United States Department of Labor
Employees' Compensation Appeals Board

A.F., Appellant	)	
and	)	**Docket No. 06-2139**
	)	**Issued: February 7, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Appellant, pro se
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument January 16, 2007

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 19, 2006 appellant filed a timely appeal from an August 10, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration as untimely filed and not establishing clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the denial of reconsideration. As the most recent merit decision was issued on August 9, 1989, the Board does not have jurisdiction over the merits of this case.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and did not establish clear evidence of error.

[1] *See* 20 C.F.R. §§ 501.2(c), 501.3.

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board affirmed a January 3, 2005 decision which denied appellant's request for reconsideration as untimely and insufficient to show clear evidence of error.[2] The Board noted that the last merit decision, dated August 9, 1989, denied his traumatic injury claim on the grounds that he had not established that the March 20, 1989 employment incident occurred as alleged. The Board found that the medical evidence submitted by appellant was not relevant to the underlying issue of whether he had established the occurrence of the March 20, 1989 employment incident. The Board further determined that he had not shown that the witnesses who provided statements were biased. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

Appellant requested reconsideration of his claim in letters dated May 15 and 17, 2006. He argued that the medical reports of Dr. Gunner Ek and Dr. V. Baldino showed that he sustained an injury on March 20, 1989.[3] Appellant additionally maintained that the Office erred in failing to develop the medical evidence. He submitted a 1989 disability certificate from Dr. Ek, who indicated that he had treated appellant since March 21, 1989 for musculoskeletal injuries and found that he could resume work on April 15, 1989. In a form report dated March 26, 1989, Dr. Baldino diagnosed lumbosacral strain and recommended an x-ray. In a report dated February 6, 2006, Dr. Maurice Singer, an osteopath, stated:

> "Today, [appellant] showed me a letter signed by my office manager, Arthur Huberfeld, which states that on March 21, 1989 [appellant] was evaluated by Dr. Gunner Ek. In the letter, Mr. Huberfeld stated that [appellant] 'reinjured his back and shoulder at work the previous day.' The letter further indicated that Dr. Ek recommended increased treatment and no work until he felt better. [Appellant] also showed me a return to work note stating that he was treat[ed] from March 21, 1989 and was able to return to work on April 15, 1989. I have no personal knowledge of these events and there are no records to review to document these events in my office since they occurred 15 years ago and are no longer in existence."

Appellant further challenged the veracity of the witnesses who submitted statements regarding the March 20, 1989 employment incident, arguing that the statements were "inconsistent and self-serving." He also asserted that his description of the March 20, 1989 employment incident was inaccurate. Appellant maintained that he originally informed the employing establishment that he backed into an all-purpose container (APC) trying to get away from a coworker, Larry Johnson. The employing establishment, however, told him to put that he was pushed by Mr. Johnson on his claim form.

By decision dated August 10, 2006, the Office denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

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[2] *Andrew Fullman*, 57 ECAB ___ (Docket No. 05-967, issued May 12, 2006).

[3] Dr. Ek's and Dr. Baldino's medical specialty could not be ascertained.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[4] The Office 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.[5] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[6] The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[7] 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.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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 which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] 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 whether the new evidence demonstrates clear error on the part of the Office. 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.[10] 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.[11]

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[4] 5 U.S.C. §§ 8101-8193.

[5] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

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

[7] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

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

[9] *Dorletha Coleman*, 55 ECAB 143 (2003); *Leon J. Modrowski*, 55 ECAB 196 (2004).

[10] *Id*.

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

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins the date following an original Office decision.[12] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[13] In this case, appellant's May 15, 2006 request for reconsideration was submitted more than one year after the last merit decision of record dated August 9, 1989 and, thus, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.[14]

Appellant argued that the medical evidence submitted in support of his request for reconsideration established that he sustained an injury on March 20, 1989. He further asserted that the Office erred in failing to develop the medical evidence. In a 1989 disability certificate, Dr. Ek diagnosed a musculoskeletal injury and opined that appellant should remain off work until April 14, 1989. In a form report dated March 26, 1989, Dr. Baldino diagnosed lumbosacral strain and recommended an x-ray. In a report dated February 6, 2006, Dr. Singer indicated that he had "no personal knowledge" of the events surrounding the March 20, 1989 employment incident. The Office, in its last merit decision dated August 9, 1989, denied appellant's claim as he failed to establish that the claimed March 20, 1989 employment incident occurred as alleged. The issue in this case, consequently, is factual in nature. The medical evidence submitted by appellant does not address the pertinent issue of whether he has established the occurrence of the March 20, 1989 employment incident. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[15] As previously found by the Board, the submission of medical evidence is insufficient to resolve the factual question of whether the March 20, 1989 employment incident occurred at the time, place and in the manner alleged.[16]

Appellant argued that the history of injury report on the claim form was inaccurate. He alleged that the employing establishment instructed him to put that Mr. Johnson pushed him into an APC on his claim form instead of that he fell backing into an APC trying to get away from Mr. Johnson. Appellant has not, however, submitted any evidence in support of his allegation and thus it is insufficient to show clear evidence of error.

Appellant asserted that the statements of witnesses to the March 20, 1989 employment incident were "inconsistent and self-serving" but did not substantiate his assertion with any corroborating evidence. It is appellant's burden to support his or her allegations with reliable

[12] 20 C.F.R. § 10.607(a).

[13] *Robert F. Stone*, 57 ECAB ___ (Docket No. 04-1451, issued December 22, 2005).

[14] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB ___ (Docket No. 05-1637, issued October 18, 2005).

[15] *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[16] *See Andrew Fullman*, *supra* note 2.

and probative evidence.[17] Additionally, the Board previously considered his arguments regarding the witness' statements and found that he had not substantiated his allegation of bias.[18]

The evidence submitted in support of appellant's untimely reconsideration request is irrelevant and thus insufficient to establish clear evidence of error. In order to establish clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[19] The evidence appellant submitted on reconsideration fails to meet this standard.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 10, 2006 is affirmed.

Issued: February 7, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[17] *See Trudy A. Scott*, 52 ECAB 309 (2001).

[18] *Andrew Fullman*, *supra* note 1.

[19] *See Veletta C. Coleman*, *supra* note 6.