

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

C.D., Appellant

and

**U.S. POSTAL SERVICE, REDONDO BEACH
POST OFFICE, Redondo Beach, CA, Employer**

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**Docket No. 06-1605
Issued: October 27, 2006**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 5, 2006 appellant filed a timely appeal from the June 13, 2006 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated October 28, 2004 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).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On January 5, 2004 appellant, then a 57-year-old sales and services associate, filed a claim for an occupational disease (Form CA-2) alleging that on November 19, 2002 he first realized that injury to his left upper extremity, hand and lower extremities were caused by factors

of his federal employment. He stated that he experienced radiculopathy of the left upper extremity at C7 and in both lower extremities at L5-S1. Appellant also experienced numbness in the middle finger of his left hand. During an accumulation of many years of hard work, his job required prolonged standing, walking, stooping and lifting. In an accompanying statement, appellant described the development of his claimed conditions and his work duties.

Appellant submitted a November 19, 2002 electromyogram (EMG) and nerve conduction study report of Dr. Benjamin Y. Chong,¹ consistent with L3-4 radiculopathy of the left lower extremity. A December 31, 2002 EMG and nerve conduction study of the upper extremities demonstrated abnormalities consistent with left carpal tunnel syndrome and chronic C5, C6 and C7 radiculopathy. On September 23, 2003 Dr. Chong performed an EMG and a nerve conduction study of the left upper extremity. It found abnormalities consistent with left C7 radiculopathy that was probably subacute with more denervation potential in the extremity. There was no evidence of carpal tunnel, ulnar nerve entrapment or radial nerve entrapment syndromes. An October 7, 2003 EMG and nerve study of both lower extremities found abnormalities consistent with bilateral S1 and L5 radiculopathy. There was no evidence of peripheral neuropathy.

On December 23, 2002 Dr. Benjamin Huang, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan of appellant's lumbar spine. He found a minimal one to two millimeter broad-based disc bulge at L5-S1 without causing significant spinal stenosis or foraminal narrowing. No other significant disc bulge or spinal stenosis was seen.

In a January 3, 2003 medical report, Dr. Po Long Lew, a family practitioner, diagnosed cervical degenerative changes at C5-6, possible carpal tunnel syndrome, disc bulges at L5-S1 with a subtle focal annular tear and radiculopathy at L3-4. These conditions were the cause of pain radiating downward towards appellant's scrotum, lower back, rectal and front abdominal areas. Dr. Lew stated that these conditions were not permanent but rather deteriorating and recommended. In a December 29, 2003 report, he stated that appellant's C5 radiculopathy of the left upper extremity and radiculopathy at S1 and L5 of the lower extremities were caused by prolonged standing, walking, stooping and lifting. Dr. Lew opined that repetitive motion and stress injury were common work-related injuries.

By letter dated January 20, 2004, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the medical and factual evidence he needed to submit to establish his claim.

In a February 10, 2004 letter, appellant described his symptom, work duties and limitations and provided a history of his medical treatment.

Appellant submitted an unsigned report dated February 4, 2004 from Dr. Bryn J. Henderson, a family practitioner, who performed a bone density and vertebral test which demonstrated osteoporosis and vertebral abnormalities. In a February 6, 2004 report, Dr. Lew diagnosed cervical radiculopathy at C7, severe low back pain with S1 and L5 radiculopathy and

¹ The Board notes that Dr. Chong's professional qualifications are not contained in the record.

status post inguinal hernia repair.² He opined that appellant's conditions were related to persistent and repetitive motion of standing, walking, stooping and lifting heavy objects. On March 19 and 22, 2004 Dr. J. Grant Orlin, a family practitioner, verified that appellant was being treated for work-related injuries. A March 19, 2004 duty status report of a physician whose signature is illegible noted that appellant was being treated for problems related to his left elbow, right and left hand and wrist, right knee, neck and lumbosacral and cervical spine. Appellant was released to return to limited-duty work on March 19, 2004 with restrictions. On March 31, 2004 Dr. Jaime Delgado³ performed an MRI scan which found an unremarkable right elbow and intrasubstance degenerative changes in the posterior horn of the medial meniscus of the right knee.

By decision dated April 13, 2004, the Office found that appellant did not sustain an injury while in the performance of duty. The medical evidence failed to establish a causal relationship between the left upper extremity, both lower extremities and left hand conditions and his employment duties.

In a July 15, 2004 report, Dr. Orlin indicated that appellant was being treated for problems related to his upper and lower back, left wrist and hand, neck and bilateral groin area. He was released to return to limited-duty work with restrictions on July 15, 2004.

In a letter dated July 29, 2004, appellant, through his union representative, requested reconsideration of the Office's April 13, 2004 decision. He submitted Dr. Orlin's April 14, 2004 report. Dr. Orlin diagnosed multilevel cervical disc syndrome with left radiculopathy with a C6-7 nerve root dysfunction and multilevel disc bulges of various sizes, thoracic spine strain, lumbar disc syndrome with an L4-5, S1 nerve root dysfunction with disc bulges of various sizes, left carpal tunnel syndrome and bilateral groin strain. Dr. Orlin opined that the diagnosed conditions were caused by appellant's work duties as a clerk at the employing establishment. On August 30, 2004 Dr. J. Andrew Hamlin, a Board-certified radiologist, performed a herniogram which found no evidence of a recurrent hernia.

By decision dated October 28, 2004, the Office denied modification of its April 13, 2004 decision. The evidence of record was insufficient to establish that appellant sustained an injury causally related to factors of his federal employment.

In a March 26, 2004 EMG report, Dr. Thomas M. Heric, a Board-certified neurologist, found abnormalities of both upper extremities consistent with C6-7 radiculopathy at or near the nerve roots that was somewhat greater on the left. He performed an EMG of appellant's lower extremities on March 26, 2004. Dr. Heric found abnormalities that involved degenerative changes in the lumbar paraspinal musculature at L4-5 and S1 bilaterally. He stated that these abnormalities appeared to be acute and chronic in nature. A March 26, 2004 nerve conduction

² Prior to the instant claim, appellant filed a Form CA-2 alleging that on February 15, 1997 he first became aware of a hernia condition. The Office accepted his claim for bilateral inguinal hernia. By decision dated August 26, 2002, the Office found that appellant did not sustain a recurrence of disability on July 14, 1997 causally related to the accepted employment injury.

³ The Board notes that Dr. Delgado's professional qualifications are not contained in the case record.

study of the lower extremities found mild underlying peripheral neuropathy with motor and sensory abnormalities. Dr. Heric performed the same study on appellant's upper extremities and found bilateral carpal tunnel syndrome with motor and sensory abnormalities. The pathology on the right was moderate and on the left it was mild to moderate. Dr. Heric found cervical radiculopathy at C6-7. In an April 1, 2004 EMG report, Dr. Heric found abnormalities of the upper extremities characterized by prolongation of nerve roots at C5 and C8 bilaterally.

In progress reports covering the period November 18, 2004 through April 26, 2006, Dr. Orlin reiterated his prior diagnoses and also diagnosed left de Quervain's syndrome. He found that appellant could return to limited-duty work with restrictions during the stated period.

On April 6, 2004 Dr. Eric Schulze, a Board-certified radiologist, performed an MRI scan of appellant's lumbar spine. He found degenerative disc disease including disc dessication at L4-5, L5-S1 with central disc protrusions of various sizes. He diagnosed mild hypolordosis in the neutral seated position. An April 6, 2004 MRI scan of the cervical spine demonstrated degenerative disc disease including disc dessication at C2-3, C3-4, C4-5, C5-6 and C6-7 with central disc protrusions of various sizes. Dr. Schulze diagnosed a lordosis in the neutral seated position.

A January 31, 2006 report of Dr. James C. Thomas, Jr., a Board-certified orthopedic surgeon, diagnosed cervical strain, cervical multilevel disc protrusions, lumbar strain, lumbar disc protrusions at L4-5 and L5-S1, significant right carpal tunnel syndrome and status post bilateral herniorrhaphy. He opined that appellant's chronic cervical strain with cervical disc protrusions was caused by casing mail for many years for prolonged periods of time with repetitive neck extension and overhead work which would have resulted in the weakening of annulus and subsequent disc placement.

In a letter dated May 10, 2006, appellant inquired about the status of his January 18, 2005 request for reconsideration of the Office's October 28, 2004 decision. He indicated that he was advised that there was no record of this request in his case record.

On May 30, 2006 appellant requested reconsideration of the Office's prior decisions. He submitted Dr. Orlin's June 1, 2006 progress report which reiterated his prior diagnoses and found that he could return to limited duty on that date.

By decision dated June 13, 2006, the Office found that appellant's letter requesting reconsideration was dated May 30, 2006, more than one year after the Office's October 28, 2004 merit decision and was untimely. The Office noted that neither the instant case record nor appellant's other three case records contained a January 18, 2005 request for reconsideration. The Office found that appellant did not submit evidence establishing clear evidence of error in the decisions rejecting his claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ 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.⁶ Pursuant to this section, if a request for reconsideration is submitted by mail, "the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as, (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date." Otherwise, the date of the letter itself should be used."⁷

Section 10.607(a) 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.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³

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

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

⁸ 20 C.F.R. § 10.607(b).

⁹ *Nancy Marciano*, 50 ECAB 110, 114 (1998).

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹² *Leona N. Travis*, *supra* note 10.

¹³ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

the claimant and raise a substantial question as to the correctness of the Office decision.¹⁴ 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.¹⁵

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. 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.¹⁶

The most recent merit decision in this case was issued by the Office on October 28, 2004. It found that appellant did not sustain an injury while in the performance of duty. As appellant's May 30, 2006 request for reconsideration was made more than one year following this merit decision, the Board finds that it was untimely filed.

The underlying issue is whether appellant established that he sustained an injury causally related to factors of his federal employment. Appellant submitted medical evidence following the Office's October 28, 2004 decision and prior to filing the May 30, 2006 reconsideration request. This included the diagnostic studies of Dr. Heric and the MRI scan reports from Dr. Schulze. The Board finds that these studies are insufficient to shift the weight of the evidence in favor of appellant's claim. The medical evidence submitted did not provide any explanation of how the various conditions were caused by factors of appellant's work duties. The Board finds that the reports of Drs. Heric and Schulze do not establish clear evidence of error.

Dr. Orlin's progress reports reiterated his prior diagnoses and opinion that appellant could perform limited-duty work with restrictions. This was duplicative of materials already of record and reviewed by the Office. This evidence is insufficient to shift the weight of the evidence in favor of appellant's claim. The Office had weighed the medical evidence submitted and found it to be insufficient to establish that appellant sustained an injury causally related to factors of his federal employment. The Board finds that the submission of evidence duplicative of that already of record does not establish clear evidence of error.

Dr. Thomas' January 31, 2006 report found that appellant's chronic cervical strain and cervical multilevel disc protrusions were caused by casing mail for many years for prolonged periods of time with repetitive neck extension and overhead work. He indicated that this resulted in the weakening of annulus and subsequent disc placement. Although Dr. Thomas addressed causal relationship between appellant's diagnosed conditions and work duties, his report is

¹⁴ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁶ *Larry L. Litton*, 44 ECAB 243 (1992).

insufficient to shift the weight of the evidence in favor of appellant's claim. As noted, it is not sufficient to merely show that the evidence could be construed so as to produce a contrary conclusion. Later medical evidence independently supporting causal relationship such as Dr. Thomas' January 31, 2006 report has no bearing on the probative value of the medical evidence that was before the Office at the time of its October 28, 2004 merit decision.¹⁷ Consequently, the evidence submitted in support of appellant's untimely reconsideration request in no way shows that the Office's decision was erroneous.¹⁸

CONCLUSION

The Board finds that the Office properly determined that appellant's May 30, 2006 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 27, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁷ *Dean D. Beets*, 43 ECAB 1153, 1158 (1992).

¹⁸ *Id.*