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DONALD H. McGOWAN, Appellant)	
)	
and)	Docket No. 03-1104
)	Issued: February 26, 2004
DEPARTMENT OF THE ARMY,)	
FORT STEWART, GA, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

On March 26, 2003 appellant filed a timely appeal from an October 25, 2002 decision of the Office of Workers' Compensation Programs, which denied appellant's request for reconsideration 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 last merit decision dated July 30, 2001 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). Accordingly, the only decision properly before the Board is the Office's October 25, 2002 decision.¹

¹ On April 7, 2003 the Office issued a decision denying appellant's March 12, 2003 request for reconsideration as untimely. The Board and the Office may not simultaneously exercise jurisdiction over the same issue in a case. *Arlonia B. Taylor*, 44 ECAB 591 (1993). As the Board obtained jurisdiction over the case on March 26, 2003, the Office lacked the authority to issue the April 7, 2003 decision denying reconsideration. Accordingly, the Office's April 7, 2003 decision is set aside as null and void. *Terry L. Smith*, 51 ECAB 182 (1999).

ISSUE

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

FACTUAL HISTORY

On June 9, 2000 appellant, then a 47-year-old painter, filed a traumatic injury claim alleging that he injured his lower back when he assisted a coworker with a paint stripping machine on June 8, 2000. He stopped work on June 14, 2000.

On September 13, 2000 the Office requested a detailed description of the employment incidents to which appellant attributed his condition and for a comprehensive medical report from his attending physician. In a September 16, 2000 statement, appellant indicated that he was training a lower grade employee to run a motorized paint stripping machine when the machine went out of control and headed toward a ditch. Appellant stated that he "stepped off a concrete tank trail and hit wrong and twisted [his] back." He noted that he had a previous back injury in 1975 and he was on light duty from another injury to his neck, shoulder and arms. Appellant also submitted a May 7, 1984 medical report, regarding a prior back injury and June 13, 2000 treatment records for severe back pain.

By decision dated October 16, 2000, the Office denied appellant's claim. The Office found that, while the evidence of record supported that appellant actually experienced the June 8, 2000 incident, the medical evidence of record was insufficient because there was no narrative opinion discussing the relationship between the June 8, 2000, incident and the claimed condition and disability.

Appellant requested reconsideration on January 23, 2001 and he submitted additional evidence. In a decision dated March 28, 2001, the Office modified the October 16, 2000 decision to find that the newly submitted medical evidence included a diagnosis of muscle strain, which was sufficient to establish an injury. However, the Office found that the record did not include a medical opinion that clearly related the diagnosed condition to appellant's June 8, 2000 employment incident. Accordingly, the Office found that appellant established but failed to demonstrate a causal relationship.

By letter dated April 16, 2001, appellant requested reconsideration and he submitted additional medical evidence. By decision dated July 30, 2001, the Office vacated the prior decision of March 28, 2001 and accepted appellant's claim for lumbar strain. The Office further found that appellant's entitlement to benefits ceased effective January 9, 2001, when he was involved in a nonindustrial injury that elevated his condition to a much more severe level.

On August 30, 2001 appellant requested reconsideration of the July 30, 2001 decision. He specifically challenged the Office's determination that his ongoing back condition was the result of a January 9, 2001 injury that occurred while assisting his son install a ceiling fan. Additional evidence was also submitted.

By letter dated October 24, 2001, the Office advised appellant that it was not clear from his August 30, 2001 request, which decision or issues he would like reconsidered. The Office also stated that the July 30, 2001 decision, was an acceptance of his claim for lumbar strain and, therefore, the decision did not have any appeal rights. Appellant was advised that no further action would be taken on his letter.

On August 29, 2002 appellant again requested reconsideration and he submitted additional evidence. He explained that the Office accepted his June 8, 2000, injury for lumbar strain and stopped benefits on January 9, 2001. Appellant stated that the included medical evidence showed that his injury still exists and is getting worse. He also explained that the January 2001, back popping incident had no effect on his injury.

By decision dated October 25, 2002, the Office denied appellant's August 29, 2002 request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

On March 12, 2003 appellant requested reconsideration.² In a decision dated April 7, 2003, the Office denied appellant's March 12, 2003 request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶ In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "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

² Appellant indicated that he was requesting reconsideration of the Office's March 28, 2001 decision.

³ 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607 (1999).

⁶ 20 C.F.R. § 10.607(a) (1999).

⁷ 20 C.F.R. § 10.607(b) (1999).

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

ANALYSIS

The Office issued a merit decision on July 30, 2001, which vacated the March 28, 2001 decision and accepted appellant's claim for lumbar strain. The Office also determined that appellant's entitlement to benefits ceased on January 9, 2001. The Board notes that appellant initially requested reconsideration on August 30, 2001 and the Office advised appellant that the July 30, 2001 decision did not have any appeal rights. Appellant was further advised to specifically identify the decision and issues he wished to have reconsidered. Contrary to the Office's October 24, 2001 correspondence, the July 30, 2001 decision was accompanied by appeal rights. The decision found that appellant's entitlement to benefits ceased effective January 9, 2001. Furthermore, appellant's August 30, 2001 request for reconsideration clearly identified the July 30, 2001 decision, as the subject of his request. Appellant clearly explained that he was challenging the Office's finding that entitlement ceased effective January 9, 2001 because of a nonindustrial injury. Therefore, the Office erred in not taking any further action with respect to appellant's August 30, 2001 request for reconsideration.

Appellant subsequently requested reconsideration on August 29, 2002 and was informed that his request was untimely filed. However, as appellant's August 30, 2001 request was filed within a year of the July 30, 2001 merit decision and the Office improperly advised appellant that he did not have any appeal rights; the Board finds that the Office failed to act upon appellant's timely reconsideration request. As appellant's initial request for reconsideration was timely filed, the Office improperly treated appellant's subsequent request for reconsideration as being untimely and erroneously examined the evidence under the clear evidence of error standard. Accordingly, the Board will set aside the October 25, 2002 decision and remand the case to the Office for review of the evidence under the proper standard of review for a timely request for reconsideration.

CONCLUSION

The Board finds that the Office erred in finding that appellant's request for reconsideration was untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Issued: February 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member