United States Department of Labor
Employees' Compensation Appeals Board

J.Y., Appellant	)	
and	)	**Docket No. 07-1614**
	)	**Issued: November 16, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Moundsville, WV, Employer	)	

Appearances:
David W. Hummel, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 23, 2007 appellant filed a timely appeal of an April 17, 2007 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration without conducting a merit review. Because more than one year has elapsed between the most recent merit decision dated January 25, 2005 and 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(d)(2). The only decision before the Board is the Office's April 17, 2007 decision denying appellant's request for reconsideration of the merits of his claim.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On September 13, 2004 appellant, then a 57-year-old deck hand, filed a traumatic injury claim alleging that, on July 30, 2004, he felt discomfort in his lower back and leg while stacking tires.[1] He stopped work on August 2, 2004 and returned on September 27, 2004.[2]

By decision dated January 25, 2005, the Office denied appellant's claim on the grounds that he did not establish an injury as alleged. The Office found that the evidence was sufficient to establish that the incident occurred as alleged. However, the Office found that the medical evidence was insufficient to establish that appellant's condition was caused by his employment duties.

By letter dated March 30, 2007, appellant requested reconsideration.

In support of his request, appellant submitted copies of medical records, all of which were previously submitted. They included treatment notes dated August 1, 2004 from Dr. Lisa Hrutkay, an osteopath, Board-certified in emergency medicine, who noted appellant's history of injury which included that he had "problems with his low back for quite some time." Dr. Hrutkay advised that "last week he had increased pain in his back after he had rolled some tires." In an August 3, 2004 emergency room note, she noted appellant's history of presenting to the emergency room with complaints of low back pain. Dr. Hrutkay noted that appellant related a "history of low back pain which is chronic in nature from an injury he had on the job some years ago." She diagnosed "intractable back pain."

In separate emergency room treatment note dated August 3, 2004, Dr. Anita Mysliwiec, Board-certified in internal medicine, noted that appellant was in a motor vehicle accident years ago, which caused his back pain to begin. She also noted that appellant related that he worked as a custodial engineer and was working when he picked up a strap which contained bound papers and fell to the ground. Dr. Mysliwiec also noted that appellant recently picked up a tire and felt pain in his lumbar region. She diagnosed "intractable back pain." In an August 4, 2004 magnetic resonance imaging (MRI) scan read by Dr. Warren Boling, a radiologist, revealed multilevel spinal and neural foraminal compromise related to disc bulging and degenerative changes along the posterior facets. In an August 11, 2004 discharge summary, Dr. Leslie Latterman, an osteopath, diagnosed lumbar disc displacement with intractable back pain, spinal stenosis, hypertension and gastroesophageal reflux. In an August 11, 2004 report, Dr. David Liebeskind, Board-certified in physical medicine and rehabilitation, noted that appellant was admitted to the hospital after a severe exacerbation of underlying chronic back pain. He diagnosed exacerbation of chronic low back pain and noted that appellant was postlaminectomy.

Appellant also submitted copies of previously submitted physical therapy reports dated August 3, 2004, copies of previously submitted occupational therapy reports dated August 11 and 13, 2004 and a certification from a health care provider dated September 22, 2004.

[1] While appellant filed his claim as a recurrence, the Office treated it as a traumatic injury.

[2] The record reflects that appellant had a prior claim for a lumbar strain under file number 032004244.

In a decision dated April 17, 2007, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] vests the Office with discretionary authority 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 any time 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."[4]

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[5] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the 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 that 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. Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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

[3] 5 U.S.C. §§ 8101-93.

[4] 5 U.S.C. § 8128(a).

[5] *Diane Matchem*, 48 ECAB 532, 533 (1997); *citing Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[6] 20 C.F.R. § 10.607(a).

[7] *Id*. at § 10.607(b).

whether the new evidence demonstrates clear error on the part of the Office.[8] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. 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

In its April 17, 2007 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its most recent merit decision on January 25, 2005. Appellant's March 30, 2007 request for reconsideration was submitted more than one year after the January 25, 2005 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review 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 untimeliness of his application. The Office reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. The underlying issue in this case is whether appellant demonstrated clear evidence of error in the January 25, 2005 Office decision which denied his claim for a traumatic injury due to the lack of medical evidence establishing causal relationship.

With his March 30, 2007 request for reconsideration, appellant submitted copies of previously submitted medical evidence, which did not provide any opinion on the issue of causal relationship. The medical evidence included treatment notes dating from August 1 to 11 2004, from Drs. Hrutkay, Mysliwiec, Latterman, and Liebeskind, who diagnosed "intractable back pain" and exacerbation of chronic low back pain. Appellant also submitted a copy of an August 4, 2004 MRI scan read by Dr. Boling, which revealed multilevel spinal and neural foraminal compromise related to disc bulging and degenerative changes along the posterior facets. He also submitted a certification from a health care provider, but it did not contain any opinion on causal relation. As this evidence did not address the critical issue in the case, causal relationship between appellant's claimed medical condition and factors of his employment, the evidence does not demonstrate clear evidence of error in the January 25, 2005 decision.

[8] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

[9] *Id.*

Appellant submitted copies of reports from physical and occupational therapists. Section 8101(2) of the Act provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law. Only medical evidence from a physician as defined by the Act will be accorded probative value. Health care providers such as physician's assistants and therapists are not physicians under the Act. Thus, their opinions do not constitute medical evidence and have no probative value.[10] These records are insufficient to demonstrate clear evidence of error.

Office procedures provide that 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 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 a case.[11]

The Board finds that this evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office committed error in its January 25, 2005 Office decision.[12] Therefore, the Board finds that appellant has not presented clear evidence of error.[13]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

[10] *See Jane A. White,* 34 ECAB 515, 518 (1983).

[11] *Annie L. Billingsley,* 50 ECAB 210 (1998).

[12] *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

[13] The Board notes that, subsequent to the Office's April 17, 2007 decision, appellant's submitted additional evidence on appeal. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell,* 5 ECAB 35 (1952).

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board