United States Department of Labor
Employees' Compensation Appeals Board

JAMES L. NEWBERRY, Appellant	)	
and	)	**Docket No. 04-1214**
	)	**Issued: October 25, 2004**
DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, GA, Employer	)	

Appearances:
James L. Newberry, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On April 5, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated January 15, 2004 which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. The Board notes that the record also contains an October 24, 2003 decision of the Office's Branch of Hearings and Review denying appellant's request for an oral hearing. Because more than one year has elapsed from the last merit decision dated December 23, 1998 to the filing of this appeal on April 5, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues on appeal are: (1) whether the Office properly denied appellant's request for an oral hearing; and (2) whether the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review dated November 24, 2003 was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On December 18, 1997 appellant, then a 55-year-old sheet metal mechanic, filed a traumatic injury claim alleging that on December 15, 1997 he had tripped over a heating duct and fell over a stand bruising his right shin and straining his right knee and right hip. Appellant stopped work on December 16, 1997 and returned to work on December 22, 1997. The Office accepted the claim for a right hip strain, a right knee strain and a right leg abrasion. On June 2, 1998 appellant lost his security clearance and was suspended indefinitely from the employing establishment. On July 6, 1998 appellant's treating physician, Dr. Todd Kinnebrew, a Board-certified orthopedic surgeon, advised that appellant could not do any kind of work pending surgery. Accordingly, the Office placed appellant on the periodic rolls in July 1998. On August 21, 1998 appellant underwent an authorized right knee arthroscopy for torn meniscus.

By decision dated December 23, 1998, the Office terminated appellant's entitlement to continuing compensation for wage-loss and medical benefits effective January 2, 1999 as he had no continuing residuals from the accepted work injuries of December 15, 1997. The Office based its decision on medical evidence from appellant's treating physician, Dr. Kinnebrew, who had released appellant to return to regular work with no restrictions on October 28, 1998.[1]

On September 1, 2002 appellant filed a notice of recurrence of disability advising that this notice was to replace the one he filed in November 2001.[2] Appellant stated that his right knee condition never went away since the original injury of December 15, 1997 and advised that he first sought treatment after the recurrence on January 31, 2001. By letter dated December 12, 2002, the Office advised appellant that as the status of the case was "denied," no benefits under that claim were payable.[3]

By letter dated April 16, 2003, appellant submitted numerous medical reports pertaining to his injury of December 15, 1997 and noted that the evidence was in relation to his claim for a recurrence. These included progress reports from Dr. K. Scott Malone, Board-certified in physical medicine and rehabilitation, Dr. Kinnebrew and objective testing from 1998 leading up to appellant's August 21, 1998 arthroscopy of his right knee and reports status post arthroscopic surgery dated 1998, 2001, 2002 and 2003 which note symptomatic degenerative joint disease or mild degenerative arthritis of the right knee.

In a letter dated August 4, 2003, the Office reiterated that no further action could be taken on appellant's claim for a recurrence as his case had been denied. The Office stated: "a denied claim cannot recur. Therefore, no further action will be taken concerning your claim for recurrence." Appellant was advised to follow the appeal rights attached to the denial of his claim.[4]

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[1] On November 2, 1998 the Office sent appellant a notice of the proposed termination. Appellant responded on November 23, 1998.

[2] The case record is devoid of any notice of recurrence of disability claim filed on or about November 2001.

[3] The letter referred to July 30, 2000 as date of injury, but noted the current claim number for the present claim.

[4] This letter referenced the correct date of injury for the present claim.

In a September 12, 2003 letter, which was postmarked September 17, 2003, appellant requested an oral hearing. He advised that he did not know his claim had been denied on December 23, 1998 and presented a statement indicating that the denial of his claim had first come to his attention on or about August 25, 2003. Appellant stated that the claims examiner had confused the present case with a different claim.

In a decision dated October 24, 2003, the Office found that appellant's request for an oral hearing was untimely filed. The Office noted that appellant's request was postmarked September 27, 2003,[5] which was more than 30 days after the issuance of the Office's December 23, 1998 decision and that appellant was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue could be addressed through the reconsideration process by submitting additional evidence.

In a November 24, 2003 letter, appellant requested reconsideration of the Office's decisions "of December 23, 1998 to terminate entitlement to continued medical benefits" and "of [the] August 4, 2003 denial of [his] recurrence of September 2002." Resubmitted was the medical evidence concerning his right knee from 1998 through 2003. By letter dated January 5, 2004, the Office advised appellant that no further action could be taken concerning his claim for recurrence. The Office noted that appellant's case had been denied and a denied claim cannot recur.[6]

By decision dated January 15, 2004, the Office denied reconsideration finding that appellant's claim was untimely and did not establish clear evidence of error.

The Board notes that appellant filed a recurrence claim and was told by the Office in letters dated August 4, 2003 and January 5, 2004 that no action could be taken on his recurrence claim since his claim was denied and a denied claim could not recur. The Board finds, however, that the Office's letters of August 4, 2003 and January 5, 2004 were based on a faulty premise. In this case, appellant's claim was not denied, but was accepted for a right hip strain, a right knee strain and a right leg abrasion. However, by decision dated December 23, 1998, the Office terminated appellant's entitlement to continuing compensation for wage-loss and medical benefits. Since appellant's claim was terminated and not denied, the Office improperly interpreted the relevant facts of the present case and failed to evaluate appellant's claim for recurrence of disability. However, as the Office never issued a final decision on appellant's recurrence claim, the Board has no jurisdiction over this matter.[7]

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days

[5] Although the Branch of Hearings and Review stated that the postmark was September 27, 2003, the record indicates that the postmark is September 17, 2004.

[6] This letter reference the correct date of injury for the present claim.

[7] 20 C.F.R. §§ 501.2(c) and 501.3.

after issuance of and Office's final decision.[8] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[9] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[10] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[11]

ANALYSIS -- ISSUE 1

In the present case, appellant requested an oral hearing by an Office hearing representative on September 12, 2003. Section 10.616 of the federal regulation provides: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[12] As the postmark date of appellant's request, September 17, 2003, was more than 30 days after issuance of the December 23, 1998 Office decision, appellant's request for an oral hearing was untimely filed. Appellant contends that he did not find out about the Office's December 23, 1998 decision until August 25, 2003. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[13] The record supports that the Office's December 23, 1998 decision was properly addressed to appellant at his post office box in Warner Robins, Georgia and there is no evidence of record to rebut the presumption of receipt. Although appellant further contends that the claims examiner had confused the present case with a different claim, this would not alter the fact that appellant had properly received the Office's December 23, 1998 decision. Therefore, the Office was correct in finding in its October 24, 2003 decision that appellant was not entitled to an oral hearing as a matter of right because his request was not made within 30 days of the Office's December 23, 1998 decision.

While the Office also has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right, the Office, in its October 24, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for an oral hearing on the basis that the case could be resolved by the submission of additional evidence to establish the relevant issue involved.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly

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[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. § 10.616.

[10] *William E. Seare*, 47 ECAB 663 (1996).

[11] *Id.*

[12] 20 C.F.R. § 10.616.

[13] *Levi Drew, Jr.*, 52 ECAB 442 (2001).

unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[14] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for an oral hearing, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for an oral hearing under section 8124 of the Act.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act does not entitle a claimant to a review of an Office decision as a matter of right.[15] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[16] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[17] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[18] In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.[19] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[20]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[21] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[22] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[23] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[24] 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

[14] *Samuel R. Johnson*, 51 ECAB 612 (2000).

[15] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[16] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.607 (1999).

[18] 20 C.F.R. § 10.607(a) (1999).

[19] 20 C.F.R. § 10.607(b) (1999).

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

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

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

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

[24] *See Leona N. Travis*, *supra* note 21.

decision.[25] 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.[26]

ANALYSIS -- ISSUE 2

The one-year time limitation begins to toll the day the Office issued its December 23, 1998 decision, as this was the last merit decision in the case.[27] Appellant's request for reconsideration was dated November 24, 2003; therefore, he is not entitled to review of his claim as a matter of right. Appellant contends that he did not find out about the Office's December 23, 1998 decision until August 25, 2003. Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish receipt.[28] The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual.[29] Presumption of receipt arises in this case as the Office's December 23, 1998 decision was properly addressed to appellant's last known address. Although appellant also asserts that the claims examiner had confused the present case with a different claim, this does not alter the fact that there is no evidence to rebut the presumption of receipt by appellant under the mailbox rule. Thus, because appellant filed his request more than one year after the Office's December 23, 1998 merit decision, he must demonstrate "clear evidence of error" on the part of the Office in denying his claim for compensation.

In accordance with its 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 appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had 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. As previously noted, the December 23, 1998 Office decision had terminated appellant's compensation and medical benefits for the accepted conditions of a right hip strain, a right knee strain and a right leg abrasion. The Office found that the weight of the medical evidence rested with appellant's treating physician, Dr. Kinnebrew, who had released appellant to return to regular work with no restrictions on October 28, 1998. Thus, the critical issue is the causal relationship between appellant's ongoing right knee problems and the accepted conditions. The medical evidence appellant submitted with his

[25] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[26] *See John Crawford*, 52 ECAB 395 (2001); *Pete F. Dorso*, 52 ECAB 424 (2001).

[27] *See Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

[28] *See Larry L. Hill*, 42 ECAB 596 (1991).

[29] *Cresenciano Marinez*, 51 ECAB 322, 325 (2000).

request for reconsideration concerned progress reports in 1998 prior to his August 21, 1998 right knee arthroscopic surgery. This medical evidence is not relevant as it does not concern appellant's current right knee problems. The medical evidence submitted from 2001 through 2003 concerned progress reports by Dr. Kinnebrew, which noted appellant was status-post arthroscopy of the knee with mild degenerative arthritis of the knee or symptomatic degenerative joint disease of the right knee. These progress reports, however, do not, on their face, show clear evidence of error. Dr. Kinnebrew fails to discuss causal relationship of appellant's current conditions. The Board has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.[30] Thus, this evidence was insufficient to show clear evidence of error in the Office's December 23, 1998 decision, and the Office properly denied appellant's reconsideration request.

CONCLUSION

The Board finds that the Office properly denied appellant's request for an oral hearing as untimely. The Board further finds that the Office properly determined that appellant's request for reconsideration dated November 24, 2003 was untimely filed and did not demonstrate clear evidence of error.

[30] *Alan G. Williams*, 52 ECAB 180 (2000).

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2004 and October 24, 2003 decisions by the Office of Workers' Compensation Programs are affirmed.[31]

Issued: October 25, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[31] The Board notes that appellant's appeal to the Board was accompanied by new evidence. The Board's jurisdiction on appeal is limited to a review of the evidence which was in the case record before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Therefore, the Board is precluded from reviewing this evidence.