United States Department of Labor
Employees' Compensation Appeals Board

D.E., Appellant	)	
and	)	**Docket No. 07-2334**
	)	**Issued: April 11, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Portland, OR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 14, 2007 appellant filed a timely appeal of a February 8, 2007 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for an oral hearing and an April 23, 2007 nonmerit decision, denying his request for reconsideration as untimely and that it failed to demonstrate clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated December 1, 2005 and the filing of this appeal, 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).

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for an oral hearing; and (2) whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On August 29, 2005 appellant, then a 26-year-old small parcel bundle sorter clerk, filed an occupational disease claim for a ruptured disc at L4-5. In September 2004 he first became aware of the condition. On May 1, 2005 he first realized that the condition was caused by his federal employment. Appellant stated that in 2004 he moved from a self-paced light-duty job to an automated flat sorter position and later to an automated bundle sorter position which involved constant driving of a machine and more lifting of heavy items, twisting, pushing and pulling than his previous job. He began to experience regular back pain that fluctuated but never completely stopped which prevented him from working.

In an undated narrative statement, appellant described the medical treatment he received for his neck and back pain. He described the duties of his automated flat sorter clerk position in the "CFS" unit. This position was more physical and involved using a fast-paced machine. It also involved heavy lifting, twisting, reaching and bending on a repetitive basis. Appellant's work area was an ergonomic nightmare as there were no suitable chairs and foot rests. His small parcel bundle sorter clerk position involved moderate work such as, keying information into a computer. It also involved twisting, pulling and occasional lifting.

Appellant submitted medical reports covering intermittent dates from May 21, 2004 through September 8, 2005 from Dr. Marcia J. Dunham, an attending Board-certified internist, who stated that appellant suffered from spasms in his neck, high blood pressure and protruding discs in his lower back. In a July 8, 2004 report, Dr. James D. Norris, a Board-certified internist, stated that appellant sustained a low back strain. An August 18, 2005 report of Dr. Jason A. Fleiss found that appellant had radiculopathy at left L5 and left leg pain.[1] Appellant underwent surgery on January 20, 2005. Dr. Fleiss opined that appellant could perform modified work with restrictions.

Appellant submitted accident reports that he filed with the employing establishment regarding his alleged injury. A September 1, 2005 narrative statement from Wendy Christensen, a supervisor, related that appellant related to her that his work duties caused his alleged injury, stating that his flat sorter position involved repetitive movement of heavy items such as, stacks of magazines and large envelopes and pushing full containers. It also involved repetitive twisting, reaching and bending, sweeping and keying.

On appellant's claim form, the employing establishment stated that he was currently performing light-duty work on a different schedule and in a different area.

By letter dated September 21, 2005, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the additional factual and medical evidence he needed to submit.

Appellant submitted Dr. Dunham's notes covering intermittent dates from November 4, 2004 through August 23, 2005. She stated that appellant sustained a herniated disc and leg pain. Dr. Dunham opined that he could work with restrictions. A February 20, 2001 report with an

[1] The Board notes that Dr. Fleiss' professional qualifications are not contained in the case record.

illegible signature noted that appellant was borderline hypertensive and that he had asthma which required the use of an inhaler. In a report and progress note dated September 16, 2005, Dr. Joan M. Browning, a Board-certified occupational medicine specialist, stated that appellant sustained a herniated nucleus pulposus at L4-5. Dr. Browning opined that he could perform modified work. Progress notes of appellant's physician's assistants stated that he suffered from back pain and left L5 radiculopathy. Progress notes covering intermittent dates from January 7 through August 19, 2005 from Dr. Mitchell A. Weinstein, a Board-certified neurologist, found that appellant sustained a disc protrusion at L4-5. A January 11, 2005 report provided laboratory tests results. Reports dated September 21, October 14 and November 21, 2005 of Dr. Robert M. Davis, a Board-certified occupational medicine specialist, found that appellant had low back pain, symptoms related to a right heel contusion and left L5 radiculopathy. Dr. Davis stated that he could perform modified work with restrictions. A September 21, 2005 progress note of Dr. Ellen L. Singer, a Board-certified internist, stated that appellant suffered from tendinitis of the right foot.

Documents from the employing establishment noted appellant's restrictions for light-duty work during intermittent periods March 17 through September 18, 2005.

In an undated statement, appellant reiterated his work duties. He also attributed his bilateral wrist strain to repetitive typing at work. Appellant noted a June 2002 motorcycle accident which resulted in bruises and leg and back pain.

By decision dated December 1, 2005, the Office denied appellant's claim. It found the medical evidence was insufficient to establish he sustained a back condition causally related to factors of his employment.

Appellant submitted a description of the procedures for performing his work duties. In a November 21, 2005 narrative statement, Pamela A. Johnson, appellant's supervisor, stated that his position involved bending, twisting, lifting and repetitive reaching, handling and keying. Ms. Johnson noted that appellant sustained injuries as a result of a motorcycle accident. She had no knowledge of any injuries he sustained while working under her supervision. Dr. Dunham's November 9, 2005 report indicated that appellant had been under her care for back pain since July 16, 1998. She ordered a computerized tomography scan, referred him for a spinal assessment and physical therapy and prescribed medication. Dr. Dunham noted appellant's current complaint of pain in the leg and not in the back due to his increased physical activity in a limited-duty position at work. She stated that she would decrease his restrictions if the employing establishment assigned him to a new permanent limited-duty position.

On December 28, 2005 appellant requested a telephonic oral hearing before an Office hearing representative regarding the December 1, 2005 decision. He submitted Dr. Davis' January 6, 2006 report which reiterated his prior finding that appellant suffered from low back pain and radiculopathy at L5 and that he could work with restrictions.

By letter dated February 8, 2006, the Office informed appellant that his telephonic oral hearing would be held on March 20, 2006 at 3:00 p.m., Eastern Time. It instructed him to call the provided toll free number a few minutes before the hearing time and enter the pass code to gain access to the conference call. The letter was mailed to appellant at his address of record.

On March 20, 2006 the date of the hearing, appellant did not call the toll free number to join the telephonic hearing.

By decision dated April 12, 2006, the Office found that appellant had abandoned his request for an oral hearing. It noted that he had received written notification of the hearing 30 days in advance of the hearing and had failed to appear. The Office found that there was no evidence of record that appellant contacted it, either prior or subsequent to the scheduled hearing, to explain his failure to appear.

By letter dated April 20, 2006, appellant advised that he did not receive a letter stating that his hearing was scheduled for March 20, 2006. On November 7, 2006 he asked the Office for guidance on how to reschedule his telephonic hearing or request reconsideration. In a December 12, 2006 letter, the Office advised him where to file requests for oral and telephonic hearings and reconsideration. By letter dated January 3, 2007, appellant requested another telephonic hearing.

In a February 8, 2007 decision, the Office denied appellant's request for a hearing on the grounds that he had abandoned his request for an oral hearing. For this reason, he was found not to be entitled to another hearing as a matter of right. It exercised its discretion and denied appellant's request for a hearing on the additional grounds that the issue involved in the case could be addressed equally well on reconsideration, by submitting evidence establishing that the claimed medical condition was causally related to his employment.

In an April 4, 2007 letter, appellant requested reconsideration of the Office's December 1, 2005 decision.

By decision dated April 23, 2007, the Office found that appellant's reconsideration request was dated April 4, 2007, more than one year after the Office's December 1, 2005 decision and was untimely. It further found that appellant did not submit evidence to establish clear evidence of error in the Office's determination that he did not sustain an injury causally related to factors of his employment.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that, before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.[2] Section 10.616(a) of the federal regulations implementing this section of the Act provides that a claimant, injured on or after July 4, 1966, who has received a final adverse decision by the Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of

[2] 5 U.S.C. § 8124(b)(1).

the date of the decision for which a hearing is sought. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[3]

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[4] Moreover, the Board has held that the Office has discretion to grant or deny a hearing when the request is made for a second hearing on the same issue.[5]

ANALYSIS -- ISSUE 1

In a December 1, 2005 decision, the Office found that appellant did not sustain a back injury in the performance of duty. On December 28, 2005 he requested a telephonic oral hearing. By decision dated April 12, 2006, the Office found that appellant had abandoned his request for a hearing as he failed to appear at the hearing or to provide an explanation for his absence. On January 3, 2007 he requested another telephonic hearing. In a February 8, 2007 decision, the Office denied appellant's request for a hearing on the grounds that he was found to have abandoned his oral hearing request and was not entitled to another oral hearing as a matter of right. The Board finds that, as appellant abandoned the oral hearing scheduled for March 20, 2006, he was not entitled as a matter of right to another oral hearing.

The Office properly exercised its discretion in denying appellant's request for another hearing by determining that the issue in the case could be equally well addressed by requesting reconsideration and submitting new evidence on the issue at hand.[6] The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probable deduction from established facts.[7] In the present case, there is no evidence that the Office abused its discretion in denying appellant's request for a hearing under these circumstances. The Board finds that the Office acted properly in denying appellant's January 3, 2007 request for an oral hearing.

[3] 20 C.F.R. § 10.616(a); *Brenton A. Burbank*, 53 ECAB 279 (2002).

[4] *Sandra F. Powell*, 45 ECAB 877 (1994).

[5] *See generally, André Thyratron*, 54 ECAB 257 (2002); *Johnny S. Henderson*, 34 ECAB 216 (1982); *John A. Zibutis*, 33 ECAB 1879 (1982).

[6] *See Joseph R. Giallanza*, 55 ECAB 186 (2003).

[7] *See Claudio Vazquez*, 52 ECAB 496 (2001); *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[8] does not entitle a claimant to a review of an Office decision as a matter of right.[9] 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.[10]

Section 10.607(b) 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.[11]

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

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.[17] 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.[18]

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[8] 5 U.S.C. § 8128(a).

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

[10] 20 C.F.R. § 10.607(a).

[11] *Id.* at § 10.607(b).

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

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

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

[15] *Leona N. Travis, supra* note 13.

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

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

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

ANALYSIS -- ISSUE 2

The Board finds that appellant failed to file a timely application for review of the December 1, 2005 merit decision. 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.[19]

The most recent merit decision was issued by the Office on December 1, 2005. It found that the evidence of record failed to establish that appellant sustained a back injury causally related to factors of his federal employment. As his April 4, 2007 letter requesting reconsideration was made more than one year after the Office's December 1, 2005 merit decision, the Board finds that it was not timely filed.

Appellant has not submitted evidence establishing that the Office erred in finding that he did not sustain a back injury causally related to factors of his employment. The Board notes that this issue is medical in nature.

Appellant has not presented clear evidence of error by the Office in finding that he did not sustain a back injury causally related to factors of his employment. In support of his April 4, 2007 reconsideration request, appellant submitted a description of the procedures for performing his work duties. Ms. Johnson's narrative statement described the physical requirements of appellant's position. She stated that he sustained injuries as a result of a motorcycle accident but that she was unaware of any injuries he sustained at work while under her supervision. This evidence is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim. The submission of this factual evidence does not show clear evidence of error because it is not relevant to the underlying issue in the case. The Board, therefore, finds that the work procedure documents and Ms. Johnson's statement do not establish clear evidence of error in the denial of appellant's claim.

Dr. Dunham's November 9, 2005 report addressed appellant's back pain and medical treatment. She stated that she would decrease his restrictions if the employing establishment assigned him to a new permanent limited-duty position. This evidence is insufficient to *prima facie* shift the weight of the medical evidence in favor of appellant's claim. Dr. Dunham did not provide any opinion as to whether appellant sustained a medical condition causally related to factors of his employment. The Board finds that her November 9, 2005 report does not establish clear evidence of error.

Dr. Davis' January 6, 2006 report reiterated his opinion that appellant had low back pain and radiculopathy at L5 and that he could work with restrictions. The Board notes that the Office had previously considered evidence from Dr. Davis and found it insufficient to establish that appellant sustained a back injury causally related to factors of his federal employment. The Board finds that the submission of Dr. Davis' January 6, 2006 report is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim as it is duplicative of his prior

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

reports. For these reasons, the Board finds that appellant has not established clear evidence of error on the part of the Office.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 23 and February 8, 2007 decisions of Office of Workers' Compensation Programs are affirmed.

Issued: April 11, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board