benefits effective February 19, 2002.

On February 25, 2002 appellant's counsel requested an oral hearing before an Office hearing representative. A hearing was held on November 21, 2006 at which appellant was represented by counsel, provided testimony and submitted evidence.

[2] Under claim number xxxxxx556 the Office, on December 28, 1983, accepted that appellant sustained a dorsal spine sprain. It denied appellant's claim for a right upper chest and upper back injury sustained on July 14, 1984. The Office assigned claim number xxxxxx326. Under claim number xxxxxx822, it accepted a mild lumbar strain as a result of a March 11, 1988 employment injury. The Office, under claim number xxxxxx313, accepted a lumbosacral strain due to an April 22, 1989 employment injury. It combined claim numbers xxxxxx313, xxxxxx822 and xxxxxx326 on April 16, 1997. On July 18, 1996 the Office doubled claim numbers xxxxxx997 and xxxxxx556.

By decision dated January 30, 2007, an Office hearing representative affirmed the termination of appellant's compensation and medical benefits effective February 20, 2002. He found the weight of the medical evidence rested with the opinion of Dr. Lim, the impartial medical examiner, who found appellant's accepted work conditions had resolved as did the temporary aggravation of his preexisting Scheuermann's disease.

On January 7, 2010 counsel requested reconsideration. In a January 7, 2010 report, Dr. Peter A. Scheidler, a treating osteopath and Board-certified internist, noted that he began treating appellant on July 31, 2008. He related that appellant was injured on April 22, 1991 while casing mail and had a history of Scheuermann's disease, which was a natural bend or kyphosis in the thoracic spine. On physical examination, Dr. Scheidler found an essentially normal neurologic examination without evidence of a herniated disc and multiple areas of tenderness from T-4 to L-4, with pain on flexion and rotation. He reviewed the medical records, including objective testing and prior examinations and opined that appellant's April 22, 1991 employment injury caused a thoracic and lumbar strain which aggravated his underlying Scheuermann's disease. This condition was aggravated multiple times due to appellant's work situation and conditions during the 1990's. Dr. Scheidler advised that the April 22, 1991 employment injury aggravated the underlying Scheuermann's disease resulting in further thoracic and lumbar spine degeneration.

By decision dated February 8, 2010, the Office denied appellant's request for further merit review as it was untimely filed and failed to establish clear evidence of error. It found that Dr. Scheidler's opinion did not establish clear evidence of error in the prior decision.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[3] provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[4] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.[5] 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 Act.[6]

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit

[3] 5 U.S.C. §§ 8101 *et seq.*

[4] 20 C.F.R. § 10.605.

[5] *Id*. at § 10.607(a).

[6] 5 U.S.C. § 8128(a); *E.R.*, 60 ECAB ___ (Docket No. 09-599, issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[7] 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 and would not require a review of the case on the Director's own motion.[8] 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.[9]

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.[10] However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[11]

The most recent merit decision was the Office hearing representative's January 29, 2007 decision, which affirmed the February 20, 2002 termination of appellant's compensation. The hearing representative found that the medical evidence was sufficient to establish that he no longer had any residuals or disability causally related to his accepted employment-related dorsal and lumbar strains and that the aggravation of his preexisting Scheuermann's disease was temporary and had ceased. Appellant's January 7, 2010 letter to the Office requesting reconsideration of his claim was made more than one year after the January 29, 2007 merit decision. Therefore, it was not timely filed.

The Board also finds that the evidence submitted by appellant in support of his January 7, 2010 request for reconsideration does not raise a substantial question as to the correctness of the Office's termination of his compensation benefits or shift the weight of the evidence of record in his favor.

The Office properly performed a limited review of the evidence to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening his case for merit review under section 8128(a) of the Act, notwithstanding the

[7] *D.O.*, 60 ECAB ___ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991). *See E.R.*, *supra* note 6; *James R. Mirra*, 56 ECAB 738 (2005).

[9] *See W.G.*, 60 ECAB ___ (Docket No. 08-2340, issued June 22, 2009); *S.D.*, 58 ECAB 713 (2007); *Alberta Dukes*, 56 ECAB 247 (2005).

[10] 20 C.F.R. § 10.607(a); *see W.G.*, *id.*; *A.F.*, 59 ECAB 714 (2008); *Robert G. Burns*, 57 ECAB 657 (2006).

[11] *E.R.*, *supra* note 8; *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, *supra* note 7.

untimeliness of his application. The Board finds that the evidence submitted in support of the application for review does not raise a substantial question as to the correctness of the Office's decision terminating his compensation in 2002 and is insufficient to demonstrate clear evidence of error. The underlying issue is whether the Office properly terminated his compensation benefits effective February 19, 2002 on the grounds that he no longer had continuing residuals of his accepted conditions. Dr. Scheidler noted his disagreement with prior physicians of record who concluded that appellant did not sustain a permanent aggravation of his preexisting Scheuermann's disease. He did not provide supporting rationale for his conclusion that the aggravation was permanent. This report does not raise a substantial question as to the correctness of the Office's prior decision. The Board notes that clear evidence of error is intended to represent a difficult standard. It is not enough to show that evidence could be construed so as to produce a contrary result.[12] The submission of a well-rationalized medical report which, if submitted before the denial of the claim was issued, would have created a conflict in medical opinion is not clear evidence of error.[13] Dr. Scheidler's opinion does not establish any error by the Office and is not sufficient to raise a substantial question as to the correctness of the termination of appellant's compensation benefits. His report does not establish clear evidence of error.

Appellant has not provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor or raise a substantial question as to the correctness of the Office's February 20, 2002 and January 29, 2007 termination decisions. Consequently, the Office properly denied his reconsideration request as his request does not establish clear evidence of error.

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error such that review of the merits was warranted.

[12] *D.E.*, 59 ECAB 438 (2008); *Jack D. Johnson*, 57 ECAB 593 (2006).

[13] *See A.F.*, *supra* note 10; *Joseph R. Santos*, 57 ECAB 554 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 8, 2010 is affirmed.

Issued: January 6, 2011
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