United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 10-1833**
	)	**Issued: June 10, 2011**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, GEORGE WASHINGTON MEMORIAL PARKWAY, McLean, VA, Employer	)	

Appearances:
George W. Brown, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 28, 2010 appellant, through his attorney, filed a timely appeal of a December 28, 2009 Office of Workers' Compensation Programs' decision denying his request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than 180 days has elapsed from the last merit decision dated November 26, 2008 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3. The only decision properly before the Board is the December 28, 2009 decision denying his request for reconsideration.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 30, 1992 appellant, then a 44-year-old laborer, filed a traumatic injury claim alleging that he injured his hip while using a push mower in the performance of duty. On July 17, 1992 the Office accepted his claim for musculoskeletal pain. It entered appellant on the periodic rolls on November 25, 1994. Appellant returned to modified work on July 10, 1995.

Appellant filed a claim alleging on August 18, 1995, he strained his low back when a coworker startled him. The Office accepted this claim for lumbar strain and entered him on the periodic rolls on February 16, 1996. By decision dated August 23, 1996, it terminated appellant's compensation and medical benefits due to his hip and back injuries. By decision dated July 8, 1997, the Branch of Hearings and Review affirmed the Office's August 23, 1996 decision, but remanded for an additional determination if appellant had established entitlement to compensation after August 23, 1996. Beginning August 23, 1996, the Office reinstated compensation benefits.

By decision dated March 11, 1999, the Office reduced appellant's compensation benefits based on his capacity to earn wages as either a parking lot attendant or an information clerk. It denied modification of this decision on April 5, 2000. By decision dated October 3, 2001, the Office modified the March 11, 1999 decision finding that the weight of the medical evidence established that appellant was totally disabled and unable to perform the duties of the selected positions. It accepted the additional condition of permanent aggravation of lumbar canal stenosis at L3-4 and L4-5 and authorized decompression laminectomy at both levels. The Office reentered appellant on the periodic rolls on October 11, 2001.

Dr. Alan Schreiber, a Board-certified orthopedic surgeon, performed complete L4 and L5 laminectomies with a left-sided L5-S1 discectomy and L4 and L5 foraminotomies on January 3, 2002.

Dr. Robert A. Smith, a Board-certified orthopedic surgeon, examined appellant on March 16, 2004 in a second opinion evaluation and found that appellant was capable of working in a light-duty position with no lifting more than 20 pounds and the opportunity to sit or stand as necessary.

The Office referred appellant for vocational rehabilitation counseling on June 23, 2004. In a report dated February 2, 2005, the vocational rehabilitation counselor noted that appellant was functioning at a low average intelligence level of 84 and that his reading and arithmetic skills were at the first and second grade levels respectively. Appellant's vocational rehabilitation plan included developing literacy skills. The vocational rehabilitation counselor recommended the positions of assembler, sorter-pricer and cashier-parking lot-automotive service for appellant. On November 1, 2005 the vocational rehabilitation counselor noted that appellant reported poor memory resulting in forgetting the information he was taught. The Office rehabilitation specialist reviewed appellant's program on December 12, 2005 and March 7, 2006 stating that appellant retained the level of vocational preparation required to qualify as a sort-pricer, assembler or cashier-parking lot automotive service as he had over six months past experience of a specific and general nature acquired from education, private industry and federal employments.

Dr. Schreiber completed a note on December 23, 2005 and stated that appellant had scar tissue from his surgery with back and leg pain. He stated that he did not believe that appellant could return to productive work considering his educational status and his minimal physical status. On April 21, 2006 Dr. Schreiber again stated that appellant could not return to work and had reached maximum medical improvement.

The Office proposed to reduce appellant's compensation on March 30, 2006 based on his capacity to earn wages as a sorter-pricer. Appellant's attorney objected and alleged that Dr. Smith's report was not sufficient to carry the weight of the medical evidence as Dr. Schreiber disputed his conclusions. He also stated that appellant was not mentally capable of working. By decision dated May 31, 2006, the Office reduced appellant's compensation benefits effective June 11, 2006 based on his capacity to earn wages in the constructed position of sorter-pricer.

Appellant requested reconsideration on May 29, 2007. Counsel argued that the Office had not properly addressed appellant's mental and intellectual limitations. In a letter dated February 6, 2007, Ben Frazell, Program Coordinator of the Literacy Volunteers stated that when appellant entered the program in February 2005 he was reading at beginning literacy skills level or approximately first grade. Mr. Frazell stated that, in February 2007, appellant had advanced to a second grade reading level. Appellant submitted a note from Dr. Schreiber dated August 25, 2006 reporting that he had objective findings of residual scar tissue in his back causing persistent back and leg pain. He stated that appellant was unable to do productive work and could not return to "any type of job whatsoever." Dr. Schreiber added the diagnosis of post-lumbar laminectomy syndrome secondary to surgery. On February 16, 2007 he stated that appellant had back pain radiating into his leg with increased radiculopathy. Dr. Schreiber opined that appellant could not return to work, but recommended a functional capacity evaluation. He again stated that appellant had reached maximum medical improvement on March 12, 2007 and opined that appellant was unable of performing light-duty work due to his current limitations. By decision dated August 28, 2007, the Office denied modification of the May 31, 2006 wage-earning capacity determination.

In a report dated February 28, 2008, Dr. Schreiber completed a work capacity evaluation and indicated that appellant was totally disabled. On March 24, 2008 he opined that appellant could not sit for prolonged periods of time and that appellant could not return to productive work. In a note dated August 11, 2008, Dr. Schreiber stated that appellant had chronic back complaints with no radiculopathy into his legs and normal sensory and motor function in both lower extremities.

Appellant requested reconsideration on August 20, 2008. Counsel argued that appellant's physiological, mental and intellectual limitations were not granted due to consideration and weight.

By decision dated November 26, 2008, the Office reviewed the merits of appellant's claim, but denied modification of his wage-earning capacity determination dated May 31, 2006. It reviewed counsels arguments and noted that appellant's job targets took into account his poor memory and literacy level.

In a report dated December 19, 2008, Dr. Schreiber stated that appellant was unable to go back to productive work as he could not lift or sit for long periods of time. On February 20, 2009 he stated that appellant was stable. In a March 13, 2009 note, Dr. Schreiber found that appellant had persistent pain both in his back and leg and that he could not return to productive work. He diagnosed chronic post-lumbar laminectomy syndrome. Dr. Schreiber opined that appellant was totally disabled on a form report dated March 21, 2008. He submitted notes on May 19 and September 11, 2009 finding appellant's back was stable and repeating his diagnosis of post-lumbar laminectomy syndrome respectively.

Appellant requested reconsideration on December 8, 2009. Counsel again argued that the Office had not adequately considered appellant's physiological, mental and intellectual limitations in formulating his constructed position of sorter-pricer. He further alleged that appellant was unable to obtain employment as a sorter-pricer or in other capacities since the wage-earning capacity determination. Counsel argued that appellant was permanently disabled.

By decision dated December 28, 2009, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that the request for reconsideration was not timely filed and did not establish clear evidence of error on the part of the Office.

LEGAL PRECEDENT

Under section 8128(a) of the Act[2] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides that "An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought."[3] In *Leon D. Faidley, Jr.*,[4] the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. The Office is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of the Office thereby requiring merit review of the claimant's case.

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates "clear evidence of error" on the part of the Office.[5]

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607.

[4] 41 ECAB 104, 111 (1989).

[5] 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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 which 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 fundamental question as to the correctness of the Office decision.[11] 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.[12]

ANALYSIS

The Board finds that the December 28, 2009 refusal of the Office to reopen appellant's case for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 was appropriate. The last merit decision was issued by the Office on November 26, 2008, more than one year prior to the December 8, 2009 request for reconsideration. The Board further finds that appellant's December 8, 2009 request for reconsideration did not show clear evidence of error and the Office's December 28, 2009 decision did not constitute abuse of discretion.

Counsel based the request for reconsideration on the legal argument that the Office failed to consider appellant's physiological, mental and intellectual limitations in determining that the constructed position of sorter-pricer represented appellant's wage-earning capacity. He further alleged that appellant was unable to obtain employment as a sorter-pricer or in other capacities since the wage-earning capacity determination.

The Board finds that the evidence in the record does not support these arguments. The vocational rehabilitation counselor was aware of and considered appellant's ability to read, write

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

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

[8] *See Jesus D. Sanchez, supra* note 5.

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

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

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

[12] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

and remember in the initial evaluation of February 2, 2005 and part of appellant's vocational rehabilitation plan included increasing his level of literacy. Furthermore, the Office rehabilitation specialist addressed appellant's vocational capacity to perform the duties of a sorter-pricer in reports dated December 12, 2005 and March 7, 2006 stating that appellant retained the level of vocational preparation required to qualify as a sort-pricer. The Board finds that, based on a review of the record, the arguments submitted by counsel are not sufficient to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of the Office decision

In regard to the argument that appellant was not able to find employment in the selected position of sorter-pricer, the Board has frequently held that the fact that a claimant is not able to secure a job does not establish that the work is not available or suitable.[13] The Board finds that appellant's inability to secure work as a sorter-pricer does not establish clear evidence of error on the part of the Office in its decisions.

Appellant also submitted several reports from Dr. Schreiber opining that appellant was totally disabled and incapable of performing productive work. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of the Office decision. While Dr. Schreiber's medical reports disagree with the conclusions of Dr. Smith, the second opinion physician, regarding appellant's physical ability to perform work, the Board finds that at most this medical evidence could be construed to create a conflict of medical opinion evidence, not to *prima facie* shift the weight of the medical evidence. He did not provide physical findings, test results and medical reasoning in support of his opinion such as to firmly shift the weight of the medical evidence in favor of his opinion that appellant was totally disabled.

Appellant may submit new evidence or argument with a written request for reconsideration to the Office within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board has made an independent determination that appellant failed to submit clear evidence of error on the part of the Office or that the Office abused its discretion in denying merit review in the face of such evidence in the December 28, 2009 decision.

[13] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board