

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)
D.O., Appellant)

and)

DEPARTMENT OF THE NAVY,)
PHILADELPHIA NAVAL SHIPYARD,)
Philadelphia, PA, Employer)
_____)

Docket No. 11-398
Issued: August 19, 2011

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 7, 2010 appellant filed a timely appeal from an August 16, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as it was untimely and insufficient to establish clear evidence of error. As the last merit decision was issued January 12, 2005, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was not timely filed and did not establish clear evidence of error.

_____)
¹ 5 U.S.C. § 8101 *et seq.*

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

This case was previously before the Board. By decision dated August 24, 1988, the Board affirmed a September 23, 1987 decision suspending appellant's compensation for failing to attend a medical appointment.³ On March 11, 1994 the Board affirmed OWCP's denial of appellant's request for a lump-sum payment.⁴ By decision dated February 28, 2003, the Board affirmed an April 23, 2002 decision terminating his compensation and authorization for medical treatment effective March 26, 2000 on the grounds that he had no further disability or residuals of his accepted cervical strain and chronic pain syndrome.⁵ On January 12, 2005 the Board affirmed July 1, 2003 and February 13, 2004 decisions finding that he did not establish continuing disability or the need for further medical treatment after March 26, 2000.⁶ By decision dated June 23, 2009, the Board affirmed a May 30, 2007 nonmerit decision denying appellant's request for reconsideration as untimely and insufficient to show clear evidence of error. The facts and circumstances as set forth in the prior decisions are hereby incorporated by reference.

On November 13, 2009 appellant requested reconsideration. He asserted that he was on compensation for 30 years from 1970 to 2000 and that during this time he received treatment for his back and his neck. Appellant argued that OWCP accepted his back condition and paid for his treatment. He enclosed a December 16, 2005 letter requesting reconsideration.

By decision dated February 12, 2010, OWCP denied appellant's request for reconsideration after finding that it was untimely and did not demonstrate clear evidence of error. It noted that he had submitted a letter dated December 16, 2005 requesting reconsideration following the last merit decision issued by the Board on January 12, 2005. OWCP determined, however, that it had not received the December 16, 2005 letter before November 19, 2009. It noted that appellant had requested reconsideration after the last merit decision on March 11, 2007.

On July 17, 2010 appellant again requested reconsideration. He contended that OWCP accepted that he sustained a back injury.

By decision dated August 16, 2010, OWCP denied appellant's reconsideration request as untimely and insufficient to show clear evidence of error. It determined that he had submitted no evidence in support of his July 17, 2010 reconsideration request.

³ Docket No. 88-638 (issued August 24, 1988). OWCP accepted that on January 19, 1970 appellant, then a 24-year-old heavy duty mechanic, sustained cervical spine sprain and somatoform psychogenic pain disorder when he slipped on ice. The employing establishment separated appellant from employment on March 27, 1970 after a reduction-in-force.

⁴ Docket No. 93-206 (issued March 11, 1994).

⁵ 54 ECAB 456 (2003).

⁶ Docket No. 04-1545 (issued January 12, 2005).

On appeal, appellant maintains that on December 16, 2005 he filed a timely request for reconsideration following the last merit decision dated January 12, 2005 and submitted a supporting medical report. He also argues that his back was an accepted condition.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁷ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁸

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.⁹ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹¹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹² As appellant's January 17, 2010 request for reconsideration was submitted more than one year after the last merit decision of record, issued by the Board on January 12, 2005, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹³

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 20 C.F.R. § 10.607.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004).

¹⁰ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

¹¹ 20 C.F.R. § 10.607(a).

¹² *Robert F. Stone*, *supra* note 10.

¹³ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

In his November 13, 2009 request for reconsideration and on appeal, appellant argued that he submitted a timely reconsideration request following the last merit decision issued January 12, 2005. He submitted a request for reconsideration dated December 16, 2005. OWCP, however, did not receive the December 16, 2005 letter until November 19, 2009. The Board has long held, in the absence of evidence to the contrary, correspondence properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.¹⁴ The Board has held that this rule applies equally to claimants and OWCP alike, provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing.¹⁵

Appellant has not submitted evidence establishing that the December 16, 2005 letter was properly mailed. There is no certified mail receipt of copy of the envelope to show whether he mailed this letter to the proper address or whether the envelope bore proper postage. Unlike OWCP, law firms or other businesses, appellant is an individual and may not establish proper mailing by business use or custom. With no evidence of proper mailing, no presumption of receipt arises from the mailbox rule.¹⁶ Accordingly, the Board finds that appellant's December 16, 2005 request for reconsideration received on November 19, 2009 was not made within one year of the January 12, 2005 decision.

On appeal and on reconsideration before OWCP, appellant maintained that OWCP accepted that he sustained a back as well as a neck condition due to his January 19, 1970 employment injury. He asserted that OWCP paid for treatment for his back condition. Appellant, however, has not submitted any evidence in support of his allegation or demonstrated how his contention, even if established, would show error by OWCP in finding that he had no further disability or need for medical treatment after March 26, 2000 due to his accepted cervical strain and chronic pain syndrome. Additionally, the fact that OWCP authorizes and pays for medical treatment does not establish that the condition for which treatment was rendered is employment related.¹⁷

The evidence submitted in support of appellant's untimely reconsideration request is insufficient to establish clear evidence of error as it does not raise a substantial question as to the correctness of OWCP's decision or present evidence which on its face shows that it made an error.¹⁸

¹⁴ See *W.P.*, 59 ECAB 514 (2008); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

¹⁵ See *Larry L. Hill*, 42 ECAB 596 (1991).

¹⁶ See *W.B.*, Docket No. 09-294 (issued October 2, 2009).

¹⁷ See *James F. Aue*, 25 ECAB 151 (1974).

¹⁸ See *D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 367 (1997).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was not timely filed and did not establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 19, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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