United States Department of Labor
Employees' Compensation Appeals Board

MURIEL V. REEVES, Appellant	)	
and	)	**Docket No. 03-2226**
	)	**Issued: January 13, 2004**
DEPARTMENT OF THE ARMY, UTILITIES AND POLLUTION CONTROL DIVISION, Fort Polk, LA, Employer	)	

Appearances:
Muriel V. Reeves, pro se

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 11, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs decision dated June 12, 2003 which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated February 23, 2001 and the filing of this appeal on September 11, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501©(2), 501.3(d)(2).

ISSUE

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

FACTUAL HISTORY

Appellant, a 53-year-old air conditioning/refrigeration equipment mechanic, injured his hip and lower back on July 24, 1973 while removing some equipment from a shipping crate. He filed a claim for benefits on July 26, 1973, which the Office accepted for a herniated nucleus pulposus. The Office paid compensation for temporary total disability from December 4, 1973 though January 13, 1974. Appellant returned to work until February 11, 1975, when he received a disability retirement. He subsequently elected to receive temporary total disability compensation from the Office in lieu of retirement benefits. On July 7, 1998 appellant refused to accept a modified position as an emergency services dispatcher. In a report dated September 18, 1998, Dr. Curtis D. Thorpe, a Board-certified orthopedic surgeon and independent medical examiner, reviewed the job description for an emergency services dispatcher and concluded that appellant was capable of working at this light-duty position.

By decision dated October 8, 1998, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work. The Office found that Dr. Thorpe's impartial medical opinion, which found that appellant could perform the modified job as emergency services dispatcher, represented the weight of the medical evidence. By decisions dated November 8, 1999 and February 23, 2001, the Office denied appellant's requests for reconsideration. In a letter received by the Office on March 28, 2003, he again requested reconsideration. Appellant submitted numerous medical reports from 2001 through 2003 which stated findings on examination, noted his complaints of continuing lower back pain and provided a general indication of the progression of his lower back condition.

In a report dated May 3, 2001, Dr. James A. Ghadially, a Board-certified orthopedic surgeon, noted that appellant complained of significant back pain which radiated from his back to his buttocks, thighs, calves and into his toes. Appellant also related that his back pain worsened with sitting or standing for extended periods of time. Dr. Ghadially advised that appellant was not a candidate for any type of employment and that he had definitely not been able to return to any type of employment, even as an emergency services dispatcher, because he was unable to sit or stand for extended periods of time. He opined that appellant was totally and completely disabled at that time from any type of employment. In a June 7, 2001 report, Dr. Ghadially stated:

> "[Appellant] is not a candidate for any type of gainful employment. He was injured on July 24, 1973. [Appellant's] current disability is actually causally related to that. He underwent a laminectomy procedure, which we had a chance to review the records of … and he is suffering from recurrent herniation and post-laminectomy syndrome. [Appellant] requires medications, which limit his capacity to operate any type of vehicle or be in any occupation that requires responsibilities, since this causes memory loss, dizziness and some confusion. Apparently, he has been offered a job of an emergency service dispatcher…. It says that he must be available to work 8 hours a day, lift 20 pounds occasionally, climb stairs occasionally, no ladder climbing, no squatting, no bending at the waist and to sit and stand as needed. I do not feel that he is really overall capable of doing this. [Appellant] cannot go eight hours a day without his medications. While this is a light duty type of position, he is not physically fit for this type of

employment. If he sits for 20 to 30 minutes, he has to stand up and move around for 20 [to] 30 minutes and often has to intermittently [lie] down, take medications. Therefore, from a practical point of view, he is really not fit for this type of employment."

In a report dated July 10, 2001, Dr. Lynn L. Pearson, a Board-certified orthopedic surgeon, noted appellant's complaints of pain and work restrictions and opined that appellant was disabled. He stated:

"[Appellant] has discussed with me that it is recommended that he take a job as the dispatcher…. [H]e is unable to perform the duties of a dispatcher as described to me (e.g.,) that he must be able to work 8 hours a day, lift 20 pounds and occasionally carry 20 [pounds] and occasionally climb stairs. He would [not] have to do any squatting or ladder climbing and limited bending at the waist where he could sit and stand as needed, however, his back will dictate as to when he would have to do that, not the requirements of the job.

By decision dated June 12, 2003, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error. The Office therefore denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle an employee to a review of an Office decision as a matter of right.[2] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

"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, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its

[1] 5 U.S.C. § 8128(a).

[2] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[3] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).[4]

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on February 23, 2001. Appellant requested reconsideration on March 28, 2003; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.[5]

In those cases where a request for reconsideration is not timely filed, the Board had held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[6] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, an appellant 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 manifested on its face that the Office committed an error.[9] Evidence which 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] 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

[3] 20 C.F.R. § 10.607(b).

[4] *See* cases cited *supra* note 2.

[5] The Office noted that although appellant's letter was dated February 19, 2002, it did not receive it until March 28, 2003. As appellant has submitted no evidence indicating that he actually mailed the letter within one year of the Office's February 28, 2001 merit decision, the Board finds that appellant's request for reconsideration was untimely.

[6] *Rex L. Weaver*, 44 ECAB 535 (1993).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[8] *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

[10] *See Jesus D. Sanchez*, *supra* note 2.

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

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

and raise a substantial question as to the correctness of the Office's decision.[13] The Board makes an independent determination of whether an appellant 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 Board finds that appellant's March 28, 2003 request for reconsideration failed to show clear evidence of error. Most of the reports that appellant submitted merely state that he is not currently working and continues to experience lower back pain and indicated, in summary fashion, that his lower back symptoms are causally related to appellant's 1973 injury. The reports from Drs. Ghadially and Pearson, which assert that appellant was unable to perform the dispatcher job offered by the employing establishment, do not show clear evidence of error because they do not specify that appellant could not do the job at the time it was offered, in 1998. The Office reviewed these reports and properly found them to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. None of these reports submitted by appellant were sufficient to overcome the weight of Dr. Thorpe's impartial medical opinion finding that appellant was capable of performing the emergency dispatcher job, which the Office properly found resolved a conflict in the medical evidence and represented the weight of the medical evidence. In addition, appellant did not present any evidence of error in his request letter. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration request of March 28, 2003. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on June 12, 2003.

[13] *See supra* note 2.

[14] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: January 13, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member