United States Department of Labor
Employees' Compensation Appeals Board

RUBEN J. EDWARDS, Appellant	)	
and	)	**Docket No. 04-2163**
	)	**Issued: February 8, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX, Employer	)	

Appearances:
Ruben J. Edwards, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 2, 2004 appellant a timely appeal of a nonmerit decision of the Office of Workers' Compensation Programs dated June 15, 2004 denying his reconsideration request of a decision terminating his compensation benefits 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 most recent merit decision of January 19, 2001 and the filing of this appeal, the Board lacks jurisdiction to review the merits of that claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.

ISSUE

The issue is whether the Office properly declined to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not contain clear evidence of error.

FACTUAL HISTORY

On September 9, 1998 appellant, then a 50-year-old custodian, filed an occupational disease claim alleging that he injured his arm, shoulder and leg in the performance of duty. The Office accepted the claim for left shoulder strain and cervical strain on September 28, 1998. On December 21, 1998 the Office entered appellant on the periodic rolls. The Office authorized C4-5 anterior cervical discectomy and fusion on January 6, 1999. Appellant underwent surgery on January 25, 1999.

Dr. Stephen R. Neece, an attending neurosurgeon, released appellant to return to work on August 23, 1999 with standing of one hour continuously and no climbing for 90 days. On August 26, 1999 Dr. Neece stated that appellant was totally disabled from August 24 to 25, 1999 and was to return to work on August 26, 1999. Appellant accepted a light-duty position on August 31, 1999. He stopped work on September 7, 1999 due to a nonemployment-related low back injury. In a report dated September 21, 1999, Dr. Warren D. Wilson, a neurosurgeon, noted that he had performed a discectomy at L4 on appellant in May 1999. He placed appellant under a lifting restriction of 20 pounds.

Appellant requested a schedule award on August 16, 1999. The Office denied his claim on November 29, 1999. Appellant also requested wage-loss compensation beginning September 7, 1999. By decision dated March 29, 2000, the Office denied appellant's claim for a recurrence of disability beginning September 7, 1999.

On April 25, 2000 the Office entered appellant on the periodic rolls. In a report dated May 8, 2000, Dr. Farooq I. Selod, a Board-certified orthopedic surgeon, found that appellant was totally disabled for eight weeks and recommended that he change professions.

Effective September 5, 2000 appellant retired from the employing establishment as he was found to be totally disabled from useful and effective service by the Office of Personnel Management (OPM). His last day in pay status was December 31, 1999.

On November 6, 2000 Dr. Selod completed a form report and indicated that appellant could perform sedentary work, lifting, pushing or pulling up to 10 pounds. Appellant was not allowed to lift more than 10 pounds, perform overhead work, bend, stoop or stand more than 10 minutes at a time.

The employing establishment offered appellant a limited-duty position as a custodial laborer on November 20, 2000 within Dr. Selod's November 6, 2000 restrictions. In a letter dated November 27, 2000, the Office informed appellant that the limited-duty job offer as a custodial laborer was suitable work. The Office allowed 30 days for appellant to accept the position or offer his reasons for refusal.

Appellant declined the job offer on November 24, 2000 on the basis that such duties had caused his current condition and he was unable to perform the duties of the offered position. He disagreed with Dr. Selod's November 6, 2000 report, and noted that he had developed a new condition, kidney problems, as a consequence of medications being taken for his accepted employment injury.

On December 1, 2000 the Office informed appellant that the reasons he offered for refusing the suitable work position were not unacceptable. The Office allowed appellant an additional 15 days to accept the offered position. Appellant responded on December 6, 2000 stating that he required additional medical treatment, that he was unable to perform the duties of the offered position and that he needed his financial records audited. In reports dated November 27, 2000 and January 18, 2001, Dr. Selod stated that appellant demonstrated spasms and tenderness on palpitation in the cervical spine with limited range of motion. He stated that appellant should avoid bending, stooping, lifting and overhead work. Dr. Selod concluded, "In my opinion, if he cannot do his work, then I recommend a sedentary life."

By decision dated January 19, 2001, the Office terminated appellant's compensation benefits and denied any future claims for schedule awards on the grounds that he refused an offer of suitable work.

In letters dated January 13 and 25, 2001, appellant requested a change of physicians asserting that Dr. Selod performed fitness-for-duty examinations for the employing establishment. He also requested a schedule award.

Appellant underwent a magnetic resonance imaging (MRI) scan of his lumbar spine on January 26, 2001 which demonstrated bilateral neural foraminal narrowing at L4-5 and L5-S1 and postsurgical changes at L4-5. He also underwent an MRI scan of his cervical spine on February 18, 2001 which demonstrated mild C6 and C7 neural foraminal narrowing, straightening of the cervical spine suggesting muscle spasm and degenerative disc disease at C2-3, C3-4 and C5-6.

Dr. Selod repeated his previous findings in a March 19, 2001 report and recommended that appellant use an electrical muscle stimulator for further treatment.

Appellant filed claims for a schedule award on June 26, 2001 and July 29, 2003. On August 11, 2003 the Office informed appellant that as he had refused an offer of suitable work he was not entitled to a schedule award. On September 25, 2003 the Office provided appellant with a copy of the January 19, 2001 suitable work termination decision.

On April 7, 2004 appellant requested reconsideration of the January 19, 2001 decision. Appellant stated that the Office should repay the continuation of pay awarded him by the employing establishment after the September 9, 1999 injury, which was denied by the Office as employment related. He argued that he was entitled to a schedule award due to the September 7, 1998 employment injury, that the employing establishment violated his work restrictions in August 1999, that he signed a job offer on August 31, 1999, that he was forced to accept disability retirement and that the Department of Veterans Affairs and Social Security Administration found him to be 100 percent disabled.

By decision dated June 15, 2004, the Office noted that appellant's request for reconsideration was not filed within one year after the January 19, 2001 decision. The Office further determined that appellant's request for reconsideration was not sufficient to establish clear evidence of error in the January 19, 2001 decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] The Office, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[5]

The Office's regulations require that an application for reconsideration must be submitted in writing[6] and define an application for reconsideration as the request for reconsideration "along with the supporting statements and evidence."[7] The regulations provide:

> "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."[8]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[9] Office regulations state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[10]

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[1] 5 U.S.C. § 8128(a).

[2] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[3] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[4] 20 C.F.R. §§ 10.607, 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[5] 20 C.F.R. § 10.607(b); *Thankamma Mathews, supra* note 2 at 769; *Jesus D. Sanchez, supra* note 3 at 967.

[6] 20 C.F.R. § 10.606.

[7] 20 C.F.R. § 10.605.

[8] 20 C.F.R. § 10.607(b).

[9] *Thankamma Mathews, supra* note 2 at 770.

[10] 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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's decision.[16]

ANALYSIS

Appellant requested reconsideration April 7, 2004. Since his reconsideration request was more than one year following the January 19, 2001 decision, the Office properly determined that the request was untimely.

The underlying issue in this case is whether the Office properly terminated appellant's compensation benefits on the grounds that he refused suitable work. In his application for reconsideration, appellant did not submit any evidence in support of his claim, but instead presented arguments concerning his claim. He stated that the Office should repay the continuation of pay awarded him by the employing establishment after the September 9, 1999 injury, the claim which was denied by the Office as nonemployment related. He argued that he was entitled to a schedule award due to his September 7, 1998 employment injury,[17] that the employing establishment violated his work restrictions in August 1999, that he signed a job offer on August 31, 1999, that he was forced to accept disability retirement and that the Department of Veterans Affairs and Social Security Administration found him to be 100 percent disabled.

Appellant's arguments are not relevant to the determinative issue in this case, whether appellant has established clear error on the part of the Office in terminating his compensation benefits on the basis that he refused suitable work. The obligation of appellant to reimburse the employing establishment for continuation of pay erroneously granted appellant, his disability retirement and the findings of the Social Security Administration and Department of Veterans

[11] *Thankamma Mathews, supra* note 2 at 770.

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

[13] *Jesus D. Sanchez, supra* note 5 at 968.

[14] *Leona N. Travis, supra* note 12.

[15] *Nelson T. Thompson,* 43 ECAB 919, 922 (1992).

[16] *Leon D. Faidley, Jr.,* 41 ECAB 104, 114 (1989).

[17] As noted previously, the Office issued a decision on this issue on November 29, 1999.

Affairs are not relevant to appellant's claim before the Office.[18] His contention that he is entitled to a schedule award and that the employing establishment forced him to exceed his work restrictions in August 2000 do not have any bearing on whether he refused suitable work, as found in the January 19, 2001 decision. As appellant did not submit any evidence or argument establishing clear evidence of error on the face of his application for review, the Office properly declined to reopen his claim.

CONCLUSION

The Board finds that appellant's request for reconsideration was not timely filed and did not establish clear evidence of error in the Office's most recent merit decision.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[18] The Board has noted that findings of other government agencies are not dispositive with regard to questions arising under the Act. *Ernest J. Malagrida*, 51 ECAB 287, 291 (2000).