United States Department of Labor
Employees' Compensation Appeals Board

KENNETH R. WINKLER, Appellant	)	
	)	**Docket No. 05-1128**
and	)	**Issued: August 15, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, Employer	)	

Appearances:
Kenneth R. Winkler, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On April 25, 2005 appellant filed a timely appeal from a January 24, 2005 nonmerit decision of the Office of Workers' Compensation Programs, denying his untimely request for reconsideration as untimely and finding that he failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated February 4, 2003 and the filing of this appeal on April 25, 2005, 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) but has jurisdiction over the nonmerit issue.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

Appellant, a tractor trailer operator, filed a traumatic injury claim alleging that on November 26, 1998 his employing establishment vehicle was struck by a passenger car while he

was performing his work duties.[1] The Office accepted appellant's claim for right fractured tibial plateau, left leg contusion, concussion, other multiple contusions, head laceration and aggravation of tinnitus. Appellant was paid appropriate compensation.

By letter dated September 18, 2001, the Office issued a notice of proposed termination of appellant's compensation based on a July 24, 2001 medical report and an accompanying July 23, 2001 work capacity evaluation of Dr. Otto W. Wickstrom, Jr., a Board-certified orthopedic surgeon and impartial medical specialist, who opined that appellant did not have any residuals of his November 26, 1998 employment-related orthopedic injuries and that his back pain was not related to his accepted employment injuries. The Office found that appellant was still entitled to compensation for his tinnitus condition. In addition, the Office found that appellant was not entitled to more than a 15 percent permanent impairment of the right leg, for which he received a schedule award or a schedule award for his tinnitus condition.

By decision dated November 8, 2001, the Office finalized its proposed termination of appellant's compensation. The Office found the evidence submitted by appellant insufficient to establish that he had any residuals of his accepted employment-related orthopedic injuries and accorded special weight to Dr. Wickstrom's July 24, 2001 report. Appellant disagreed with the Office's decision. His May 3 and November 21, 2002 requests for modification were denied by the Office by decisions dated August 1, 2002 and February 4, 2003, respectively. In a letter dated July 21, 2003, he again requested reconsideration.

In a December 18, 2003 decision, the Office denied appellant's request for a merit review of his claim on the grounds that the evidence submitted was not relevant. He requested reconsideration by letter dated June 16, 2004. Appellant submitted a November 15, 2000 letter from the Office which advised him that his request to change his treating physician was authorized. He also submitted prescriptions for medications and a hot tub. In addition, appellant submitted a March 3, 2004 request for leave under the Family Medical Leave Act signed by a physician whose signature is illegible which found that he suffered from intermittent back and leg pain of variable severity resulting from his November 26, 1998 employment injuries, he would permanently miss two days to four weeks per year due to his conditions and he required medication and possibly physical therapy.

A November 27, 1998 report was electronically signed by Dr. Dean D.T. Maglinte, a Board-certified radiologist and indicated that an x-ray examination of appellant's right ankle was negative for acute bony injury and found no fracture or dislocation. Dr. Maglinte's computerized tomography (CT) scan of the head was negative. A November 27, 1998 report which contained the typed name of Dr. Carol M. Bosanko, a Board-certified radiologist, provided a history of the November 26, 1998 employment injuries and her findings on x-ray examination of appellant's right leg. Appellant appeared to have a nondisplaced oblique fracture through the fibular head and an avulsion fracture on the soft tissues inferior to the lateral malleolus which was believed to be possibly related to talus.

Appellant submitted an incident report taken by fire department personnel regarding his November 26, 1998 employment injuries. He also submitted medical instructions from an

[1] The Board notes that appellant's traumatic injury claim form is not in the record.

emergency room physician whose signature is illegible and a September 26, 2000 medical report from Dr. Robert J. Huler, a Board-certified orthopedic surgeon, in which he found that appellant's sciatica of the left leg, was caused by the November 26, 1998 employment injuries.

A January 19, 2004 report of Dr. John F. Tzucker, a Board-certified family practitioner, provided a history of appellant's November 26, 1998 employment injuries and his objective findings. Dr. Tzucker stated that appellant's tinnitus appeared to be permanent stemming directly from the November 26, 1998 employment injuries. He further stated that appellant's backaches came and went since the November 16, 1998 injuries and his low back pain with buttocks numbness was not to be confused with an old disc problem with little backache but more leg pain and numbness, which resolved long ago. Dr. Tzucker indicated that the tinnitus was a nuisance but it did not significantly limit appellant's hearing. He further indicated that his back may hurt while walking, lifting or driving, especially when hitting bumps with the shock coming up through the stiff truck suspension. Dr. Tzucker opined that postconcussion symptoms were largely cleared up by May 28, 1999. He noted appellant's treatment plan and physical limitations. Dr. Tzucker concluded that chronic low back strain and knee/ankle aches were expected to be present off and on indefinitely but he did not expect appellant to have major disability from these conditions.

Appellant submitted a hospital admission form dated November 26, 1998 and signed by someone whose signature is illegible, which indicated that he was unable to sign the form. He also submitted emergency room treatment notes that were signed by a physician whose signature is illegible and described the November 26, 1998 employment incident and his injuries and a duplicate copy of Dr. Wickstrom's July 24, 2001 report and July 23, 2001 work capacity evaluation.

An October 17, 2000 letter contained appellant's request that the Office permit him to change his physician of record for his hearing condition. In a July 10, 2001 letter, the Office advised appellant about the referral to Dr. Wickstrom for an impartial medical examination due to a conflict in the medical evidence as to whether he had any residuals of his employment-related injuries. A February 25, 2003 treatment note of a physician whose signature is illegible addressed a November 26, 1998 x-ray examination, which showed a fracture of the tibia and fibula and a fractured talus resulting from the accident that occurred earlier on that date.

By decision dated January 24, 2005, the Office stated that appellant's letter requesting reconsideration was dated June 16, 2004 and received by the Office on December 2, 2004 and, therefore, found it was filed more than a year after the Office's February 4, 2003 decision and was untimely. The Office also found that appellant did not submit any evidence establishing clear evidence of error in the Office's prior decision. Consequently, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[4]

Section 10.607(a) 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.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10]

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.[11] The Board makes an independent determination of whether a claimant has submitted clear evidence

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[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] 20 C.F.R. § 10.607(a).

[5] 20 C.F.R. § 10.607(b).

[6] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[7] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[8] *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

[9] *Leona N. Travis, supra* note 7.

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

[11] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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.[12]

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[13]

The last merit decision in this case was issued by the Office on February 4, 2003 which denied modification of the Office's November 8, 2001 termination of appellant's compensation. As his June 16, 2004 letter requesting reconsideration was made more than one year after the Office's February 4, 2003 merit decision, the Board finds that it was untimely filed.

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was an error in the Office's decision to terminate his compensation benefits on the grounds that he no longer had any residuals of his November 26, 1998 employment-related orthopedic conditions. The Board notes that this issue is medical in nature.

Appellant submitted correspondence regarding his requests to change his treating physician and the Office's authorization of this request and referral of him to Dr. Wickstrom for an impartial medical examination and an incident report prepared by fire department personnel regarding his November 26, 1998 employment injuries. The Board finds that this evidence does not demonstrate clear evidence of error as it does not specifically address whether appellant continues to suffer from residuals of his accepted employment-related injuries.

The prescriptions for medications and a hot tub are not relevant to the issue in this case of whether appellant continues to suffer from residuals of his accepted employment-related injuries.

Dr. Wickstrom's July 24, 2001 report which found that appellant no longer had any residuals of his accepted employment injuries and Dr. Huler's September 26, 2000 report which found that appellant's sciatica of the left leg was caused by the November 26, 1998 employment injuries were previously of record and considered by the Office in its prior decision. Duplicate evidence by itself does not raise a substantial question as to the correctness of the Office's denial of compensation.[14]

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

[13] *Larry L. Litton*, 44 ECAB 243 (1992).

[14] The Board has held that the submission of evidence or legal argument that repeats or duplicates that already in the case record does not constitute a basis for reopening a case. *Denis M. Dupor*, 51 ECAB 482 (2000).

The medical records submitted by appellant which are either unsigned or contained an illegible signature regarding his accepted employment injuries and as such do not constitute probative medical evidence.

Dr. Maglinte's November 27, 1998 report revealed negative x-ray and CT scan results regarding appellant's right ankle and head. His report does not address whether appellant continued to suffer residuals of his November 26, 1998 employment injuries. Thus, the Board finds that Dr. Maglinte's November 27, 1998 report is not sufficient to shift the weight of the evidence in favor of the claim.

Dr. Tzucker found in his January 19, 2004 report, that appellant's tinnitus was permanent and it stemmed directly from the November 26, 1998 employment injuries. He stated that appellant's backaches had continued off and on since the accepted employment injuries and that the pain would continue but it would not result in any major disability. Dr. Tzucker did not provide any medical rationale explaining how or why appellant's backaches were caused by his accepted employment-related injuries. Moreover, the Office did not terminate appellant's compensation benefits relative to his tinnitus. The Board, therefore, finds that his report does not show that the Office's decision to terminate appellant's compensation benefits was incorrect. As the evidence submitted by appellant on reconsideration does not raise a substantial question as to the correctness of the Office's termination of his compensation benefits for his employment-related orthopedic conditions, the Board finds that he has failed to meet his burden of proof.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board